



**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
Information Rights**

**Appeal Reference: EA/2015/0282**

**Heard at Field House  
On 28 June 2016**

**Before**

**JUDGE PETER LANE  
ANNE CHAFER  
SUZANNE COSGRAVE**

**Between**

**ANDREW LOWNIE**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**Appearances:**

For the appellant: Mr G Callus, Counsel

For the respondent: The respondent did not appear and was not represented

# DECISION AND REASONS

## **A. Introduction**

1. The appellant is an author and journalist. He has written a book called *Stalin's Englishman: The Lives of Guy Burgess*. On 13 March 2015, the appellant wrote to The National Archives (TNA) requesting FCO28/4199/1 – Closed Extract: Folio 1 from Defectors to and from the Soviet Union, including Kim Philby. The relevant file was said by TNA to be exempt from disclosure under section 40(2) of the Freedom of Information Act 2000 (FOIA) on the basis that it contained the personal data of third persons.

2. The appellant complained to the Information Commissioner. On 9 November 2015, the Commissioner issued a notice of decision (FS 50586206), in which he concluded that TNA had correctly applied the exemption under section 40(2) because the information was the personal data of third persons and releasing it would contravene the Data Protection Act 1998.

## **B. Appeal**

3. The appellant appealed to the Tribunal. He said that, insofar as the disputed information concerned Kim Philby, Guy Burgess and Donald Maclean and no other living individual, the Commissioner was wrong to accept that it constituted personal data. This was because the Data Protection Act does not protect individuals who have died. The Commissioner was said to be wrong to assume that the information related to living individuals.

4. The first data protection principle states:-

- "1. 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; and
  - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

5. The appellant contended that condition 6(1) in Schedule 2 was satisfied in his case. Condition 6(1) provides:-

"The processing is necessary for the purposes of legitimate interest pursued by the data controller or 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."

6. The appellant additionally prayed in aid paragraph 5 of Schedule 3:-

"5. The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject."

In this regard, the appellant said that the publication by George Blake of his autobiography and his appearance in a television documentary satisfied paragraph 5.

7. The appellant also sought to rely on paragraph 10 of Schedule 3:-

"10. The personal data are processed in circumstances specified in an order made by the Secretary of State for the purposes of this paragraph."

The appellant contended that it was likely that the data he sought fell within paragraph 10.

8. Finally, the appellant contended that, insofar as the disputed information contains personal data which cannot lawfully be disclosed, the Commissioner ought to have required the disputed information to be released in redacted form.

### ***C. Discussion***

9. In reaching our unanimous decision in this case, we have had regard to the materials contained in the open and closed bundles. We have also had regard to the submissions made orally by Mr Callus at the hearing.

10. The appellant originally contended that the TNA and by extension, the Commissioner had been wrong to rely on the presumption that, where it does not have evidence that an individual under 100 years of age is deceased, the TNA shall conclude that they are still living. This issue has, however, fallen away, since the Commissioner has confirmed that the individuals in question are still alive.

11. The Tribunal agrees with the Commissioner that where section 40(2) of FOIA is engaged, the Tribunal is required to undertake a different task from when it deals with other FOIA exemptions. Whilst FOIA in general promotes the right to information, where section 40(2) is under consideration, the proper approach is for the interest of data subjects to receive a high degree of protection. Whilst this does not mean that disclosure cannot be justified, it does mean that the Tribunal must be careful not to start from the position of presuming disclosure should occur.

12. The Commissioner confirmed (as do we) that the disputed information does not relate to George Blake. That ground of appeal, accordingly, falls away.

13. The Commissioner disagreed with the appellant that disclosure of the personal data would not be detrimental to the individuals concerned. The Commissioner considered that the relevant individuals would have a reasonable expectation that the withheld information would not be disclosed to the public.

14. The Tribunal agrees. Having looked at the closed material, there is no reason whatsoever to suppose that, in the particular circumstances of the case with which we are concerned, the fact the defector had defected would be known to the government of the defector's place of residence or, in any event, to all the defector's friends, family, neighbours and colleagues. There is also no reason to suppose that the individual who may have had an involvement with the defection has informed friends or family.

15. We do not consider that the appellant can, in the circumstances, successfully contend that the passage of time since the end of the Cold War would have greatly reduced the sensitivity of the information. On the contrary, having regard to the matters we have just mentioned, there is a strong expectation on the part of the individuals concerned that the withheld information would be kept confidential and not disclosed to the public as a whole. There is not, in the circumstances anything "unreasoned and speculative" involved in that finding.

16. Like the Commissioner, we agree that there is some public interest in information relating to defectors in general during the Cold War. However, the risk to these living individuals of disclosure, even at this remove, cannot be underestimated. It is quite possible that the personal relationships of each of them with family, friends and colleagues could be jeopardised. A precautionary approach is, accordingly, fully justified.

17. So far as concerns the ground which relies on paragraph 6(1) of Schedule 2, the appellant contends that disclosure is necessary for the purpose of the legitimate interests of research and journalism pursued by him and/or the legitimate interests of the public at large; and that such processing would not be unwarranted by reason of any prejudice to the rights and freedoms or legitimate interests of the data subjects.

18. There is nothing in the Supreme Court judgments in South Lanarkshire Council v Scottish Information Commissioner [2013] UKSC 55, which casts doubt on the Divisional Court judgment in Corporate Officer of the House of Commons v The Information Commissioner [2008] EWHC 1084 (Admin), where it was held that the word "necessary" in paragraph 6(1) reflected the meaning attributed to it by the European Court of Human Rights, when justifying an interference with a recognised right; that is to say, that there should be a "pressing social need and that the interference was both proportionate as to the means and fairly balanced as to ends".

19. The Tribunal does not consider the appellant has shown there to be a "pressing social need" to disclose the identity of each and every defector, at whatever level and in whatever circumstances, during the period known as the Cold War. In any event, for the reasons we have given, there would be a real risk of serious prejudice to the legitimate interests of the data subjects, in the event of disclosure. The appellant has not demonstrated any social need that outweighs these serious concerns.

20. The appellant contends that if the disputed information contained sensitive personal data, then disclosure would meet certain of the conditions in Schedule 3. We accept that the data does not comprise or contain sensitive personal data. But, even if it did, the

relevant provisions of the Data Protection (Processing of Sensitive Personal Data) Order 2000 would not, in any event be engaged. As we have found, the data falls to be protected, as personal data.

21. The appellant's final ground concerns whether material may be released in redacted form. The Commissioner considered that the level of redaction would be so extensive "that it would render the document meaningless to the reader". Before us, Mr Callus submitted that the Commissioner had applied the wrong test. FOIA does not contain an exemption for material that may be meaningless.

22. We accept there may be situations where the result of all necessary redaction is such that the unredacted material is so exiguous that it cannot properly be said to constitute information, within the scope of FOIA. We have, however, concluded that the short letter which comprises the withheld material does, in its redacted form, constitute something that is sufficiently comprehensible to impart what can be categorised as information. Whether it is of any significant interest to the appellant, or anyone else, we rather doubt.

23. The Tribunal accordingly allows the appeal to the extent that the notice of decision is hereby amended, so as to require the public authority, not later than 35 days from the date of this decision, to disclose the withheld material in the redacted form set out in the Confidential Annex to this decision.

**Judge Peter Lane**

**6 September 2016**