



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER  
TRIBUNAL UNDER SECTION 57 OF THE FREEDOM OF  
INFORMATION ACT 2000**

**Appeal No. EA/2015/0260**

**BETWEEN:**

**RANJIT SAHOTA**

**Appellant**

**-and-**

**INFORMATION COMMISSIONER**

**Respondent**

**Before**

**Brian Kennedy QC**

**Michael Hake**

**Date of Hearing: 15 March 2016, Wolverhampton, West Midlands. The Appellant consented to an oral hearing before only two panel members as due to unforeseen circumstance the third panel member was unable to attend.**

**Date of Decision: 29 March 2016**

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## **DECISION**

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Application of sections 40(1) & 40(2) of the Freedom of Information Act 2000.

The Tribunal dismisses the appeal.

## **REASONS**

### **Introduction**

1. The decision concerns an appeal of a Decision of the respondent (“the Commissioner”) dated 2 November 2015, reference: FS50595553 (“the DN”).
2. In the DN the Commissioner held that the Public Authority, in this case the Berkshire Healthcare NHS Foundation Trust, (“the Trust”) had correctly withheld requested information from the appellant pursuant to s 40(1) and section 40(2) of Freedom of Information Act 2000 (“the FOIA”).
3. The Tribunal is provided with a bundle of documents referred to herein as the Open Bundle, (“OB”) and a bundle including the requested information referred to as the Closed Bundle (“CB”).

**Background concerning requested information:**

4. At some point in 2015 the Appellant unsuccessfully applied to Berkshire Healthcare NHS Foundation Trust ('the Trust') for the position as IT Compliance and Audit Manager. The general background set out clearly in paragraphs 4 – 7 of the Commissioner's' Response at pages 16 - 17 of the OB. The pertinent Chronology is as follows;
  - a) 04 August 2015: Request from Appellant for a depersonalised copy of the successful application and all information, shortlisting methods and notes pertinent to the recruitment process
  - b) 06 August 2015: Refusal by the Trust, citing s40 FOIA (personal information).
  - c) 18 August 2015: Appellant requests an internal review.
  - d) 19 August 2015: Review by Trust upholds refusal.
  - e) 22 September 2015: Complaint by Appellant to the Commissioner.
  - f) 02 November 2015: Commissioner issues DN upholding the Trust's refusal.
  - g) 08 November 2015: Appellant's Notice of Appeal.
  - h) 09 December 2015: Commissioner's Submissions in Response.
  - i) 14 December 2015: Appellant's Response.

**The Legislative Framework:**

5. The relevant legislation is set out at paragraphs 17 – 26 of the Decision Notice at page 4 and 5 of the hearing bundle before us and paragraphs 9 - 12 of the Commissioners' Response to the Grounds of Appeal at pages 18 – 20 of the OB before us and in particular the relevant exemption applicable in this appeal concerning section 40 of the FOIA which provides as follows:
  - a) S40 (2) FOIA provides an absolute exemption for the personal data of any third party if its disclosure would contravene data protection principles.
  - b) S35 Data Protection Act 1998 provides for disclosure of personal information where it is necessary in connection with legal proceedings or to obtain legal advice or is otherwise necessary for establishing, exercising or defending legal rights.
  - c) Schedule 2 Data Protection Act 1998 sets out the conditions necessary to permit the processing personal data.
  - d) Schedule 3 Data Protection Act 1998 sets out the conditions necessary to permit the processing of sensitive personal data as defined by s2 of the Act.

6. The First Data Protection Principle, as set out in Schedule 1, Part 1 paragraph 1 to the

DPA, 1998 provides, that 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 - - -“*

The schedule 2 conditions include –

“(5) *The processing is necessary –*

*(a) for the administration of justice . . .*

*(b) for the exercise of any other functions of a public nature exercised in the public interest by any person*

*(6) (1) - The processing is necessary for the purpose of legitimate interests*

*pursued 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. The test to be applied in relation to Condition 6(1) of Schedule 2 to the DPA is that of

*Goldsmith International Business School V IC and Home Office [2014] UKUT 563 (AAC)* where the Upper Tribunal endorsed the principles to follow which include insofar as it is material on the facts of this case:

*“Proposition 1 : Condition 6(1) of Schedule 2 requires 3 questions to be asked namely:*

*(i) Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?*

*(ii) Is the processing involved necessary for the purposes of those interests?*

*(iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?*

*Proposition 2: The test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.*

**Issues for this Tribunal to consider:**

8. Are the depersonalised copies of job applications and interview assessments in this case exempt information under s40 FOIA?

9. The first question is whether the person to whom the data is disclosed is pursuing a legitimate interest. A tribunal is, therefore, entitled to take into account private interests as well as those of the wider public.

10. The Appellant argued that disclosure was reasonably necessary for the furtherance of a legitimate interest. Insofar as the argument amounts to an argument that the public are entitled to general transparency this Tribunal is not satisfied that the *Goldsmith* test is met at such a broad level, as if so the necessity test would always be met and the Tribunal would only need to

consider the balancing stage (iii) test. There is no presumption in favour of disclosure of personal data FOIA except in accordance with the data protection principles.

11. “*Necessity*” carries its ordinary English meaning (more than desirable but less than indispensable or absolute necessity), and following *Goldsmith* we are satisfied that the test is one of “*reasonable necessity*, which involves the consideration of alternative measures i.e. a measure would not be necessary if the legitimate aim could be achieved by some less intrusive means.

**Decision Notice:**

12. The Trust confirmed that the requested information confirmed personal data of the Appellant, two short-listed candidates and the successful candidate. It did not consider the request to cover the other two short-listed application forms or interview notes. The Commissioner disagreed, holding that all four applications fell to be considered under s40(1) and s40(2).

13. The Appellant is identifiable from his application form and interview assessment, therefore the information is exempt under s40(1). The other applications and assessments contain information which would identify the candidates and also contain sensitive personal data.

14. The Commissioner did not consider there to be a Schedule 2 legitimate public interest in disclosing details of interview performance of the other candidates, nor, in his view, is there a relevant condition satisfied under Schedule 3. The strong and reasonable expectation that information submitted in an application form will be handled sensitively and privately outweighs any public interest in increasing transparency in the recruitment process. The Commissioner therefore upheld the Trust's decision. The Appellant has failed to persuade us that this is wrong.

15. The Trust also confirmed that, after the FOIA request, it created a document entitled 'Manager's shortlisting review' scoring the candidates against the job specification. The Commissioner agreed that this material did not fall within the scope of the request.

16. The Trust confirmed that it held an advert for the post with a job description, both of which were in the public domain. Whilst it was not clear if the material was still in the public domain at the time of the Decision, the Commissioner ordered the disclosure of that material.

**The Appellant's Grounds of Appeal:**

17. The Appellant requested details of the online shortlisting system and copies of notes and emails. The Appellant requested the redacting of the other application forms to remove personal information. He states that without disclosure he is unable to obtain legal advice and a fair hearing, citing s35 DPA 1998. He further alleges that the Commissioner on the



telephone advised him that he could obtain redacted copies of the applications.

**The Commissioner's Response:**

18. The Commissioner argues that the Appellant erroneously seeks to rely on s35 DPA 1998, as disclosure is not necessary in relation to the claim he has commenced in the Employment Tribunal, as the ET has its own powers to order disclosure of documents. This was clarified in the Case Management Note of the Chamber President of this Tribunal, dated 20 November 2015 (See page 24 OB) with which the Commissioner agrees.

19. It is not possible, the Commissioner argues, to redact the disputed information to protect the identity of third parties, as even depersonalised forms would reveal personal information about the successful candidate.

**The Appellant's Reply:**

20. The Appellant relies upon Nassé v Science Research Council; Vyas v Leyland Cars [1979] IRLR 465 HL, stating that it holds that confidential documents must be disclosed if necessary to dispose fairly of the case or to save legal costs if there is no other way to obtain the necessary information. He asserts that comparators are critical in discrimination cases. However his analogy is to misunderstand the purpose of the FOIA and the function of this Tribunal and the form of litigation being considered.

21. On the question of redaction, because the name of the person appointed is in the public domain, any information from a redacted application would or could be linked to him.

22. We are not persuaded that processing is “necessary”. Processing would be inconsistent with legitimate interest of applicants’ privacy and there is no consent. See letter at pages 47 – 51 OB which sets out clearly reasons why the trust rely on section 40.

**Discussion:**

23. The FOIA does not look at the reasons for the applicant making the request. It is not the same as disclosure or discovery in other Litigation forums, for example in the Employment Tribunal or in High Court litigation. Some of the requested information is sensitive (e.g. disability or not) and Section 35 is not relevant. Legal proceedings do not apply to the FOIA, which has its own test in section 40, and in any event the Appellant has confirmed, at the oral hearing of his appeal before this Tribunal, that he has had this disclosure in another court and had his grievances heard at the Employment Tribunal with full disclosure as required. This Tribunal took time to explain that disclosure in his personal litigation had served its purpose but was quite distinct from the disclosure to the world at large as a consequence of the FOIA. The Appellant further indicated to us that he wants disclosure even if it is meaningless, by way of redaction or otherwise. This is not a legal basis for arguing the Commissioner erred. We agree with and adopt the Commissioners reasoning in the DN supported by his Response to the grounds of this appeal.

**Conclusion:**

24. In light of all the above considerations and for the reasons given above, this Tribunal finds the requested information is exempt under s 40 FOIA and the Appellant has failed to persuade us that the Commissioner erred in that conclusion or in his reasoning in support thereof in the DN.

Brian Kennedy QC

29 March 2016.