



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

Appeal Reference: EA/2019/0074

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Anne Chafer
And
Malcolm Clarke

Between

Keith Jago

Appellant

And

The Information Commissioner

Respondent

**Determined, by consent, on written evidence and submissions
Considered on the papers on 1 July 2019.**

DECISION AND REASONS

INTRODUCTION

1. The Appellant requested the amount of money paid to a certain officer (the officer) of the University of Sussex (the University) to “encourage” that officer’s resignation. Thus, the Appellant’s request dated 18 April 2018 read: -

“I wish to know how much [the officer] was paid by the University of Sussex to encourage his resignation in [date redacted].”

BACKGROUND AND DECISION MAKING

2. The University responded on 17 May 2018 and refused to confirm or deny holding information within the scope of the request. It claimed to be relying on Section 40(2) FOIA as its reason for doing so. There was an internal review, and the University wrote to the Appellant on 19 June 2018, refusing again to confirm or deny holding information and again cited Section 40(2) FOIA.
3. The Appellant complained to the Commissioner on 8 August 2018 about the way his request had been handled. He argued, in particular, that disclosure was “in the public interest”. The Commissioner made initial contact with the University pointing out that if it intended to neither confirm nor deny (NCND) that it held the information then the appropriate statutory provision was s40(5) FOIA, and the University agreed with this, issuing a corrected refusal notice on 22 January 2019. The Commissioner’s decision notice is dated 12 February 2019. The Commissioner states that: -

In this Notice the Commissioner has used various hypothetical scenarios to aid understanding of the arguments involved. Nothing in this Notice should be taken as any indication as to whether the requested information is held by the University.

4. The Tribunal takes the same approach. Indeed, the Tribunal does not know whether the University holds the requested information or not.
5. The Commissioner comments that under s1(1)(a) FOIA a public authority is obliged to advise an applicant whether or not it holds the information requested, but that this duty to 'confirm or deny' does not always apply if the public authority can properly rely on one of the exemptions from the duty in FOIA. Thus, the exemption in s40(5) FOIA states that the duty to confirm or deny whether or not the information is held does not arise if providing the requester with confirmation or denial would itself contravene any of the data protection principles.
6. Section 40 FOIA, materially, reads as follows: -

40. – Personal information.

- (1) ...
- (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) ...

7. The first question in determining whether the exemption is engaged is to decide whether confirmation (or denial) alone that information is held would involve the disclosure of personal data. The relevant definition of personal data is set out in section 1 of the Data Protection Act 1998:

“...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, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.”

8. The Commissioner’s approach was to say that the Appellant has named an individual (the officer) in his request and that the request is worded in such a way that any information within its scope must relate to the officer. It therefore follows that any confirmation or denial of the extent of information held will, by definition, “relate” to the Officer (see paragraph 17 of the

decision notice) and the Commissioner concluded at paragraph 18 that: -

As information disclosed as a result of confirmation or denial could only relate to the Officer and he is identified in the wording of the request, the Commissioner considers that confirmation or denial could not be achieved without the disclosure of the Officer's personal data.

9. If it is accepted that confirmation or denial in response to the request would mean the disclosure of personal data, then the issue is whether the disclosure of the personal data would contravene any of the data protection principles.
10. Materially, for the purposes of s40(3)(a)(i), the first data protection principle requires that personal data is processed (which includes disclosure) fairly and lawfully and in particular, shall not be processed unless – (a) at least one of the conditions in Schedule 2 is met.
11. The requirement for personal data to be processed fairly is a general one, and may be assessed first before the Schedule 2 requirements are considered. Nevertheless, in relation to interpreting the first principle, the disclosure must also not breach the material conditions in Schedule 2 to the DPA 1989 'relevant for purposes of the first principle'. Processing is permitted if the data subject has consented to it (Sch 2, first condition), but if not (as in this case) then for the purposes of the sixth condition in Sch 2 (which appears to be the only condition relevant in the present case) it must be established that the disclosure is necessary in order to meet the legitimate interests pursued by the Appellant (or others who are not relevant in this case).
12. Further for the purposes of the sixth condition, there is an exception to disclosure even where disclosure has been established as for the purposes of the Appellant's legitimate interests. Thus, that exception covers a situation where the processing (disclosure) is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

13. The Commissioner's decision notice explains the approach that the Commissioner took as follows: -

22. The Commissioner's approach when considering the First Principle is to start by looking at whether the disclosure that would result from confirmation or denial would be fair. If that disclosure would be *unfair*, the exemption is engaged immediately. Only if the Commissioner finds that that disclosure *would* be fair will she go on to look at lawfulness and whether a Schedule 2 condition can be satisfied

23. In assessing whether the disclosure that would result from confirmation or denial would be unfair, and thus constitute a breach of the First Data Protection Principle, the Commissioner takes into account a number of factors, including the following:

- What reasonable expectations does the data subject(s) have about what will happen to their personal data?
- What are the consequences of disclosure?
- Are there any legitimate interests in disclosure which would outweigh the rights and freedoms of the data subject(s)?

23. The decision notice then describes the University's position as follows: -

(a) Any information held (or disclosed through confirming or denying that it held the information) would relate to the reasons for the cessation of the officer's employment.

(b) Although any information would relate to the officer's public life, private life was also engaged given the underlying implication in the request that the officer was encouraged by payments to resign, and the affect this might have on the officer's reputation.

- (c) Any employee leaving the university would reasonably expect information relating to their resignation to be treated confidentially – nothing is in the public domain and no publication is to take place.
- (d) The officer had not been asked for consent in relation to any disclosure.
- (e) There was a distinction between payments made to ‘encourage’ a resignation, and payments made for example, in lieu of notice.
- (f) The University has to publish details of staff that exceed £100,000, which it says meets the requirements for transparency.

24. The Commissioner noted that the Appellant appeared to have grievances against the officer, one of which (we do not think it involves the Appellant personally) had led to a legal settlement with students, but had not provided evidence of the other grievances. The Appellant had pointed out that the University’s annual accounts for 2017 had referred to a particular sum paid in lieu of notice to senior post-holders. The Appellant believes this probably relates to the officer. The Commissioner notes (paragraph 33) that: -

The complainant argued that disclosure was “in the public interest.” Whilst Section 40 does not require consideration of the balance of public interest, some of the arguments the complainant made have informed the Commissioner’s view of the “legitimate interest” in confirmation or denial.

25. The Commissioner concluded as follows: -

- (a) Confirming or denying that the information within the scope of the request was held would have been disclosing personal data about the officer and therefore reliance on s40(5) FOIA was correct.

- (b) Releasing information under FOIA is effectively releasing it to the world at large.
- (c) Although the Appellant has asked for a particular figure, that figure is contingent on the officer having been encouraged to resign. The University cannot confirm or deny it holds the information without confirming or denying that that the officer was (or was not) encouraged to resign by the making of payments.
- (d) An individual employee has a reasonable expectation that the public authority would treat information about cessation of employment confidentially. This applies to the officer, and there is a risk of distress if the University confirms or denies that it holds the information.
- (e) In certain circumstances where very, large sums of money are expended, there is strong evidence of malpractice, or a person occupies a very senior position, for example, then there may be a legitimate interest in disclosure but, in the Commissioner's view that is not this case.
- (f) The published accounts which refer to payments made in lieu of notice to senior post holders, do not necessarily refer to the officer alone or at all.
- (g) To confirm or deny that the information is held in the present case would therefore be unfair to the officer.

THE APPEAL

26. The Appellant filed an appeal to the decision notice on 9 March 2019. The Appellant objects to the fact that the Commissioner directed the University

towards the correct exemption and did not consult with him in the process. He refers to the behaviour of the officer as a reason why the officer should forgo the reasonable expectation of privacy, and he refers to press reports of defamatory statements against students which are said to have led to out of court settlements. He emphasises the public interest in disclosure in such circumstances, for the reasons set out in the guidance on the Commissioner's website.

27. The Appellant refers to having been wrongly banned from the University campus at the officer's behest, and that the officer lied to the police, but he does not enlarge upon the circumstances. He says that the University knows the circumstances. He says that the misconduct of the officer is sufficient to require disclosure. The Appellant complains about the process adopted by the Commissioner which denied him the right to comment on the University's case and also about the Commissioner's use of the phrase "underlying grievance" to describe the Appellant's concerns about the behaviour of the officer". He says that the process adopted by the Commissioner is unfair and that the Commissioner is biased.

DISCUSSION AND DECISION

28. As the Tribunal considers the matter afresh, then we can take on board, when considering the appeal, any points that the Appellant feels that he was unable to make to the Commissioner. This is a case which has been determined without a hearing, upon the agreement of the parties, and we have taken account of all the information made available to us.

29. In relation to the Appellant's initial points about the Commissioner's role in directing the University to the correct exemption, we accept the position put forward in the Commissioner's response to the appeal that (a) the

Commissioner has a role in ensuring that the correct exemption has been advanced; (b) that the correspondence suggests that the University always intended to rely on s40(5)FOIA, but misdescribed the exemption; and (c) that a public authority is entitled to rely on additional or different exemptions after its initial response. Thus, if to neither confirm or deny that information is held is the most appropriate protection for the officer complained about by the Appellant, then the Commissioner is right to seek to apply it.

30. We agree with the Commissioner that s40(5) FOIA is the appropriate exemption to apply and that to confirm or deny that the requested information is held would in itself involve the disclosure of personal data as described in s1 of the Data Protection Act 1998. As argued, to have relied on s40(2) FOIA would have entailed the University confirming or denying that it held information relating to a request which asked what amounts had been paid to the officer to encourage the officer to resign. It may be that a request can be framed in such a way as to make it appropriate for the University to confirm or deny that information is held about payments made to the officer, for whatever reason. The Commissioner says that the Appellant had declined her suggestion that he might consider a re-wording of his request although the Appellant denied that such a suggestion had been made.

31. In relation to fairness to the officer, in general we agree with the approach taken by the Commissioner. However, we disagree with the Commissioner's view that the officer involved was not of a seniority where there would have been a reasonable expectation that employment details would not be published as a matter of course, because the officer held a very senior position. This also seemed to be a case where the misconduct alleged was of quite a serious nature (but despite the out of settlement payments to students, we are in no position to adjudicate on whether the allegations are substantiated). Nevertheless, given the nature of the request in this case, which would involve confirming or denying whether the officer was

'encouraged' to resign, our conclusion is that, before we consider any legitimate interests of the Appellant (and subject to that consideration), disclosure would be unfair to the officer.

32. The Appellant has centred his appeal arguments on whether it is in the public interest that disclosure should be made. However, the public interest test, as set out in s2(2) FOIA does not apply when considering the s40(5) FOIA exemption. However, the Appellant's legitimate interests can be taken into account when considering whether the disclosure of personal data is fair (as explained above).

33. In relation to the legitimate interests of the Appellant, the Appellant states that the University knows the full basis of his complaints against the officer. The information we have from the Appellant is that he alleges he was wrongly excluded from the University campus by the officer and that the officer lied to the police. We cannot know if the allegations are true, and we do not know the full circumstances. Other than this, the Appellant clearly has a general interest in the alleged wrongdoing that led to students at the University receiving compensation, and a general interest in payments that may have been made to senior staff who he believes were involved in the wrongdoing. We do not have sufficient information to draw conclusions from this information (for example as to whether there has been wrongdoing or not), and thus in our view we cannot conclude that disclosure is necessary for the purposes of the legitimate interests pursued by the Appellant, such as to make it fair that it is confirmed or denied that the information is held.

34. Even if we were to find (on the information available) that the legitimate interests of the Appellant made such disclosure necessary, in our view the legitimate interests do not override the rights of the data subject in this case, for the reasons set out above, relating to the officer's reasonable expectation of

privacy in relation to the motive for and circumstances surrounding his resignation.

CONCLUSION

35. For the reasons set out above we are satisfied that that University was entitled to rely on s40(5) FOIA to decline to confirm or deny that the information is held, and the Commissioner was right to make that finding in the decision notice. Therefore, this appeal is dismissed.

Judge of the First-tier Tribunal

Date: 15 July 2019.

Promulgation date 16th July 2019