First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal References: EA/2019/0132
EA/2019/0144

Decided without a hearing
On 28 January 2020

Before

JUDGE ANTHONY SNELSON
MS ROSALIND TATAM
MR NIGEL WATSON

Between

MINISTRY OF JUSTICE (EA.2019.0132)
EDWARD WILLIAMS (EA.2019.0144)

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

EDWARD WILLIAMS (EA.2019.0132)
MINISTRY OF JUSTICE (EA.2019.0144)

Second Respondents

DECISION

The unanimous decision of the Tribunal is that appeal in ref. no. EA.2019.0132 is allowed and the appeal in ref. no. EA.2019.0144 is dismissed. No further step is required.

REASONS

Introduction

1. We will refer to the parties as the Ministry, Mr Williams and the Commissioner.

2. In May 2018 Stephen Yaxley-Lennon, the right-wing political activist better known as Tommy Robinson, was committed to prison for contempt of court. His appeal to the Court of Appeal succeeded in part and he was released on 1 August 2018.

3. On the same day Mr Yaxley-Lennon posted a video on social media claiming (*inter alia)* that he had been held in "solitary confinement" for two months, that he had been "mentally tortured" by being denied access to a television, and that he had been transferred to a prison in which 30% of the inmates were Muslims.

4. The Ministry issued a press statement on 2 and 3 August stating (*inter alia*):

> **Mr Yaxley-Lennon was treated with the same fairness we aim to show all prisoners … he had access to visits, television and showers and it is totally false to say that he was held in 'solitary confinement'.**[1]
>
> **He was initially placed into the Care & Separation Unit for less than 48 hours while an assessment of the risk to his safety was undertaken by prison staff. He then joined the main prison population. …**

5. On or around 4 August Mr Yaxley-Lennon posted online a letter from the prison where he had been held which, he said, proved (*inter alia*) that he had been held in 'solitary confinement' for his entire period of confinement. Manifestly, the letter proved no such thing: it was dated 18 June 2018 and (to state the obvious) could not stand as evidence of the conditions under which Mr Yaxley-Lennon was held after that date.

6. As a result of a request on behalf of a national newspaper for comment, the Ministry caused further inquiries to be made, as a result of which it was established that Mr Yaxley-Lennon had been held in the Care & Separation Unit for seven days, rather than 48 hours as initially stated. The Ministry communicated this information to the newspaper, explained that the mistake in the press statement had been the result of human error and repeated the point that Mr Yaxley-Lennon had not be held (at any time) in 'solitary confinement.' The newspaper did not carry this communication or report its content.

[1] 'Solitary confinement', or 'cellular confinement' is a form of punishment for breach of prison disciplinary rules. 'Segregation', typically in facilities such as the Care & Separation Unit, is not a punishment and does not connote the same loss of privileges.

7. On 5 August 2018 Mr Williams wrote to the Ministry requesting, pursuant to the Freedom of Information Act 2000 ('FOIA'), various information including:

> **…**
> **4. Provide the names and positions of all persons who authorised that the statement … could be sent.**

8. The Ministry responded on 3 September 2018. It declined to provide the information sought by request 4, maintaining that it was exempt under FOIA, s40(3)(a)(i). In addition, in its answer to request 2, it volunteered the same information as had been given to the newspaper (see para 6 above) concerning the error in the press statement concerning the time spent by Mr Yaxley-Lennon in the Care & Separation Unit. The Ministry's document of 3 September 2018 is in the public domain, having been placed online by Mr Williams.

9. Mr Williams took issue with that response, but, in a letter of 18 October 2018, the Ministry stood by it.

10. On 18 October 2018, Mr Williams complained to the Commissioner about the way in which his request for information had been handled. An investigation followed.

11. By a decision notice dated 7 March 2019 the Commissioner determined that the Ministry was entitled to apply FOIA, s40 to withhold the names requested but not their job titles. Disclosure of the latter information was accordingly ordered. The key elements of her reasoning were the following.

    (1) Names would identify the relevant individuals.
    (2) Job titles would identify the relevant individuals.
    (3) Accordingly, *both* names *and* job titles were personal data.
    (4) There was a legitimate interest in holding public authorities accountable for inaccurate statements.
    (5) The Ministry's acknowledgment of its error had to some extent met the legitimate interest.
    (6) Disclosure of the names would not add to the public's understanding.
    (7) Accordingly, disclosure of the names was not necessary to serve the interest.
    (8) But disclosure of job titles was necessary to indicate to the public whether responsibility sat at an appropriately senior level within the Ministry.
    (9) The balance came down in favour of disclosure of job titles because:
        (a) the aim of not personalising press statements was not related to individual interests;
        (b) the pool of people likely to be able to identify the data subjects was likely to be quite small;

(c) disclosure would concern the job holders' performance of their work duties and not intrude upon their private lives;
(d) senior civil servants have greater levels of responsibility than junior ones and must expect greater levels of scrutiny.

(10) For the above reasons, disclosure of the job titles would be fair.
(11) Transparency would be met because the Ministry was subject to FOIA.

12. By a notice of appeal dated 12 April 2019, the Ministry challenged the Commissioner's adjudication that the job titles should be disclosed.

13. By a notice of appeal in the form of an email dated 17 April 2019 Mr Williams appealed against the Commissioner's decision that the relevant names should not be disclosed.

14. In a document dated 29 April 2019 Mr Williams supplied grounds for his appeal and joined issue with the Ministry on its appeal.

15. In a document dated 29 May 2019 drafted by Christopher Knight, counsel, the Ministry responded to Mr Williams's document of 29 April.

16. The Commissioner resisted the appeals in a response drafted by Khatija Hafesi, counsel, dated 4 July 2019.

17. On 31 August 2019 Mr Williams sent a further submission to the Tribunal pointing out that the balance of public interests have to be tested as at the date of the public authority's decision on the relevant request for information (*NHS England v Information Commissioner and Dean* [2019] UKUT 145 (AAC)).[2]

18. In case management directions dated 25 October 2019 the parties were given permission to deliver final written submissions no later than 29 November 2019.

19. Final submissions dated 22 November 2019, prepared by Mr Knight, were presented on behalf of the Ministry. The other two parties did not choose to supplement their prior written representations.

20. The appeals came before us for consideration on paper, the parties being content for them to be determined without a hearing.

The Statutory Framework

The freedom of information legislation

21. FOIA, s1 includes:

[2] Of course, the public interest balance is not applicable here, but the point for which this and other authorities stand is, it seems to us, of general application.

> **(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).

22. By s40[3], 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 does not fall within subsection (1), and**
> **(b) the first, second or third condition below is satisfied.**
>
> **(3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act—**
>
> **(a) would contravene any of the data protection principles …**
>
> **…**
>
> **(7) In this section—**
>
> **"the data protection principles" means the principles set out in—**
> **(a) Article 5(1) of the GDPR …**
>
> **(8) In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted.**

The exemptions under s40 are unqualified under FOIA and the familiar public interest test has no application (see s2(3)(f)). 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[4] lays out. The references which that Act makes to provisions of DPA 1998 must be understood in the light of the legislative purpose**

[3] As it stands following the 2018 amendments (see below)
[4] The proceedings were brought under the Freedom of Information (Scotland) Act 2000, but its material provisions do not differ from those of FOIA.

> **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

23. It is not in question that the data protection regime in force following the commencement of the Data Protection Act 2018 ('DPA 2018') and the implementation of the General Data Protection Regulation 2018 ('GDPR') (25 May 2018) applies to this case.

24. By DPA 2018, s3(2) 'personal data' is defined as:

> **… any information relating to an identified or identifiable living individual …**

25. The applicable data protection principle is the first, which is set out in GDPR, Article 5(1)(a) as follows:

> **Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.**

26. Lawfulness is governed by Article 6(1), which prescribes a number of qualifying conditions. The relevant provision here is that:

> **(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.**

27. Assessment of fairness involves balancing the interests of the data subject and the data user (see *Johnson v Medical Defence Union* [2007] EWCA Civ 262, para 141, *per* Arden LJ).

28. A key consideration for the purposes of the fairness balance is the reasonable expectations of the data subject (see *eg Haslam v Information Commissioner and Bolton Council* [2016] UKUT 139 (AAC), para 33, *per* Judge Markus QC). The trend of the case-law is to the effect that the identities of junior civil servants are not disclosable because they have a reasonable expectation of privacy, but the case for privacy is weaker where senior officials are involved. That said, the question is fact- and context-specific and must be determined in the light of all the circumstances (see *Cox v Information Commissioner and Home Office* [2018] UKUT 119 (AAC), paras 34-46, *per* Judge Wikeley).

29. In *Goldsmith International Business School v Information Commissioner and Home Office* [2014] UKUT 0563 (AAC) Judge Wikeley, sitting in the Upper Tribunal, provided helpful guidance on the proper approach to what is now Article 6(1)(f), in (so far as relevant) these terms:

35. *Proposition 1*: Condition 6(1) of Schedule 2 to the DPA requires three questions to be asked:

"(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?"

…

36. *Proposition 2*: The test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

…

37. *Proposition 3*: "Necessity" carries its ordinary English meaning, being more than desirable but less than indispensable or absolute necessity.

…

38. *Proposition 4*: Accordingly the test is one of "reasonable necessity", reflecting the European jurisprudence on proportionality, although this may not add much to the ordinary English meaning of the term.

…

39. *Proposition 5*: The test of reasonable necessity itself involves the consideration of alternative measures, and so "a measure would not be necessary if the legitimate aim could be achieved by something less"; accordingly, the measure must be the "least restrictive" means of achieving the legitimate aim in question.

…

40. *Proposition 6*: Where *no* Article 8 privacy rights are in issue, the question posed under Proposition 1 can be resolved at the necessity stage, i.e. at stage (ii) of the three-part test.

…

41. *Proposition 7*: Where Article 8 privacy rights *are* in issue, the question posed under Proposition 1 can only be resolved after considering the excessive interference question posted by stage (iii).

…

The Tribunal's powers

30. 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 considers –

(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.

Analysis and Conclusions

31. As we have noted, neither party requested an oral hearing. We proceed on the basis that the copy documents put before us are genuine and that the statement of Ms Porter, which strikes us as measured, rational and plausible, is true and accurate to the extent that it states facts.

32. It is not in question that the names of living individuals constitute their personal data. There is also no challenge to the proposition at the heart of the Ministry's appeal that the job titles of the individuals to whom the disputed request is directed, if disclosed, would identify them, and that accordingly that information also constitutes their personal data.

33. We turn to GDPR, Article 5, which embodies the requirement for processing to be lawful, fair and transparent in relation to the data subjects.

34. Transparency *in relation to the data subjects* does not appear to be a relevant consideration here. Plainly, if the names and/or job titles of the relevant individuals were disclosed, there would be no difficulty about making them aware of the fact of such disclosure and the reason (namely that Mr Williams had made a successful freedom of information request for it). Wider considerations of transparency are considered below.

35. As we have explained, the issue of lawfulness engages Article 6(1)(f). The first question here is whether a legitimate interest is pursued by the data controller or a third party. In the present context, the issue is whether Mr Williams, the 'third party,' is pursuing a legitimate interest. We have noted possible interests debated by the Commissioner in her decision notice, paras 30, 31 and 33 (in relation to the request for names) and para 41 (in relation to the request for job titles) but we have reminded ourselves that our function is not to carry out a public interest balancing test. The legislation applicable here is concerned with the interests actually pursued by Mr Williams. To ascertain this there can be no better than source that his own document of 29 April 2019, in which he stated his aim quite openly as being (para 15):

… to catch a senior civil servant, or better still a politician, in the request net."

The candid admission speaks for itself. It explains why the request was not directed to establishing what, if anything, was wrong about the initial press release, or how the error had occurred, or how similar errors might be avoided in the future. Rather, in line with the admitted objective, it was focussed entirely on identifying the individuals involved. In our judgment, Mr Williams was not pursuing a legitimate interest. Accordingly, his case collapses at once. We will, however, complete the analysis.

36. Even if we had been persuaded to take a broader view of Mr Williams's 'interest', we would not have judged it 'legitimate'. We detect no serious underlying concern or objective. The error which prompted the request was minor. It was voluntarily corrected and explained. It does not show up any systemic problem suggestive of a risk of recurrence and in any event lessons have been learned (see the statement of Ms Porter, para 14). And Mr Williams's complaints of 'spin' are unfair: the Ministry quite properly sought to correct a false assertion that Mr Yaxley-Lennon had been held in solitary confinement for two months. The fact that its initial statement misstated the period spent in segregation does not detract from that unobjectionable purpose.

37. Even if we had identified a legitimate interest, we would have found against Mr Williams on the issue of necessity. As a matter of common sense, it can be assumed that authorisation for the press statement was given at a reasonably high level. The particular names and roles of the persons concerned are immaterial. Moreover, we note and accept Ms Porter's observation (statement, para 26) that disclosure of the grades of the relevant individuals would be sufficient to allay any concern as to whether responsibility for approving media statements rests at an appropriate level. 'Proposition 5' (see the citation above from the *Goldsmith International Business School* case) applies.

38. Turning to fairness under GDPR Article 5(1)(a), we start with Mr Knight's central submission that the Commissioner's case contains a fatal contradiction in, at one and the same time, accepting that the names are exempt but determining that the job titles must be disclosed. We agree. It is undisputed that disclosure of the job titles would result in the individuals being identified. The submissions on behalf of the Commissioner do not engage with this fundamental difficulty. In our view, the contradiction undermines the coherence of the decision notice and makes the result unfair without more.

39. Moreover, we are satisfied in any event that disclosure of the identities of the relevant individuals would not be fair. The points already made in relation to 'legitimate interest' also favour the Ministry on fairness. In addition, the reasonable expectations of the data subjects must be considered. Although the authorities acknowledge that it *may* be necessary to differentiate between the expectations of senior and junior civil servants, the Tribunal must in every case address the specific context. We note and accept the evidence of Ms Porter (statement, paras 31-32) that Departments of State ordinarily issue media

statements through spokespersons, who are rarely involved in the action or decision under comment. Likewise, those who authorise media statements are rarely acquainted at first hand with their subject-matter. In our judgment, civil servants discharging responsibilities of this kind have a reasonable expectation of privacy regardless of their seniority. They are in a quite different category from, say, the senior civil servant charged with advising a Minister on a policy decision, who, as one directly involved at an operational level, may struggle to sustain an objection to a request for disclosure of his or her identity.

40. Conversely, we cannot accept that refusing disclosure would occasion unfairness to Mr Williams. The foregoing analysis on legitimate interest and necessity is no less adverse to him on fairness.

41. We do not think it necessary to dwell on possible consequences of disclosure or the refusal thereof. We are unable to discern any evident benefit of disclosure other than the natural satisfaction for Mr Williams of a successful outcome. That is plainly not a significant consideration. On the other hand, disclosure could well impair the Ministry's orderly and efficient handling of communications with the media. Concerns about being identified might become a distraction for press officers and inhibit them from fully discharging their important functions. These are not insignificant considerations.

42. We have had regard to the transparency in the broad sense: the general interest in transparency. It is a factor which must be considered in every case but here we find that it carries little weight. As we have pointed out, the information requested has little or no intrinsic significance. There is little general interest in the free flow of inconsequential information. Moreover, this is not a case in which the Tribunal might have cause to worry that refusing disclosure might militate against transparent dealings in the future. The Ministry was concerned to put the relevant information into the public domain and, once the error was detected, to put the correction into the public domain.

43. The reasoning so far dictates the outcome. This is a very clear case. The Ministry succeeds on lawfulness and fairness. We do not get to the wider balancing exercise under GDPR, Article 6(1)(f) ('Proposition 1', element (iii)). But if we did, the Ministry would succeed there too. Mr Williams fails to make out any ground for displacing the primacy of data protection over freedom of information stressed in (among others) the *Common Services Agency* case, cited above.

44. Finally, we have noted Mr Williams's submission of 31 August 2019 (summarised in our introduction above) but, with respect, we fail to see how the point which he makes shows up any flaw in the Ministry's response of 29 May 2019, para 15. In any event, we do not consider that the Ministry's essential case has changed over time.

Disposal

45. It follows that the Ministry's appeal is allowed and Mr Williams's is dismissed. The Ministry is not required to take any steps.

46. We have reached our conclusions without needing to address the Ministry's arguments about alleged risks of harassment in the event of the relevant individuals being identified. We prefer to express no view on that aspect.

(Signed) Anthony Snelson

Judge of the First-tier Tribunal

Dated: 25 February 2020

Promulgated: 27 February 2020