



**Appeal number: EA/2016/ 0193**

**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

**DEBBIE BRYCE**

**Appellant**

**- and -**

**THE INFORMATION COMMISSIONER**

**Respondent**

**TRIBUNAL: JUDGE ALISON MCKENNA  
Dr HENRY FITZHUGH  
Mr DAVE SIVERS**

**Determined on the papers, the Tribunal sitting in Chambers on 15 March 2017**

## DECISION

1. The appeal is dismissed.

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## REASONS

### *Background to Appeal*

2. The Appellant made a request to Trinity Hall Cambridge (“THC”) on 9 July 2015 in the following terms:

10 *“I would like to request from you the following information to assist with my possible appeal by 20 July.*

*1. The contract between Trinity Hall and the Avery benefactor (or its representatives) regarding the benefactions we discussed at the hearing on 30 April.*

15 *2. The annual or any other reports from Trinity Hall to the benefactor (whatever reports there may be) covering financial information and could you tell us what report you prepare.*

*3. Anything else shedding light on these documents or the way the college handles the Avery benefaction relating to THA.*

20 *4. Your correspondence with (name redacted) of the ICO and any related materials for my information request to Trinity Hall of 22 May 2014 which received no response”.*

3. THC withheld the requested information in its entirety citing sections 40 (2) and 43 (2) of the Freedom of Information Act 2000 (“FOIA”).

25 4. The Respondent issued Decision Notice FS50596835 on 27 June 2016, upholding THC’s decision to withhold all the requested information under s. 40 (2) FOIA and requiring it to take no steps.

### *Appeal to the Tribunal*

30 5. The Appellant’s Notice of Appeal dated 10 August 2016 submitted in relation to s. 40 (2) FOIA that: (i) there is more information held; (ii) there is a public interest in disclosure of the requested information which should override the privacy of the donor in order to ensure correct regulatory reporting; (iii) consideration should be given to releasing redacted information; (iv) THC’s auditors may hold relevant information on its behalf; (v) the Tribunal should order restricted disclosure outside FOIA; (vi) the surviving donor has told the Appellant that she is happy for the  
35 information to be disclosed; (vii) the Tribunal should order disclosure of information generated since the date of the request.

6. In relation to s. 43 (2) FOIA, it was submitted that there is no commercial sensitivity in the arrangements and if the contract purports to impose confidentiality then this does not bind the Respondent or the Tribunal.

7. The Appellant's Grounds of Appeal and her additional submissions raised several matters which fall outside of our statutory jurisdiction. These include complaints about the Respondent's timeliness and process, public law arguments about legitimate expectation; her analysis of the hypothetical possibility that the bequest in question is being mis-applied by THC; and whether a publication scheme should be adopted in respect of the requested information. We have no power to decide these points so we have not addressed them in this Decision.

8. The Respondent's Response dated 20 September 2016 maintained the analysis as set out in the Decision Notice. It confirmed that, applying the standard of the balance of probabilities, the Information Commissioner was satisfied that THC did not hold any information falling within paragraphs 1 and 2 of the request, and that the information it held falling under paragraph 3 was exempt from disclosure as it constituted personal data, the disclosure of which would contravene the first data protection principle.

9. The Respondent issued the Decision Notice on the basis that the Appellant did not wish there to be a determination of paragraph 4 of the information request. This followed confirmation from the Appellant that she agreed to this course. In her Grounds of Appeal to the Tribunal the Appellant submitted that she had not in fact agreed to this course and asked the Tribunal to adjudicate on paragraph 4. Having reviewed the correspondence (pages 64-66 Open Bundle), we are satisfied that the Appellant did agree not to pursue paragraph 4 and we have decided that in those circumstances the Respondent was entitled to proceed with her investigation on that basis. Accordingly, as paragraph 4 of the request was not investigated or determined by the Decision Notice, it does not fall within the scope of the appeal to this Tribunal.

10. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered an agreed open bundle of evidence comprising some 250 pages, including submissions made by both parties, for which we were grateful. We also considered a Closed Bundle consisting of 8 pages, comprising the withheld information (6 pages falling within paragraph 3 of the request) and a document prepared by THC for the Information Commissioner's investigation and which is revelatory of the withheld information (2 pages).

#### *The Law*

11. The duty of a public authority to disclose requested information is set out in s.1 (1) of FOIA. The exemptions to this duty are referred to in section 2 (2) as follows:

40 *"In respect of any information which is exempt information by virtue of any provision of Part II, section 1 (1) (b) does not apply if or to the extent that –*

*(a) the information is exempt information by virtue of a provision conferring absolute exemption, or  
(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”*

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12. The exemption upheld in the Decision Notice in this case is s. 40 (2) FOIA. S. 40 (2), where engaged, provides an absolute exemption falling under s. 2 (2) (a).

13. THC also cited s, 43(2) FOIA, which provides that:

10 “(2) *information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).*”

S. 43 (2) FOIA is a so-called qualified exemption, giving rise to the public interest balancing exercise required by s. 2 (2) (b).

#### *Powers of the Tribunal*

15 14. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

*“(1) If on an appeal under section 57 the Tribunal consider -*

20 *(a) that the notice against which the appeal is brought is not in accordance with the law, or  
(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*

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*(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”*

30 15. We note that the burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

#### *Conclusion*

35 16. As a preliminary comment, we note that the information request in this case was made on the basis of a prior assumption by the Appellant that the making of a gift to a charity involves a continuing contractual relationship between the donor and the recipient charity with reporting obligations. THC has explained that this was not the case and we are aware that there are numerous possible permutations for the structuring of gifts to charities. The Appellant is in contact with the Charity Commission which may be able to advise her about these. We also note that THC is a

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registered charity and that its financial details are in the public domain as they are published on the Charity Commission's website and on its own website.

17. Turning to the Grounds of Appeal, we conclude as follows:

5 18. *Ground i – that there is more information held.* We have considered the representations made by THC to the Respondent during her inquiry (pages 89, 94-5 and 108 of the Open Bundle) and the Appellant's representations. We conclude that the Information Commissioner applied the correct standard of proof and that there is no error of law in the conclusion of the Decision Notice (at paragraph 32) that no further information was held.

10 19. *Ground ii - that there is a public interest in disclosure of the requested information which should override the privacy of the donor in order to ensure correct regulatory reporting.* Firstly, we are satisfied that the withheld information constitutes personal data in the form of the name of the donor and financial information about the donation made jointly with her late husband. We discern no error in the conclusion at paragraph 37 of the Decision Notice to that effect. Moving  
15 on to the question of whether disclosure would be fair, we have proceeded on the basis that there is no consent by the data subject for the reasons set out below. On this basis, we are satisfied that there is no error in the Decision Notice's conclusion that disclosure would breach the first data protection principle and unfair.

20 20. Secondly, we note the Appellant's concerns that the donation might be being mis-applied by THC. However, we take the view that an expression of concern is insufficient to create a public interest in disclosure of otherwise exempt information, especially in circumstances where THC is a registered charity and subject to regulatory oversight by the Charity Commission. We concur with paragraphs 52 and  
25 53 of the Decision Notice in this regard.

21. *Ground iii – that consideration should be given to releasing redacted information.* Having reviewed the withheld information, we do not consider that it would be possible to redact it without disclosing the personal data of the data subject.

30 22. *Ground iv - that THC's auditors may hold relevant information on its behalf.* We conclude that, whilst this may be the case, if information held by a public authority itself is exempt from disclosure, then information held on its behalf by another is also exempt.

23. *Ground v - that the Tribunal should order restricted disclosure outside FOIA.* We conclude that have no power to make such an order.

35 24. *Ground vi - that the surviving donor has told the Appellant that she is happy for the information to be disclosed.* The Appellant contacted the surviving donor direct in 2014 and made her own note of their conversation. We do not know if the note is accurate or whether the donor knew that a note was being made or for what purpose. We do not know anything about the circumstances in which that conversation took  
40 place. In the circumstances, we are unwilling to attribute evidential weight to the reported consent to disclosure of personal data.

25. We have in the Open Bundle (pages 73 and 95) communications from THC to the Information Commissioner stating that Mrs Avery is not willing for the information requested to be disclosed. Once again, we do not have much information about the surrounding circumstances, however it does appear that Mrs Avery was by then aware of the Information Commissioner’s involvement. As her reported refusal post-dates her reported consent, we conclude that it was correct for the Decision Notice to rely on the latest information available and address the data protection principle on the basis that the data subject has not consented to disclosure. We find no error of law in the Decision Notice in this respect.

26. *Ground vii- that the Tribunal should order disclosure of information generated since the date of the request.* We accept the Respondent’s submission that the relevant date at which the requested information is “held” is the date of the request – see s. 1 (4) FOIA.

27. In respect of s. 43 (2) FOIA, it was submitted by the Appellant that there is no commercial sensitivity in the arrangements between a charity and its benefactor. As the Decision Notice did not determine THC’s reliance upon s. 43 (2) FOIA in respect of pages 7 and 8 of the Closed Bundle and as we are satisfied that those pages are also exempt from disclosure under s. 40 (2) FOIA, it is not strictly necessary for us to consider s. 43 (2). Nevertheless, it may be helpful to state that we do regard the question of a charity’s relationship with its donors and potential donors as engaging s. 43 (2) FOIA. The definition of “commercial interests” under FOIA was construed broadly by the Court of Appeal in the recent case of *DWP and IC v Zola* [2016] EWCA Civ 758.

28. For the above reasons, this appeal is dismissed.

**(Signed on the original)**

**ALISON MCKENNA**

**DATE: 10 April 2017**

**PRINCIPAL JUDGE**

**Promulgated Date 10 April 2017**