



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0158

**Heard at Cardiff Civil and Family Justice Centre
On 9 March 2017**

**Before
CHRIS RYAN
JUDGE
SUZANNE COSGRAVE
PAUL TAYLOR
TRIBUNAL MEMBERS**

Between

ANDREW HOVORD

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

Attendances:

The Appellant attended the hearing

The Information Commissioner did not attend and was not represented

GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed

REASONS FOR DECISION

Introduction

1. We have decided that the Information Commissioner was correct in concluding that Cardiff Council (“the Council”) would have been entitled to neither confirm nor deny that it held certain information requested by the Appellant. The basis of that decision is that any other response breached the data protection principles, as they apply to the individual to which the information referred.

The request for information

2. On 9 September 2016 the Appellant sent the Council a request for information in the following terms:

“Under the Freedom of Information Act could you supply me with the number of tickets that have been issued to the vehicle registration numbers below from the 01/01/16 please?”

Two registration numbers then followed. One was for a van and the other a car.

3. FOIA section 1 imposes on the public authorities to whom it applies an obligation to inform a person requesting information whether it holds the requested information. If it does, then it should communicate the information to him or her unless certain conditions apply or the information is exempt from disclosure. The relevant part of section 1 reads:

“(1) Any person making a request for information to a public authority is entitled-
(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
(b) if that is the case, to have that information communicated to him.

...

(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as ‘the duty to confirm or deny’”

4. The Council refused to disclose the requested information on the basis that doing so would involve the disclosure of the personal data of the registered keeper of each

vehicle and it was therefore exempt information under FOIA section 40(2). The Council maintained that stance during the initial stage of an investigation carried out by the Information Commissioner at the request of the Appellant. However, it ultimately discovered that the owner of the van was not an individual but a company. No question of personal data could therefore arise in relation to it and that part of the requested information was immediately disclosed to the Appellant.

The Information Commissioner's Decision Notice

5. At the end of her investigation into the Council's treatment of the rest of the information request, the Information Commissioner issued a decision notice (FS50651941 of 22 June 2017) in which she determined that the Council had been entitled to refuse to disclose the information requested. However, she went further and ruled that the Council should, in fact, not even have indicated whether or not it held any relevant information. It should have exercised its right to "neither confirm nor deny". Conceding that it held information within the scope of the information request had the effect of disclosing that the registered owner had received one or more penalty tickets in respect of the vehicle. That fact was part of that individual's personal data.
6. The relevant part of FOIA section 40 reads:

"40 Personal information.

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

(3) The first condition is —

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene —

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4)The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

(5)The duty to confirm or deny –

(a)does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b)does not arise in relation to other information if or to the extent that either –

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

7. The Information Commissioner decided, first, that it was possible to identify an individual from a registered vehicle's number plate. This was based on the definition of "personal data" set out in section 1 of the Data Protection Act 1998 ("DPA"). It provides:

"'personal data' means data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller"

8. Information that a penalty notice had been issued against an individual's vehicle was taken to be information that related to that individual. The test then applied by the Information Commissioner, in order to determine whether the individual would be identifiable, was to ask whether a member of the public, provided with the requested information and applying a degree of determination, could have established who had been penalised. If the chance of that happening was, in the words of the Information Commissioner, "above a hypothetical possibility" in the circumstances under consideration, then that would be sufficient to establish that the requested information did constitute personal data.

9. The second part of the test that the Information Commissioner set was whether confirming or denying that the information was held would breach the data protection principles (as set out in Schedule 2 to the Data Protection Act 1998 ("DPA")). She focused on the first principle which reads:

"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 ..."

It is common ground on this Appeal that the relevant Schedule 2 condition is paragraph 6 which reads, in relevant part:

"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."

10. The Information Commissioner decided that confirming or denying the information request would not be "fair". The registered keeper would have been entitled to expect privacy in respect of his or her ownership of the vehicle and whether any penalty tickets had been issued in respect of it. They would have a reasonable expectation that they would not be exposed to a "name and shame" disclosure. Those factors outweighed the public interest in transparency and accountability of public sector organisations, such as the Council, in the performance of its enforcement activities.

11. The Information Commissioner concluded her decision in these terms:

"In light of the nature of the information, the reasonable expectations of the data subject and the consequences of disclosure, the Commissioner is satisfied that confirming or denying if the requested information is held could potentially cause unnecessary and unjustified distress to the data subject. She considers that these arguments outweigh any legitimate interest in disclosure. She has therefore decided that confirmation or denial in this case would breach the first data protection principle and finds the exemption at section 40(5) is engaged and the duty to confirm or deny does not arise"

The Appeal to this Tribunal

12. On 31 July 2017 the Appellant submitted an appeal against the decision notice to this Tribunal. It was out of time but an extension of time was granted.

13. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, she ought to have exercised her discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.

14. The Appellant's Grounds of Appeal included several complaints about the way in which the Information Commissioner had conducted her investigation, but the principle grounds were based on two arguments. First, the Appellant challenged the Information Commissioner's conclusion that personal data was involved. He argued that it was not possible to identify any individual from information about the number of times penalty tickets had been issued in respect of an inanimate object. Secondly, the Appellant argued that, as the vehicle owner had committed an offence (by parking illegally on, the Appellant said, "over 100 occasions"), the data protection principles ought not to protect them, in any event, from disclosure of that fact. His legitimate interest in knowing whether traffic wardens in the area had been doing their job or just ignoring his complaints should have prevailed.

15. The Information Commissioner filed a Response to the Appeal. She argued that confirmation or denial would reveal to the World (not just the Appellant) that one or more penalty tickets had been issued against the individual who was registered as the keeper of the vehicle in question. And if one or more members of the public were able then to identify that individual they would have come into possession of his or her personal data. As to the Appellant's second argument, the Information Commissioner argued that she had been correct to conclude in her Decision Notice that the registered keeper had a reasonable expectation of confidentiality in respect of any parking fines issued against him or her. The Appellant's concerns about illegal parking and the Council's reaction to it did not give rise to a public interest in disclosure that carried sufficient weight to justify overriding that expectation.
16. The Appellant asked that his appeal be determined following a hearing, as he was entitled to do. However, the Information Commissioner indicated that she did not intend to be represented at the hearing. We have therefore reached our decision on the basis of the Appellant's oral submissions at the hearing, considered alongside the parties' written submissions and an agreed bundle of relevant materials.

Our determination

17. The fact that an individual has had one or more penalty tickets issued against a vehicle of which he or she is the registered keeper constitutes that individual's personal data. It is biographical information about him or her. As to the Appellant's argument that the withheld information related only to an inanimate object, not an individual, there is a strong likelihood that members of the public, if informed that parking tickets had been issued in respect of a particular vehicle would, immediately or with minimum further enquiry, complete the connection with the registered keeper. We therefore reject the Appellant's first argument.
18. As indicated above the Information Commissioner approached the Appellant's second argument by assessing whether disclosure would be fair. Having decided that it would not she did not consider whether or not disclosure would have satisfied the relevant Schedule 2 test – as set out in paragraph 9 above.
19. We prefer to adopt the approach, approved by the Upper Tribunal in *Farrand v Information Commissioner and London Fire and Emergency Planning Authority* [2014] UKUT 0310 (AAC), of considering, first, whether disclosure would satisfy the test set out in Schedule 2.
20. Guidance on the proper approach to adopt in relation to paragraph 6(1) of that Schedule is to be found in the Upper Tribunal decision in *Information Commissioner v (1) CF and (2) Nursing and Midwifery Council* [2015] UKUT 449 (AAC). At paragraph 19 of that decision Judge Jacob said:

“19. The application of paragraph 6(1) is often referred to as involving a balance. I prefer not to use that language, as it is potentially misleading. Any balance involved is different from the balance that has to be applied under, for example, section 2(1)(b) of FOIA. As I said of paragraph 6(1) in Farrand v the Information Commissioner and the London Fire and Emergency Planning Authority [2014] UKUT 310 (AAC):

29. ... It contains a condition that must be satisfied – that processing is necessary – to which there is an exception – prejudice to the data subject. ...

... Applying paragraph 6(1) may involve up to three stages:

- The first stage is to consider whether 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 would be disclosed. If not, it is not necessary to proceed to the other stages. That is what I decided in *Farrand* at [29].
- The second stage only arises if the consideration passes the first stage. It is then necessary to identify the rights and freedoms or legitimate interests of the data subject. If there are none, it is not necessary to proceed to the third stage.
- The third stage only arises if the consideration passes the first and second stages. It is then necessary to consider whether the processing is unwarranted, or overridden, in any particular case by reason of prejudice to the data subject's rights, freedoms or legitimate interests."

21. In the present case the Appellant explained to us during the hearing his concern, both personally and as a member of the public paying council tax, about what he saw as lax enforcement by the Council of its own rules on illegal parking. Without entering a debate as to whether the "legitimate interest" under the first stage of the analysis must be a private or a public interest, we are satisfied that the Appellant did have a legitimate interest in pursuing his information request.
22. Turning to Upper Tribunal Judge Jacob's second stage, we consider that the Information Commissioner was right to conclude that confirmation or denial would interfere with the rights and freedoms of the registered keeper of the vehicle in question. He or she would have a reasonable expectation that the receipt of one or more parking tickets would remain private, just as a private citizen would in respect of a failure to pay council tax – see the Upper Tribunal decision of *DH v (1) Information Commissioner, (2) Bolton Council*¹. Upper Tribunal Judge Marcus made it clear in that case that it was only the role of the data subject as a local councillor which justified disclosure.
23. The *Bolton Council* decision also provides valuable guidance for the third stage of our analysis, in that it makes it clear that the element of disapproval that may attach to an individual's failure to comply with elements of his or her obligations to fellow citizens does not, on its own, justify the relevant data processing – it will remain an "unwarranted" interference with privacy unless outweighed by one or more other factors that make the interference "necessary" to serve an identified interest. We do not consider that the Appellant's concerns, understandable and genuinely felt as they clearly are, carry sufficient weight to tip the balance in favour of the degree of disclosure that would follow a confirmation or denial of the existence of the requested information.
24. In these circumstances we consider that the Information Commissioner was correct to conclude that the Council should have issued a "neither confirm nor deny" response to the information request, although we reach that conclusion by a slightly different route.
25. Our decision is unanimous.

¹ [2016] UKUT 0139 (AAC) at paragraphs 39 and 40

Signed

**Judge Chris Ryan
Judge of the First-tier Tribunal
Date: 11 July 2018**