



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

**Appeal Reference: EA/2018/0237**

**Heard at Birmingham Magistrates Court  
On 3 April 2019**

**Before**

**HH JUDGE SHANKS**

**NIGEL WATSON**

**MIKE JONES**

**Between**

**OLIVER SILENCE**

Appellant

**and**

**(1) INFORMATION COMMISSIONER**

**(2) MINISTRY OF JUSTICE**

Respondents

Representation:

Mr Silence: in person

Respondents: did not appear

## DECISION OF FIRST-TIER TRIBUNAL

For the reasons set out below the appeal is dismissed.

### REASONS

#### **Introduction**

1. The Appellant, Mr Silence, is a serving prisoner at HMP Swinfen Hall. On 16 April 2018 he made a request for information under the Freedom of Information Act 2000 seeking:

**The amount paid to the staff working in HMP Swinfen Hall's programmes department 2016-2017 along with their genders.**

We say at the outset for the sake of clarity that he was not seeking to know the names of the staff to whom the individual salaries relate.

2. The Ministry responded on 14 May 2018 by agreeing that they held this information but refusing to supply it in reliance on section 40(2) of FOIA on the basis that it "constituted personal data" of the staff concerned (see section 40(2)(a)) and that its disclosure would involve a breach of the first data protection principle (see section 40(2)(b) and 40(3)(a)).
3. Mr Silence disputes both that the information is personal data and that its disclosure would breach the first data protection principle. He complained to the Information Commissioner about the Ministry's refusal to supply the information. The Commissioner upheld the Ministry's position in a decision notice dated 29 October 2018. Mr Silence has appealed to this Tribunal against that decision notice.

#### **Procedure and issues on appeal**

4. In addition to the open bundles we were supplied on a "closed basis" with certain details of the staff working in the Swinfen Hall Programmes Department (ie gender, job, grade and the individual salaries of the "non-operational band 4 members of staff") which are redacted from pages 51, 56 and 57 of the open bundle. We should record that we are not entirely sure on reflection that all the redacted details needed to be withheld from Mr Silence (in particular the gender and job breakdown of the staff) but in any event we do not consider that he will have been prejudiced. We also note here that he

*has* been provided at page 57 of the bundle with the amounts of the three salary bands (4, 5 and 6) which apply to the staff in the department.

5. Mr Silence has taken a vow of silence but nevertheless under the relevant rules he was entitled to a hearing (see: rule 32(1)(a) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009). It was not possible to organise a video-link to the prison so the Tribunal staff went to considerable lengths to organise a hearing at Birmingham Magistrates Court where there is a secure dock. The only party to attend the hearing was Mr Silence. He handed the Tribunal a characteristically clear and well-written skeleton argument and indicated that he wished the Tribunal to read it but did not require us to take any further steps in relation to the hearing. The Tribunal members have read and taken account of all that he says in that document as well as the other papers in the case.
6. The issues for us to consider on the appeal are the same as those considered by the Commissioner, that is:
  - (1) whether the requested information is “personal data” and
  - (2) whether its disclosure to Mr Silence would contravene the first data protection principle.

### **Personal data**

7. “Personal data” are data which relate to a living individual who is identifiable; for the purposes of this kind of case the case law has established that this refers to someone who can be identified from the data itself combined with other information which is in the possession of, or is likely to come into the possession of, a member of the public, including a so-called “motivated intruder” (see in particular: *Information Commissioner v Miller* [2018] UKUT 229 (AAC)). There is no question that a person’s salary is data which relates to him/her; the issue in this case is whether any of the individual members of staff in the department would be identifiable from a combination of his/her gender and salary (the data) along with other information which is likely to be in, or come into, the possession of others.
8. Having regard to the information we have about the Programmes Dept at HMP Swinfen, it seems to us that it would be fairly easy for anyone familiar with it (of whom there must be a number) to work out from the information requested by Mr Silence the salaries of at least some identified members of staff. There are about 20 staff in the whole department. Some would be readily identifiable because of a comparison of the salaries disclosed with their position in the hierarchy, others because they were part-timers (and to give meaningful information about salary it would be necessary to reveal part-time status), others because they are men and only one or very few men work in certain capacities; there may be other factors, like length of service, which

could be readily ascertained and which would help anyone interested to work out which salary related to which individual.

9. Mr Silence has made the point that he personally would not be likely to seek to identify the salaries of particular individuals; as is clear from our account of the legal position his personal intentions are not relevant: disclosure under FOIA is in effect disclosure to the world. He also says that he can see no logical reason why anyone would desire to do so, particularly as it would involve “immense effort”. As we have indicated, we do not consider it would involve immense effort for someone familiar with the department to work out at least some of the salaries of specified individuals. And, unfortunately, we are not as sanguine as he is about the desire of certain people to find out how much other people earn.
10. Accordingly we consider that the information he requested (which is clearly meant to be considered as one “block of information”) would include personal data relating to at least some of the staff in the department.

### **The first data protection principle**

11. So far as relevant, the “first data protection principle” states:

**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 [to the Data Protection Act 1998] is met ...**

The only condition in Schedule 2 which is ever likely to be relevant in the case of a request for information under FOIA is para 6 which says this:

**The [disclosure] is necessary for the purposes of legitimate interests pursued by ... the third party ... to whom the data are disclosed, except where the [disclosure] is unwarranted in any particular case by reason of prejudice to the rights and freedoms and legitimate interests of the data subject.**

In her decision notice the Information Commissioner considered the question whether disclosure was fair to the data subjects in general terms first without considering para 6 of Schedule 2. We prefer to consider para 6 before considering fairness generally as we think this provides for a clearer and more structured approach to the issues.

12. The first issue is therefore whether disclosure of the requested information to Mr Silence is “necessary for the purposes of a legitimate interest” which he is pursuing. His position is that he (and the public) are properly interested in the “gender pay gap” in the Ministry of Justice and that disclosure of the requested information is relevant to this issue. He also says the public are entitled to reasonable transparency from the Ministry and to know that their taxes are being spent appropriately. We are satisfied that he is pursuing

legitimate interests in relation to these matters. We are not satisfied, however, that disclosure of the requested information to him is “necessary” for the purpose of pursuing those interests. As we understand the “gender pay gap” issue, it arises from a concern that, even where women are paid the same as men for the same work within a large organisation, the structure of the work force can mean that women are paid less on average than men working in the same organisation. We do not see how information about the pay of a small group of men and women working in a particular department within such an organisation would be relevant or helpful in relation to that issue. Nor can we see that providing information about individual salaries and gender would be relevant to more general issues of transparency and value for money; as we have indicated it is clear that there is no secret as to the pay bands of those working in the department and numbers of staff ought to be readily ascertainable. We do not therefore consider that disclosure of the requested information is “necessary” for pursuing Mr Silence’s legitimate interests.

13. If we are wrong about that, it would be necessary to consider the second issue which is whether, even if such disclosure was (reasonably) necessary, it was nevertheless “unwarranted” because of the harm that would be done to the interests of the data subjects, ie those members of staff whose individual salaries were disclosed. We accept the Commissioner’s position that staff at the level we are considering would reasonably expect their salaries to be kept confidential and that they would feel a legitimate sense of grievance if they were disclosed. Mr Silence rightly points out that there is no specific evidence that distress would be caused by disclosure of the requested information. However, there is no requirement that any disclosure should be shown to be likely to cause actual distress (paragraph 6 requires “prejudice to ... legitimate interests”, not distress); and in any event we are quite satisfied, without the need for specific evidence, that disclosure of actual salaries in the context of a small team has the potential to cause distress even (and perhaps more so) where all the staff are paid salaries within fairly narrowly defined grades. We are quite satisfied in the circumstances that disclosure in this case would be “unwarranted” having regard to the likely harm as compared with the minimal benefits it would bring.
14. We therefore take the view that disclosure in this case would not meet the condition at para 6 or any other condition in Schedule 2 and that it would therefore amount to a contravention of the first data protection principle. We reach this view without considering fairness in general.

## **Conclusion**

15. For those reasons we consider that the information requested by Mr Silence was personal data whose disclosure would involve a contravention of the first data protection principle and the Ministry was entitled to rely on section 40(2)

to refuse to supply the information and the Commissioner was right so to find. Accordingly, we dismiss the appeal. This is a unanimous decision.

HH Judge Shanks  
(First Tier Tribunal Judge)

Date of Decision: 10 April 2019

Date Promulgated: 17 April 2019