



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

Appeal Reference: EA/2018/0203

**Decided without a hearing
On 5 March 2019**

Before

JUDGE BUCKLEY

PAUL TAYLOR

DAVE SIVERS

Between

KEVIN BOWLER

and

THE INFORMATION COMMISSIONER

Appellant

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 FS50734649 of 7 September 2018 which held that the request was for personal data and that

confirming or denying whether the requested data was held would breach the first data protection principle and therefore the public authority (Billingham Town Council referred to as 'the Council' in this decision) should have relied on s 40(5) of the Freedom of Information Act (FOIA) to neither confirm or deny whether it held the requested information. The Commissioner also held that the Council had breached s 17(7) FOIA. The Council was not required to take any steps.

Factual background to the appeal

2. The Appellant is the chair of the North Billingham Residents Association.

Request, Decision Notice and appeal

3. The Appellant made the request which is the subject of this appeal under the FOIA on 16 January 2018:

Dear Billingham Town Council, following absence due to ill health, we learned that your [redacted] is on a phased return to work, with reduced hours compared to the 37 hour full time working week.

- (1) Since returning to work, how many weeks has [redacted] been authorised to work at reduced hours until the Town Council will require [them] to return to a full time 37 hour working week?
 - (2) Is the maximum possible duration for a phased return to work (following sickness absence) contractually stipulated, or has the Town Council set no limits on the duration of phased returns to work?
 - (3) Is/was [redacted] being paid [their] full salary (applicable for a 37 hour working week) for the duration of [their] phased return to work?
4. The public authority replied on 8 February 2018. It refused to provide the information, which it classed as sensitive data, under s 40 (2) and s 40 (3)(a)(i) FOIA.
 5. An internal review was conducted and the public authority upheld its original decision on 5 March 2018.
 6. During the course of the ICO investigation the Council supplied information in response to the second and third parts of the request. It relied on s 40(2) in relation to the first part of the request.
 7. In her decision notice dated 7 September 2018 the Commissioner concluded that confirming or denying whether the requested information was held would confirm or deny whether the individual had been on long-term sickness absence which was personal data. This is data about an individual's physical or mental health or condition and therefore sensitive personal data within section 2 of the Data Protection Act 1998 (DPA). In assessing fairness the Commissioner took account of the fact that it would be rare that disclosure of personal data would

be considered fair. The existence of personal data in the public domain is a relevant factor but does not necessarily mean that the subject could not hold a reasonable expectation that his or her sensitive personal data would not be disclosed.

8. The Commissioner proceeded to consider schedule 3 DPA on the basis that disclosure could reasonably be considered to be fair in these circumstances. Under schedule 3 the Commissioner found that neither of the two relevant conditions applied. The data subject did not consent to disclosure and there was no evidence that the data subject had already deliberately made the personal data public.
9. The Council was found to be in breach of s 17(7) FOIA by failing to inform the requestor of his right to complain to the Commissioner.

Grounds of Appeal

10. The Grounds of Appeal are:
 - a. The information requested was not personal data.
 - b. The Council had already placed information confirming the individual's sickness absence in the public domain.
 - c. The information sought was not about an individual's physical or mental health or condition.

Commissioner's response

11. The Commissioner's response states:
 - a. When considering if the information is personal data, the context of the request inextricably links any response to a particular individual.
 - b. By confirming or denying the request the Council would be confirming or denying that the individual had been absent due to ill health and providing information about the severity of the illness by virtue of the number of weeks at reduced hours. It is therefore sensitive personal data.
 - c. Confirmation or denial would arguably be unfair because it reveals further information that is not in the public domain i.e. information on the severity of the illness.
 - d. There is no evidence that either relevant schedule 3 condition is met.
 - e. If the data is not sensitive, no schedule 2 condition is met: no legitimate interest has been identified and confirmation or denial would be unwarranted by reason of prejudice to the rights and freedoms and legitimate interests of the individual concerned.

Appellant's reply

12. The information requested is whether or not a resolution was taken by the Council and if so, whether it included a specified time duration. All decisions taken by the Council should be recorded and available to view in the public domain unless they contain exempt or confidential information. Refusing to confirm or deny if information is held goes against the spirit of the Openness of Local Government Bodies Regulations 2014. The fact of the sickness absence is public knowledge and put into the public domain by the individual concerned. The request could not have raised awareness of the absence or led to disclosure of any details about it.
13. The requested information would not identify an individual. An inaccurate job title was used in the request. Third parties would not be able to identify the name of that individual from the Council website using that job title.
14. It is not sensitive personal data. The request is not for medical records, the nature of the condition or views on the length of recovery. The fact that the individual had made her sickness absence public means that it is not sensitive personal data because it alerts a third party to the fact that individual had been absent from work due to ill health. The number of weeks a person has been authorised to work at reduced hours is not indicative of the severity of the condition.
15. The General Data Protection Regulations 2018 were in force at the time. The requested data does not fall into any of the categories of personal data in those regulations.

Commissioner's submissions dated 4 December 2018

16. The Appellant's request provided both an inaccurate and an accurate job title. The individual was therefore capable of being identified from publicly available documents. The tribunal decision of OP v Information Commissioner EA/2018/0095 confirms that the answer to a FOIA request should be read in conjunction with the request itself. The answer inherently discloses the information contained in the request.

Legal framework

S 40 – Personal Information

17. 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...

...

(5) The duty to confirm or deny –

...

(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 191(a) would (apart from this Act) contravene any of the data protection principles...

18. The General Data Protection Regulations 2018 do not apply to this appeal. 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.

19. The definition of "personal data" consists of two limbs:

i) Whether the data in question "relate to" a living individual and

ii) Whether the individual is identifiable from those data.

20. The tribunal is assisted in identifying 'personal data' by the cases of **Ittadie v Cheyne Gardens Ltd** [2017] EWCA Civ 121; **Durant v FSA** [2003] EWCA Civ 1746 and **Edem v Information Commissioner** [2014] EWCA Civ 92, from which the following principles are drawn.

21. In terms of 'identifiability', personal data covers, for example, the name of a person in conjunction with his telephone details or information about his working conditions or hobbies, as well as information that a person has been injured and is on half time, or his name and address.

22. In **Durant**, Auld LJ, giving the leading judgment said at [28]:

Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he

may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity.

23. In **Edem** Moses LJ held that it was not necessary to apply the notions of biographical significance where the information was plainly concerned with or obviously about the individual, approving the following statement in the Information Commissioner's Guidance:

It is important to remember that it is not always necessary to consider 'biographical significance' to determine whether data is personal data. In many cases data may be personal data simply because its content is such that it is 'obviously about' an individual. Alternatively, data may be personal data because it is clearly 'linked to' an individual because it is about his activities and is processed for the purpose of determining or influencing the way in which that person is treated. You need to consider 'biographical significance' only where information is not 'obviously about' an individual or clearly 'linked to' him.

24. Sensitive personal data is defined in s 2 DPA as:

personal data consisting of information as to-

- (a) The racial or ethnic origin of the data subject;
- (b) His political opinions;
- (c) His religious beliefs or other beliefs of a similar nature;
- (d) Whether he is a member of a trade union...
- (e) His physical or mental health or condition;
- (f) His sexual life;
- (g) The commission or alleged commission by him of any offence; or
- (h) Any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

25. 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).

26. 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)

27. 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?

28. Where the data is sensitive personal data, the first data protection principle imposes a further requirement, namely that one of the conditions in schedule 3 DPA must be satisfied. The only conditions potentially relevant in the context of this appeal are that:

1. The data subject has given his explicit consent to the processing of the personal data.
- ...
- ...
4. The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.

The Task of the Tribunal

29. 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 she 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

30. The issues we have to determine are:

- a. Was the information requested sensitive personal data?
- b. If so, would confirming or denying that the Council held information be fair?
- c. Is one of the conditions in schedule 3 DPA satisfied?
- d. If the information was not sensitive personal data, was it personal data?
- e. Would confirming or denying that the Council held the information be fair?
- f. If so, are the conditions in schedule 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?

Evidence and submissions

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

Discussion and conclusions

32. We are only considering part 1 of the request. We conclude that the information requested was sensitive personal data.
33. We accept that it is right to take account of the contents of the request when deciding if the information was personal data. The individual in question is easily identifiable using publicly available documents from the job title provided in the request. The requested information, given as a response to and seen in the light of the request reveals details about the individual's working conditions, i.e. the number of weeks they have been authorised to work at reduced hours. The information is plainly about that individual. It relates to and identifies that individual and is therefore personal data.
34. That personal data is, in our view, sensitive personal data because it consists of information as to the individual's physical or mental health or condition. Information as to the number of weeks an individual has been authorised to work at reduced hours during a phased return following absence due to ill health would confirm or deny to the public that the individual had been absent due to ill health and would give some indication of the severity of the condition. The issue of whether or not this information was already in the public domain is not relevant to the question of whether or not it amounted to information about an individual's health and is therefore sensitive personal data.
35. We conclude that it would be not be in the reasonable expectations of the individual that their employer would confirm or deny that it held information on the number of weeks at which they had been authorised to work at reduced hours. This places in the public domain information which gives some indication of the severity of the illness. This is so even if the mere fact of the illness is already in the public domain, because more information is revealed namely information about her recovery process and some indication of the severity of that illness. The tribunal is not aware of any particular public interest in knowing the specific information requested. The tribunal concludes that confirmation or denial would be unfair.
36. Further, no schedule 3 condition is satisfied. The individual has not consented to the Council confirming or denying that it holds the information. There is no evidence that this individual was the person who put in the public domain the information which is said to disclose the fact that they had been absent due to

ill health. Further, even if this were the case, that individual has not put in the public domain information which reveals either the specific information requested or whether the Council holds the specific information requested. No other schedule 3 condition is relevant and in those circumstances we find that no schedule 3 condition is satisfied. Confirmation or denial of whether the requested information was held would therefore be unlawful and breach the first data protection principle.

37. Finally the tribunal observes that the appellant has complained that no internal review was carried out in the meeting of 27 February 2018, because it is not recorded in the minutes and a member of public attended who did not recall such a discussion. The minutes of that meeting at p186/7 of the bundle suggest that the matter was discussed, after the public had been asked to leave:

At this point Members discussed recent FOI requests and other confidential issues.

38. The tribunal concludes that the Commissioner's decision was correct and we dismiss the appeal. Our decision is unanimous.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 25 March 2019

Promulgated: 25 March 2019