ON APPEAL FROM

THE INFORMATION COMMISSIONER'S DECISION NOTICE NO:FS50607698

Dated: 22nd. March, 2016

Appeal No. EA/2016/0107

Appellant: Jane Rayner ("JR")

Respondent: The Information Commissioner ("the ICO")

Before

David Farrer Q.C.

Judge

and

Dave Sivers

and

Melanie Howard

Tribunal Members

Date of Decision: 21st. October, 2016

The appeal was determined on the basis of written submissions

Subject matter : FOIA s. 40(2)

(i) Whether the Appellant's requests involved the processing of personal data of third parties.

(ii) If so, whether such processing was fair for the purposes of the First Data Protection Principle ("the FDPP"), hence lawful.

The Tribunal's decision

The requests involved the processing of personal data of library staff.

Such processing would not be fair and, specifically, would not satisfy a DPA Schedule 2 condition.

The appeal is dismissed.

Surrey County Council is not required to take any steps.

David Farrer Q.C.

Tribunal Judge

21st. October, 2016

The relevant statutory provisions

The Data Protection Act, 1998 ("the DPA") s.1(1)

> *"personal data" means data which relate to a living individual who can be identified-*
>
> *(i). From those data, or*
>
> *(ii). From those data and other information which is in the possession of, or is likely to come into the possession of, the data controller."*

DPA Schedule 1. Part 1 §1

> *"Personal data shall be processed fairly and lawfully, and in particular, shall not be processed unless-*
>
> *(i) at least one of the conditions in Schedule 2 is met,*
>
> *….*

Schedule 2 Condition 6(1)

> *"The processing is necessary for the purposes of legitimate interests 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".*

Authorities

Common Services Agency v Scottish Information Commissioner [2008] 1 W.L.R. 1550.

R (Department of Health) v Information Commissioner [2011] EWHC 1430.

Goldsmith International Business School v IC & Home Office [2014] UKUT 563 (AAC)

Foster and Rodriguez-Noza v Information Commissioner and Nursing and Midwifery Council [2015] UKUT 0449 (AAC).

Abbreviations — In addition to those relating to the parties and those indicated in the text the following are used in this Decision –

FOIA	The Freedom of Information Act, 2000
The DN	The Decision Notice.
The UT	The Upper Tribunal
SCC	Surrey County Council

The Decision

The Background

1. In 2014 SCC undertook a significant restructuring of its library services, which required the redeployment of staff to libraries in other parts of the county than those in which they had previously worked. In the ten months following the implementation of the scheme (on 1st. December, 2014) eighty – three of the five hundred and twelve members of staff employed on that date left that employment. Fifteen retired. Others were made redundant. Two had already given notice to terminate their employment.

The Requests

2. JR, a librarian who left her SCC employment following implementation of the new scheme, made a series of seven requests for information on 23rd. September, 2015. They all related to the departures of staff from the library service and the numbers quoted at §1 were disclosed in responses to those requests. In all, replies were given to five requests. The remaining two requests were in these terms –

   "How many library staff members who have left were paid departure payments, redundancy, severance etc.

   What is the total cost of those departure payments including legal fees if applicable ?".

3. As to these requests, SCC, in reply, simply cited s.40(2), without more, as its justification for withholding the requested information. JR requested an internal review, pointing out that the press had reported that two members of staff had received redundancy payments, that if they were the only two, then they had already been identified; if the number was greater than two, there was no way of knowing who were the other members of staff to receive departure payments. The internal review, as served on JR, provided a concise explanation of SCC's position. It amounted to this –

    - As to each request, the numbers (whether of persons or payments) were small;
    - Taken together with information already available, particularly to those now or previously working in the library service, they would enable those receiving (and, therefore, those not receiving) payment to be identified.
    - They were, therefore, the personal data of the recipients of payments.
    - So disclosure of the numbers requested would breach the FDPP.
    - The exemption relied on is an absolute exemption so that no question of the public interest arises.

    The refusal was therefore upheld. JR complained to the ICO.

<u>The DN</u>

4. The ICO upheld SCC's decision. He concluded that disclosure would identify individuals, whose personal data would therefore be revealed. He relied on the small number of persons involved since their former colleagues at least would probably spot who had received departure payments. He was unable to descend to details since that could undermine his own decision.

5. As to the second issue, he concluded that disclosure would be unfair to those individuals. As to fairness, they would not have expected such disclosure, given the confidential character of severance negotiations. Disclosure in respect of the second request would not allow an exact calculation of who got what but could well give a good idea of the awards made.

6. JM appealed.

The appeal

7. In her grounds of appeal, JR argued again that press publicity had already brought the identity of two recipients of departure payments to public knowledge and that the number of other recipients (if there were more) and the aggregate payments made would identify nobody.

8. She stated that SCC had previously publicised the numbers of employees receiving redundancy payments and the aggregate sum involved, citing the example of teachers, which appeared in the press and the case of a departmental director whose salary and severance package were specified in SCC's accounts.

9. Furthermore, JR submitted, the public had a legitimate interest in the number of departing library staff receiving redundancy payments, since it was an indication of how SCC "values and treats its staff".

10. The confidentiality clause in staff employment contracts was imposed by SCC rather than agreed with members of staff. They should therefore be ignored.

11. The ICO relied in part on a closed submission as to the issue of identification. In essence, his case was the same as in the DN; there were a small number of payments and those with background information on this issue could readily identify those receiving payments and the general level of such payments by relating the requested information to what they already knew.

12. As to the disclosure of personal data, assuming that the requested information was personal data, the individuals concerned would have had no expectation of disclosure, particularly where, as JR indicated, their employment contracts contained a confidentiality clause applicable to such a disclosure.

13. He argued that practice in other cases involving different facts was no guide to what these individuals should expect and that the receipt or otherwise of a redundancy payment was no reflection on the employer's assessment of the value of the departing employee's work.

The Law

14. The relevant provisions of FOIA and the DPA are set out in the introduction to this decision.

Is the disputed information personal data ?

15. Data are not personal data if they are rendered anonymous – see *Common Services Agency v Scottish Information Commissioner [2008] 1 W.L.R. 1550.*at §25 per Lord Hope. That requires that the data subject should not be identifiable from a combination of the information to be disclosed and any

other information held by or likely to come into the possession of the requester or another member of the public. The test implied by the DPA definition of personal data – "*can be identified*" – does not require that identification would be inevitable. Any substantial risk of identification defeats a claim that the data have been anonymized (*R (Department of Health) v Information Commissioner* [2011] EWHC 1430, where Cranston J, at §70 upheld the Tribunal finding that such a risk was "*extremely remote*").

16. We can do no more in this open decision than state that the limited number of recipients, linked to the matter referred to in the ICO's closed submission, leads us to the conclusion that JR or any other member of the public with the knowledge of the background, which she is likely to have, could very well infer the identities of one or more of such recipients. So we find that this information is the personal data of those recipients of payments.

Would disclosure breach the FDPP ?

17. In considering this question, our approach is guided by the UT decisions in *Goldsmith International Business School v IC & Home Office [2014] UKUT 563 (AAC)* and *Foster and Rodriguez-Noza v Information Commissioner and Nursing and Midwifery Council [2015] UKUT 0449 (AAC).* We scrutinize the question of fairness generally and then examine whether Condition 6(1) of Schedule 2 to the DPA is met. As in the great majority of s.40(2) appeals, it is the only condition which, on the facts, falls to be considered.

18. We do not consider that an employee of a public authority, whether in the public or private sector, should reasonably expect the financial terms of his severance package to be publicly aired, save in exceptional circumstances such as where he promptly resumes the same role in a different guise under a

fresh contract. Of course, very senior figures in positions of great public importance may be in a different position but that is not this case. We have seen no evidence of a confidentiality clause in their contracts of employment, but any such clause in the terms of settlement of a redundancy claim would make the case still clearer.

19. It is likely that unforeseen disclosure of (i) his/her identity and (ii) an aggregate figure which would permit fairly accurate inferences to be drawn as to the amount paid to a him/her would cause embarrassment and perhaps significant distress, depending on the individual.

20. As regards Condition 6(1), there is certainly a legitimate public interest in the apparent disruption measured by the number of longstanding employees who left their employment when and shortly after the new SCC scheme came into effect. That interest has been met by precise disclosure of the large number of staff who left, on whatever terms. Whether there is a similar interest in the number receiving payments of whatever kind and the amount of such payments is much more questionable. Entitlement to a redundancy payment and the quantum of such payment are not related to the attitude of the employer towards the employee or to his workforce in general but to length of service, contracted hours and other factors, for example, SCC's entitlement under their employment contracts to require library staff to relocate within the county or some part of the county. The public knows nothing of such matters. To suggest that the number of recipients of payments and the aggregate of such payments could indicate that SCC undervalued its staff, is simply wrong.

21. If, contrary to our finding, there was a legitimate interest in the number of beneficiaries of severance payments, it was satisfied by the information that

very few such payments were made. Whether very few meant 2, 4, 8 or 12 is of no consequence. The point can be made without further elaboration – "a large section of the library staff left and very few of them received any payment on the termination of their contracts".

22. Independently of the point made at §21, there could be no legitimate interest in the aggregate figure for payments, if the number of recipients must remain unknown to the public. There would be no basis for assessing whether the payment(s) was/were generous, miserly or neither.

23. There being no legitimate interest in the disputed information, compliance with condition 6(1) fails at the first hurdle. However, for the reasons already given at §22 and §23, the requests could not satisfy the second requirement that disclosure was necessary for such legitimate interests.

24. SCC's practice in other cases does not assist since the facts may be quite different, e.g., the number of teachers sharing the total redundancy fund was far greater, so that individuals were far less likely to be identified from publication of aggregate figures and the average payment was not a pointer to what a particular individual received.

25. There is no evidence to support the assertion that SCC "imposed " confidentiality on its staff in the sense of forcing them to accept such a term against their wishes in their contracts of employment. As observed earlier in this decision, there is no evidence of such a term in those contracts at all. Such a clause inserted in the terms of settlement of a redundancy claim would reinforce the beneficiary's expectation of confidentiality. Whether or not such a term applied would not affect the Tribunal's conclusions as to a breach of the FDPP.

26. For these reasons we find that disclosure would breach the FDPP because it would be unfair and, within that finding, would not satisfy any condition in Schedule 2 to the DPA.

27. This appeal is therefore dismissed

28. Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge

21st. October, 2016