



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

**Appeal Reference: EA/2019/0117**

**Decided without a hearing  
On 23 October 2019**

**Before**

**JUDGE ANTHONY SNELSON  
MS ROSALIND TATAM  
MRS ANNE CHAFER**

**Between**

**ALAN DAVIES**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**DECISION**

The unanimous decision of the Tribunal is that the appeal is dismissed.

**REASONS**

***Introduction***

1. On 11 February 2018 Mr Alan Davies, the Appellant in these proceedings, wrote to the North West Leicestershire District Council ('the Council')

requesting, pursuant to the Freedom of Information Act 2000 ('FOIA'), information in these terms:

**The Council's Head of Finance received a compensation payment of £37,030 in 2016/17.**

- 1 What was the compensation for?**
- 2 Who made the decision to pay it?**

**Please let me have a copy of the minute or decision record that confirms this decision.**

**Please treat this as a request information under the Freedom of Information Act.**

2. The Council responded on 2 March 2018. As to part (1) of the request, it provided a link to its annual accounts (published online), in which the relevant payment was shown. Its reply to part (2) was that the decision was taken by the Council's Chief Executive Officer ('CEO'), but that the information was not held in recorded form.
3. Mr Davies took issue with that response, but, in a letter of 26 March 2018, the Council stood by it, in addition citing FOIA, s40(2)<sup>1</sup> (personal information) in respect of part (1) of the request.
4. On Mr Davies's further challenge, the Council conducted an internal review, the outcome of which, given on 23 May 2018, was that its stance was maintained.
5. On 8 June 2018, the Appellant complained to the Respondent ('the Commissioner') about the way in which his request for information had been handled. An investigation followed in which the Council gave notice that, in relation to part (1) of the notice, it also wished to rely on s41 (information provided in confidence).
6. By a decision notice dated 14 March 2019 the Commissioner determined that the Council had correctly applied s40(2) in relation to part (1) of the request but that its response to part (2) was incorrect and a fresh response to that part must be delivered. The decision on part (2) was based on clarification supplied by the Council in the course of the investigation in these terms:

**This decision was made by the Chief Executive ... following consultations ... It should be noted that the Chief Executive has delegated authority under the Council's Constitution to make decisions relating to matters of this nature and of this value. The final decision document in a matter such as this is the Settlement Agreement itself which is subject to contractual confidentiality provisions ...**

Given her findings on s40(2), the Commissioner declined to address the applicability of s41.

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<sup>1</sup> All section numbers below refer to FOIA unless otherwise stated.

7. By a notice of appeal dated 2 April 2019, the Appellant challenged the Commissioner's adjudication on part (1) of his request. He made the following main points:
  - (1) the payment under consideration, taken by an unelected officer, was "shrouded in secrecy." There should be openness and transparency in the use of public money.
  - (2) The Council had already concealed information about the payment (this assertion was not explained).
  - (3) It was inappropriate for s40(2) to be used in a "blanket" fashion to suppress disclosure of "very limited information."
  - (4) All that part (1) sought was "a few words" to explain the nature of the compensation payment. The settlement agreement was not sought.
  - (5) A response to part (1) would not "relate to or identify the [recipient] any more than the information which is already in the ... accounts."
8. The Commissioner resisted the appeal in a response drafted by counsel dated 15 May 2019. She submitted as follows.
  - (1) The request (part (1)) asked for the reason for the payment, not the settlement agreement itself. The issue was whether other information held by the Council was within the scope of the request.
  - (2) Even a "brief explanation" would constitute personal data of the data subject (the recipient of the payment).
  - (3) There was a public interest in furthering transparency in relation to the use of public funds but in the present case that interest was outweighed by countervailing factors, in particular:
    - (a) the information relates to a former, not present, employee;
    - (b) the settlement agreement was subject to a confidentiality clause;
    - (c) disclosure of the information would cause distress to the data subject.
  - (4) There was no question of s40(2) being applied in a 'blanket' fashion.
  - (5) In the circumstances, disclosure would be contrary to the first data protection principle (specifically, the requirement for personal data to be processed fairly and lawfully).
9. In emails of 20 May and 15 July 2019 Mr Davies made the point again that he was not seeking disclosure of the settlement agreement and only asked for "a few words" to explain the compensation payment.
10. In case management directions dated 23 July 2019 the Tribunal's Registrar, Mrs R Worth, alluded to the repeated requests for a few words of explanation and observed:

**I have read Mr Davies' objection which he states that "the only information I am asking for is a short, concise summary (i.e. a few words) to explain the nature of a**

large compensation payment ..."; it seems that Mr Davies is not aware that the Freedom of Information Act 2000 does not require a public authority to create information only to provide information (unless exemption(s) apply) which it holds. Therefore, these proceedings are about all the information which is in the scope of the request made by Mr Davies.

11. In an email of 29 August 2019 Mr Davies stated that he wished only for a "concise summary ... from the information already held by the Council" to explain the nature of the compensation payment.
12. We have also considered a long document from Mr Davies dated 29 August which goes into the background history of dealings between him and the Council (with which we are not concerned) and adds fresh observations on or at least connected with the matters which are before us. We have had regard to those observations but it is not necessary to recite or summarise them here.
13. The appeal came before us for consideration on paper, the parties being content for it to be determined without a hearing.

### *The Statutory Framework*

#### *The freedom of information legislation*

14. FOIA, s1 includes:

- (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.

'Information' means information "recorded in any form" (s84).

15. By s40<sup>2</sup>, it is provided, so far as material, as follows:

- (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 the paragraphs (a) to (d) 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 -

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<sup>2</sup> As it stood before the 2018 amendments (see below)

- (i) any of the data protection principles ...

...

- (7) In this section -

**“the data protection principles” means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998 ... ;**

**“data subject” has the same meaning as in section 1(1) of that Act;**

**“personal data” has the same meaning as in section 1(1) of that Act.**

The exemptions under s40 are unqualified under FOIA and the familiar public interest test has no application. Rather, the reach of the exemptions is, in some circumstances, limited by the data protection regime (see below). But the starting-point is that data protection holds pride of place over information rights. In *Common Services Agency v Scottish Information Commissioner* [2008] 1 WLR 1550 HL, Lord Hope reviewed the legislation, including the Council Directive on which DPA 1998 is founded. At para 7 he commented:

**In my opinion there is no presumption in favour of release of personal data under the general obligation that FOISA<sup>3</sup> lays out. The references which that Act makes to provisions of DPA 1998 must be understood in the light of the legislative purpose of that Act, which was to implement Council Directive 95/46/EC. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data ...**

### *The data protection legislation*

- 16. The data protection regime in force before the commencement of the Data Protection Act 2018 (“DPA 2018”) and the implementation of the General Data Protection Regulation (25 May 2018) applies to this case (see DPA 2018, Sch 20, para 52). That regime is founded on the Data Protection Act 1998 (“DPA 1998”).
- 17. DPA 1998, s1 includes:

- (1) In this Act, unless the context requires otherwise -

**“data” means information which –**

- (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
- (b) is recorded with the intention that it should be processed by means of such equipment,
- (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
- (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record ...

**“data controller” means a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;**

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<sup>3</sup> The proceedings were brought under the Freedom of Information (Scotland) Act 2000, but its material provisions do not differ from those of FOIA.

**“data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;**

**“data subject” means an individual who is the subject of personal data;**

**“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 ...**

**“processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including –**

**(a) organisation, adaptation or alteration of the information or data,**

**(b) retrieval, consultation or use of the information or data,**

**(c) disclosure of the information or data by transmission, dissemination or otherwise making available ...**

18. The data protection principles are set out in Part 1 of Schedule 1 to DPA 1998. The first is relied upon by the Commissioner. So far as material, it is in these terms:

**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, and**

For reasons that will be explained, our analysis ends before the Schedule 2 conditions are reached. Accordingly, we will not set out those conditions here.

19. The Upper Tribunal has held that it is legitimate to consider at the outset the first part of the test (fair and lawful processing), before addressing (if need be) the Schedule 2 conditions (see *Farrand v Information Commissioner* [2014] UKUT 310 (AAC), para 20).

#### *The Tribunal’s powers*

20. The appeal is brought pursuant to the FOIA, s57. The Tribunal’s powers in determining the appeal are delineated in s58 as follows:

**(1) If on an appeal under section 57 the Tribunal consider –**

**(a) that the notice against which the appeal is brought is not in accordance with the law; or**

**(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,**

**the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the tribunal shall dismiss the appeal.**

**(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.**

21. In her current Guidance on Requests for Personal Data about Public Authority Employees<sup>4</sup>, the Commissioner states (p13):

The data protection exercise of balancing the rights and freedoms of the employees against the legitimate interest in disclosure is different to the public interest test that is required for the qualified exemptions listed in section 2(3) of FOIA.

In the FOI public interest test, there is an assumption in favour of disclosure because you must disclose the information unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

In the case of section 40(2), the interaction with the DPA means the assumption is reversed and a justification is needed for disclosure.

22. The Guidance continues (pp 16-17):

As with other requests for employee information, your consideration of the legitimate interests balancing test usually involves considering the employee's reasonable expectations.

In assessing these expectations, you have to take account of statutory or other requirements to publish information and also the increasing public expectation of transparency regarding the expenditure of public money and the performance of public authorities. This is especially the case if there is any evidence of mismanagement by senior staff in a public authority.

The general issue of lawfulness under principle (a)<sup>5</sup> is also relevant to the disclosure of compromise agreements.

A compromise agreement is likely to contain a confidentiality clause and our view is that disclosure is unlawful if it was in breach of an enforceable contractual term. However, you cannot simply contract out of your obligations under FOIA. Whether a confidentiality clause applies in any particular case depends on whether the specific information is truly confidential.

### *Analysis and Conclusions*

23. In our judgment this appeal is misconceived. Mr Davies does not seek disclosure of the settlement agreement. His request under part (1) is for a summary of the reason(s) for the compensation payment. As Mrs Worth has endeavoured to explain, FOIA is concerned with information that already exists. A public body cannot be compelled to *create* information. And, as we have noted above, for the purposes of the Act, 'information' means recorded information (s84). The Council has explained that it does not hold information (*ie.* recorded information) about the reason(s) for the compensation payment. That is not challenged by Mr Davies, who does not say or suggest that any document containing such information exists, apart from the settlement agreement (disclosure of which he does not seek). In his grounds of appeal he

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<sup>4</sup> Strictly directed to the 2018 legislation but equally applicable, for present purposes, to the 1998 Act.

<sup>5</sup> This refers to the first data protection principle.

says, "In answer to my question 1 the only information I seek is a few words to explain the nature of the compensation payment ..." Part (1) of the request, as clarified in the notice of appeal and reaffirmed several times in subsequent correspondence, is an inadmissible request for the Council to *create* recorded information to satisfy the inquiry. The remedy which Mr Davies asks for is not one offered by FOIA.

24. Part (2) of the request is not 'live' before us. The Council's unsatisfactory and inconsistent replies on that element were exposed and, as we have noted, it was ordered to provide a fresh response. If there was, after all, any document (other than the settlement agreement, which is not sought) relevant to the question of the identity of the person who took the decision to make the payment, it will no doubt, subject to any other exemption being relied upon, have been disclosed.
25. For completeness, and since the parties have devoted their energies to the subject, we would add that, had there been a theoretically tenable appeal on the part (1) request<sup>6</sup>, it would in any event have failed.
26. The first question would have been whether the information to which the request related was the personal data of a relevant third party. Self-evidently, information about the termination of a person's employment and a legally binding settlement agreement between that individual and his employer was his personal data. It related to him and, either on its own or with other information held by the Council, it identified the data subject.
27. The second question would have been whether processing the information would have offended against the first data protection principle. We are in no doubt that it would. There is no need to look further than the first requirement, namely that data be processed "fairly and lawfully." The settlement agreement with the third party was subject to confidentiality terms under which, *inter alia*, the Council promised to keep the terms of the agreement confidential and not to disclose them to anyone save "professional advisers, employees and Council members and to instruct any person to whom they were disclosed that they must be kept confidential." The settlement was a contract, binding in law. In our judgment, it is plain that disclosure of the (hypothetical) information, to the extent that it corresponded with information contained in the settlement agreement, would have been unlawful as breaching the confidentiality terms. In any event, we are satisfied that disclosure of any recorded information within the scope of part (1) would have been demonstrably unfair. We have three main reasons. First, the data subject, who must be taken to have entered into the settlement agreement in good faith had a legitimate expectation that the confidentiality terms would be respected. Second, refusal of the request would not have left the requester, or the public at large, with no information.

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<sup>6</sup> There might have been if, for example, the Council held a document relevant to the part (1) request but declined on s40(2) grounds to disclose it.



Although Mr Davies complained, citing an earlier instance of a severance payment made to a senior employee, that the entry in the Council's accounts could and should have been fuller, it is a fact that the accounts did publish *some* relevant details. Third, there is no suggestion of any 'smoking gun'. In our view, these factors, taken in the structural context of the primacy of data protection over information rights, comfortably outweigh countervailing factors including in particular the valid point that 'fairness' embraces wider considerations, including the public interest in the effective scrutiny of public authorities and their use of public funds.

*Disposal*

28. It follows that the appeal must be dismissed.

(Signed) Anthony Snelson

Judge of the First-tier Tribunal

Dated: 4 November 2019

Promulgated: 11 November 2019