



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2014/0305

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50522678
Dated: 11 November 2014

Appellant: PAUL CARDIN

1ST Respondent: INFORMATION COMMISSIONER

**2ND Respondent: WIRRAL METROPOLITAN BOROUGH
COUNCIL**

**Heard at: LIVERPOOL CIVIL AND FAMILY JUSTICE
CENTRE AND, THEREAFTER, ON THE PAPERS**

Date of hearing: 16 APRIL 2015

Date of decision: 9 March 2016

Before

ROBIN CALLENDER SMITH

Judge

and

MS ANNE CHAFER and MR MICHAEL JONES

Tribunal Members

Attendances:

For the Appellant: Mr Paul Cardin with the assistance of Mr Martin Morton

For the 1st Respondent: Written submissions from Ms Helen Wrighton, Solicitor for
the Information Commissioner.

For the 2nd Respondent: Mr Robin Hopkins, Counsel instructed by Wirral MBC.

IN THE FIRST-TIER TRIBUNAL

Case No. EA/2014/0305

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

Subject matter: FOIA 2000

Absolute exemptions

- Personal data s.40

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 11 November 2014 and dismisses the appeal.

REASONS FOR DECISION

Background

1. Mr Paul Cardin (the Appellant) requested information from Wirral Metropolitan Borough Council (Wirral MBC) about any council officers who had received compensation from the Council for internal disputes or complaints.
2. The chronology of events in this appeal has not been straightforward but, to make this decision clear and intelligible, it is necessary to record the main points.
3. In essence the Appeal relates to the Appellant's determination to have disclosed to him the personal data of a former officer of the Council - now referred to as X - relating to a confidential compromise agreement entered into between X and the Council.
4. It stems from Mr Cardin's request under FOIA made on 6 October 2013, which gave rise to the Commissioner's original Decision Notice.

Chronology and Findings of Fact

5. The Tribunal granted a stay on 16 April 2015, having heard oral submissions from Wirral MBC, in order to allow Wirral MBC an opportunity to conduct a thorough independent review of allegations of impropriety relating to X's compromise agreement.
6. The basis of the submissions on which the stay was granted was that, if the allegations were found to be substantiated, Wirral MBC might change its position and disclose to the Appellant the personal information about X that he had sought.
7. The Independent Review found that the allegations of impropriety were not substantiated and that there was no impropriety regarding the compromise agreement.
8. When the stay was lifted the proceedings did not immediately resume because of the Appellant's personal circumstances.
9. It is notable that the scope of the information in dispute in this appeal has narrowed very significantly over time.
10. At the start there was a 10-part request. The Appellant wanted to know a great deal about the case of X and other similar cases involving Council employees.
11. In essence Wirral MBC was being asked to disclose to the Appellant – and the world at large – a great deal of detail about X and the experience of other employees in similar circumstances. The information he was seeking related to matters which were highly sensitive in terms of X.

12. When the Appellant began the appeal process he abandoned certain parts of his request (specifically parts 3, 5, 6 and 8).
13. His grounds of appeal were drafted seeking wide-ranging relief but, with the passage of time, it is clear that he accepted that the Tribunal's jurisdiction was confined to whether or not he was entitled to the information held within the scope of parts of his request that he continued to pursue.
14. The Appellant was told the answer to Parts 4 and 10 of his request. The scope of the Tribunal's decision then became to determine whether the information held by Wirral MBC in respect of Parts 1, 2, 7 and 9 of the request was exempt under section 40 (2) FOIA. Had the proceedings resumed as an oral appeal that would have been the focus of the hearing.
15. The Tribunal has been able to consider all the information in respect of this because it has been provided with a Closed Bundle containing the recorded information held by the Council falling within the scope of those parts of the request.
16. In an email dated 7 January 2016 the Appellant stated that the only substantive issues in dispute was a specific date. He raised the question of whether Wirral MBC, in continuing to withhold the information, was acting in a proportionate manner and in the public interest.
17. At this stage the Tribunal – and the other parties – formed the view that the Appellant was only interested in Part 1 of his request.
18. Further Directions were then issued by the Tribunal. These required the Appellant to explain his reason for asserting that there was a legitimate public interest that would be furthered by the disclosure of this single item of personal data.

19. The Appellant's position, set out in his reply of 18 January 2016, was that he had already narrowed his appeal so as to seek only the date and the amount of the payment to X. He now knew the amount of the payment to X and did not need to pursue that question any further.

20. Importantly he stated that, for the avoidance of doubt: "I will reiterate that the basis of my appeal is that I am not seeking personal data."

Evidence

21. The Tribunal reminded itself of the recent guidance for the approach to be taken by courts and tribunals in respect of any closed material procedure.

22. In *Bank Mellat v HMT (no. 1)* [2013] UKSC 38, which was not a case about FOIA, Lord Neuberger said at paragraphs 68-74 that:

- i) If closed material is necessary, the parties should try to minimise the extent of any closed hearing.
- ii) If there is a closed hearing, the lawyers representing the party relying on the closed material should give the excluded party as much information as possible about the closed documents relied on.
- iii) Where open and closed judgments are given, it is highly desirable that in the open judgment the judge/Tribunal (i) identifies every conclusion in the open judgment reached in whole or in part in the light of points made or evidence referred to in the closed judgment and (ii) says that this is what they have done.
- iv) A judge/Tribunal who has relied on closed material in a closed judgment should say in the open judgment as much as can properly be said about the closed material relied on. Any party excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and the arguments it has received.

23. In *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC) the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA

cases, noting that such practices are likely to be unavoidable in resolving disputes in this context:

- i) FOIA appeals are unlike criminal or other civil proceedings. The Tribunal's function is investigative, i.e. it is not concerned with the resolution of an adversarial civil case based on competing interests.
- ii) Closed procedures may therefore be necessary, for consideration not only of the disputed material itself, but also of supporting evidence which itself attracts similar sensitivities.
- iii) Parliament did not intend disproportionate satellite litigation to arise from the use of closed procedures in FOIA cases.
- iv) Tribunals should take into account the Practice Note on Closed Material in Information Rights Cases (issued in May 2012). They should follow it or explain why they have decided not to do so.
- v) Throughout the proceedings, the Tribunal must keep under review whether information about closed material should be provided to an excluded party.

24. The closed bundle in this appeal contained the disputed information.

25. It was necessary for the Tribunal to see the disputed information – and consider the totality of it – in relation to the exemptions claimed.

26. The Tribunal has considered carefully and rigorously the Appellant's points and concerns already expressed in the notice of appeal and in his other representations and submissions.

27. As a result of its conclusions and reasons the Tribunal's decision is an open one with no closed, confidential annex.

Conclusion and remedy

28. The Tribunal finds that, at the date of the Appellant's request, there was no confirmation of any X's personal data in the public domain.

29. In July 2015, material entered the public domain which meant that Wirral MBC considered it safe and sensible to confirm the identity of X. That was because X had left the Council's employment on 17 July 2015.
30. The amount of the payment to X of £48,000 was broadly correct but the Council has never confirmed the exact figure and has only confirmed those points in the context of this appeal.
31. The Tribunal does not consider it necessary to identify X in this decision because to do so would only cause unnecessary further distress and damage.
32. Someone reading this decision might conclude that, given the narrowness of the information now being sought, it should be disclosed on the basis that there would be no harm in giving the Appellant the information he seeks about X's case.
33. However – as Mr Hopkins on behalf of Wirral MBC puts it in his final submissions dated 5 February 2016 - the Tribunal's function and jurisdiction under section 58 FOIA means that the Tribunal is required to dismiss an appeal unless it finds an error of law in the Information Commissioner's decision notice.
34. Put another way, it is not the Tribunal's job to consider what the outcome of this appeal should be if a differently-framed request was made now.
35. The Tribunal finds there was no error the Information Commissioner's original decision.
36. The fact that the Appellant maintained what might be described as a "moving and narrowing target" does not alter the fact that the relevant time for assessing the request for the information is in October 2013.

37. The Tribunal finds that the Appellant's request was for personal data within the meaning of Section 1 of the Data Protection Act.
38. If Wirral MBC had then answered Part 1 and 2 of the request in October 2013 it is most likely that X would have been identifiable.
39. Section 40 (2) FOIA is a "gateway" section in FOIA opening into the Data Protection Act regime which, in itself, is a privacy regime. When it comes to personal data, because privacy is the starting point, transparency must be justified under the DPA before any disclosure can be made under FOIA.
40. This brings the focus to the conditions within Schedule 2 DPA relating to fairness and, in particular, Condition 6 (1) of that Schedule. The Upper Tribunal summarised the correct approach to consideration 6 (1) in *Goldsmith International Business School v IC and Home Office* (GIA/1643/2014). There it set out eight propositions which – because they are recorded in the decision itself – will not be further set out here.
41. The effect, however, is that – despite being requested to advance an identifiable legitimate interest in the disclosure of the information he now seeks – the Appellant has not done so.
42. The Tribunal finds that the Appellant has no legitimate interest in it.
43. The clarification in *Goldsmith* (above) is that the "legitimate interest" is not the quasi-personal one of the Appellant individually but, more generally, in respect of ordinary members of the public.
44. X's Article 8 ECHR private life rights are engaged when there is a reasonable expectation of privacy and, looking at the matter in the context of October 2013, X had such an expectation.

45. The settlement payment was made because of the compromise agreement which contained an express confidentiality clause applying to the terms of the agreement. This covered both the date and the amount of the payment made under the agreement.

46. Without X's consent to the disclosure of the disputed information, the Article 8 privacy rights are engaged in a manner giving X a firm and reasonable expectation that information about the compromise agreement would be kept confidential.

47. Further, it is also clear to the Tribunal – and it makes this as a finding of fact – that the payment to X has been repeatedly scrutinised by external and independent professionals who have found no impropriety.

48. In the circumstances, disclosure of the information sought by the Appellant is not justified and would not be a proportionate interference with X's Article 8 ECHR rights. The disclosure would breach the first Data Protection Principle.

49. The information was correctly withheld by the Information Commissioner under section 40 (2) FOIA.

50. It follows that the Appellant's appeal does not succeed.

51. Our decision is unanimous.

52. There is no order as to costs.

Robin Callender Smith
Judge
9 March 2016

Promulgated 10th March 2016