



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

Appeal Reference: EA/2018/0176

**Decided without a hearing
On 7 March 2019**

Before

JUDGE BUCKLEY

PAUL TAYLOR

MALCOLM CLARKE

Between

JUSTIN TAPI

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE MINISTRY OF JUSTICE

Second Respondent

DECISION

1. For the reasons set out below the appeal is dismissed.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice FS50726966 of 16 August 2018 which held that the request was for personal data and that the Ministry of Justice ('MOJ') were entitled to rely on s 40(2) of the Freedom of Information Act (FOIA) because disclosure would breach the first data protection principle. The Commissioner also held that the MOJ had breached s 10(1) FOIA. The MOJ was not required to take any steps.

Factual background to the appeal

2. The Appellant asks for a list of the names of members of the Justices' Clerks' Society ('the Society'). Justices' clerks, or justices' legal advisors, ('JLAs') provide legal advice to Justices in the Magistrates Courts. The Society is a private unincorporated body which provides professional leadership support and representation for JLAs and JLAs. Its members include most but not all JLAs and JLAs and some other members, mainly former JLAs. It is an independent body but HMCTS hosts the Society's website on the MoJ intranet and provides secretariat support. The MoJ holds the list of members for this purpose. Membership of the Society is not public and the MOJ has no permission from the members to disclose it.
3. JLAs are appointed under s 27 of the Courts Act 2003 to:
 - a. carry out certain judicial acts which are authorised to be done by, to or before a single justice of the peace, or a judge of the family court;
 - b. give advice to justices of the peace about matters of law on questions arising in connection with the discharge of their functions.
4. They are civil servants employed by HMCTS but are independent when carrying out their statutory functions under s 29 of the Courts Act 2003.
5. Under rule 24.15 of the Criminal Procedure Rules a JLA assisting a justice of the peace must 'whenever necessary, give the court legal advice and if necessary, attend the members of the court outside the courtroom to give such advice, but inform the parties (if present) of any such advice given outside the courtroom.'
6. Under rule 5 of the Criminal Procedure Rules the court officer must record the name of the JLA dealing with the case and provide it on request if the verdict was not more than 6 months ago.

Request and reply

7. The Appellant made the request which is the subject of this appeal under the FOIA on 12 December 2017:

Please kindly supply me with the following data you may hold; under authority of the Freedom of Information Act 2000 ('FOIA'), s.1, s.3, s.6 and s.8:

1. A current (up to date) list of all members of the Justices' Clerks' Society also known as JCS (of HMCTS, 3rd Floor, Temple Court, 35 Bull Street Birmingham B4 6 EQ or other location), to include their title and department as at 12 December 2017.
 2. A current document or statement of (link to relevant HMCTS website may be acceptable where data is held) aims and objectives, mission statement, vision, remit etc., as at 12 December 2017.
8. The MOJ replied on 12 February 2018 (in a letter dated 19 January 2018). It refused to confirm or deny whether it held the information in requested in question 1 relying on s 40(5) FOIA (personal data). It provided the information requested in question 2.
 9. An internal review was conducted and the public authority upheld its original decision in a letter dated 5 April 2018.
 10. During the course of the ICO investigation the MOJ confirmed that it held the information and altered its position to rely on s 40(2). This was confirmed by letter to the appellant dated 16 July 2018.

Decision Notice

11. In her decision notice dated 16 August 2018 the Commissioner concluded that the request was for personal data because it asked for the members' names. She concluded that disclosure would be unfair and therefore breach the first data protection principle because:
 - a. Members of the Society would have a reasonable expectation that their personal data would not be disclosed to the public.
 - b. Disclosure has the potential to cause damage and distress.
 - c. There is no pressing social need for publication and no legitimate interest in disclosure which would outweigh any detriment.
12. The Commissioner did not consider it necessary to go on to decide whether disclosure would be lawful or whether one of the schedule 2 DPA conditions is met.
13. The MOJ was found to be in breach of s 10(1) by failing to respond within the statutory time frame.

Grounds of Appeal

14. The Grounds of Appeal are that the Decision Notice goes against the principle of open justice and is inconsistent with proper accountability. Magistrates' court proceedings are not recorded and seldom, if at all, maintained as a

matter of record. Proceedings are apparently dictated by the actions of JLAs and are frequently the subject of maladministration.

15. 'Summary Justice' is an unconstitutional cover for and/or iteration of the Star Chamber Court. The Magistrates Act 1980 did not properly confer any power of a competent court of record and the Magistrates Court is contrary to a number of specified constitutional statutes. It is therefore in the public interest to release the data.

The Commissioner's response

16. The Commissioner's response states that it would not be fair for the information to be disclosed and disclosure would consequently breach the first data protection principle because:
 - a. A list of names is obviously personal information.
 - b. It would be unfair to the people identified for the information to be released. The MOJ only hold the contact details to provide secretarial services. The members have a reasonable expectation that the MOJ would not disclose this information to the public.
 - c. There is a risk of distress and potential damage if Defendant's misunderstood their role and attributed responsibility for the outcome of a case to the Clerk.
 - d. There is no legitimate interest in the information being public. Clerks are not judicial office-holders and have no decision-making function.
17. It is not necessary to consider condition 6(1), but for completeness it would not be satisfied because disclosure is not necessary to allow a third party to pursue a legitimate interest. Disclosure of this list is not necessary to enable to operation of the Magistrate's Courts to be questioned.
18. The other arguments raised by the Appellant have no bearing on the operation of the duty of disclosure under FOIA.

The Appellant's response dated 14 September 2018 enclosing additional evidence

19. The Magistrates Court is not a court of record. The public interest in disclosure outweighs the DPA clause on non-disclosure of personal information because of the duty to uphold the rule of law and protect access to justice and its open administration. The cases cited in relation to failures and lack of accountability of the Magistrates Court are a small percentage of many other incidences.

The Appellant's response dated 17 September 2018

20. The Commissioner's submission that the information is exempt because JLAs do not carry out judicial functions is wrong because of the maladministration and despotic modus repeatedly witnessed in the Magistrates Courts.

21. The Tribunal should consider condition 6(1), schedule 2 DPA 1998 first.
22. JLAs and Assistance Clerks do carry out judicial functions (see ss 27-29, 32 and 37 Courts Act 2003 and the Justices' Clerks Rules 1999, rule 2).
23. The legitimate interest is ensuring an overhaul/abolition of the magistrates' court summary justice system as a whole.
24. The constitutional statutes do add weight to the appeal.
25. JLAs exercise judicial independence in respect of their advice giving functions. As the magistrates' court is not a court of record its proceedings are contrary to the due process of law.

The MoJ's response dated 23 September 2018

26. The cases cited by the Appellant relating to applications to Magistrates Courts to state a case for the opinion of the High Court do not apply to the general run of magistrates' courts proceedings but to a specific form of appeal under s 111 of the Magistrates' Courts Act in relation to which, where appropriate, a court can decline to state a case.
27. A magistrates' court is a 'court of record' in the sense that it has the power to fine or imprison for contempt. It is not a court of record as informally used in the sense that it does not take a contemporaneous record of its proceedings.
28. The information sought is personal data. Disclosure would breach the first data protection principle because it does not satisfy the conditions in schedule 2 DPA.
29. Disclosure is not necessary for the purposes of the Appellant's legitimate interests:
 - a. The membership list is not a complete or accurate list of all JLAs because not all JLAs are members and not all members are JLAs. The list is not organised by location. Providing the list would be a highly ineffective method of obtaining information that can be otherwise obtained by means of rules of court.
 - b. The acts of JLAs are accountable through other avenues. A list of all members of the Society is an ineffective alternative.
 - c. A list of names and addresses of JLAs is unnecessary to obtain a record of court proceedings or a court order.
 - d. It is difficult to see how the list would further the Appellant's campaign to abolish magistrates' courts.

30. The MoJ is concerned that revealing the names and addresses of all members of the Society would render them susceptible to abuse from members of the public who are dissatisfied with magistrates' courts and blames JLAS for it. The MoJ is aware of instances where dissatisfaction has extended to attempts to trace home addresses. The members of the Society have an expectation that the MoJ will do what it can to protect them from threats of this nature. There is a real risk of prejudice to the rights and freedoms of the data subjects.

Legal framework

S 40 – Personal Information

31. The relevant parts of s 40 of FOIA provide:

(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)-(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...

32. The legislation in force at the relevant time was the Data Protection Act 1998 ('DPA') Personal data is defined in s1(1) DPA as:

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..

33. The first data protection principle is the one of relevance in this appeal. This provides that:

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..." (See para.1 Sch 1 DPA).

34. The only potentially relevant condition in Schedule 2 DPA is section 6(1) which provides that the disclosure 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.' (See para.s 6 Sch. 2 DPA)

35. The case law on section 6(1) has established that it requires the following three questions to be answered:

1. Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
2. Is the processing involved necessary for the purposes of those interests?
3. Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

36. Whether disclosure is fair and whether condition 6(1) is satisfied are independent and can be addressed in either order.

The Task of the Tribunal

37. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

Issues

38. The issues we have to determine are:

- a. Whether the information requested was personal data.
- b. Would disclosing the information be fair and lawful?
- c. If so, are the conditions in 6(1) met i.e.
 - 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?

Documents

39. We have read and were referred to an open bundle of documents and a bundle of authorities, which we have taken account of where relevant.

Discussion and conclusions

40. We conclude that the information requested was personal data – a list of the names of members of a Society falls within that category.

41. The conditions in Schedule 2 arise independently of the general issue of fairness. In this appeal, it is convenient to begin with considering schedule 2

section 6(1). The Tribunal accepts that the appellant has a legitimate interest in the lawful operation of the magistrates courts, in there being a proper record of proceedings, in the principles of open justice and in the role of the JLA and further that he has a legitimate interest in furthering his call for the abolition of Magistrates' Courts.

42. We find that the disclosure of the list of names of members of the Society is not necessary for the purposes of any of those legitimate interests. The membership list is not a complete or accurate list of all JLAs, and does not identify the location of the JLA. We accept that JLAs exercise some judicial functions, but the name of a JLA in a particular case can be obtained under the Criminal Procedure Rules. Further JLAs are accountable for their actions through other avenues. We cannot see how knowing the names of the members of the Society could further the appellant's interests in any way, and disclosure is certainly not necessary for him to pursue those interests. On this basis we do not need to go on to consider whether the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject, nor do we need to consider fairness. Section 6(1) is not satisfied and the requested information is therefore exempt.

43. Had it been necessary to consider whether disclosure was fair and lawful, we would have concluded that it was not. The Society is independent of the MoJ, which holds the list of member's names purely because it provides secretariat services. We find that the individuals would not reasonably expect the MoJ to disclose the list of names to a third party. Further we accept that there is a risk that revealing the names of members of the Society would lead to a real risk of abuse from members of the public who are dissatisfied with magistrates' courts and the role of JLAs. For those reasons the tribunal concludes that it would not be fair to disclose the information.

44. We make an observation in relation to paragraph 42 of the decision; here the Commissioner notes that:

Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to provide the information if there is an overriding legitimate interest in disclosure to the public...

45. With respect, Part II of Schedule 1 to the DPA (Interpretation of the Principles...) makes clear at paragraph 2(1) that personal data are not to be treated as processed fairly for the purposes of the first principle unless data subjects are provided with:

Paragraph 2(3)

(a) ...

(b) ...

(c) The purpose or purposes for which the data are intended to be processed, and

(d) Any further information which is necessary, having regard to the specific circumstances in which the data are or are to be processed, to enable processing in respect of the data subject to be fair.

46. It is the above information which sets a data subject's '*reasonable expectations*'. The Commissioner had already noted at paragraph 37 of the decision that members of the Society would have no reasonable expectation that their personal data might be disclosed; it follows therefore that disclosure cannot be fair given the wording of paragraph 2(1) in particular. If disclosure is unfair because of an individual's reasonable expectations and the effect on an individual, this cannot be overridden by a legitimate interest in disclosure to the public.

47. This appeal is dismissed. Our decision is unanimous.

Judge of the First-tier Tribunal

Date: 22 March 2019