



**Appeal number: EA/2019/0413/P**

**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

**BERNARD BRANDON**

**Appellant**

**- and -**

**THE INFORMATION COMMISSIONER**

**Respondent**

**TRIBUNAL: JUDGE CL GOODMAN**

**Determined on the papers, the Tribunal sitting in Chambers on 16 October 2020**

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## DECISION

1. The appeal is dismissed.
2. The withheld information is exempt by virtue of section 40(2) of the Freedom of Information Act 2000 (“FOIA”) and therefore not covered by section 1(1) FOIA. The Housing Ombudsman Service is not required to disclose the withheld information to the Appellant.

## REASONS

### *Mode of hearing*

3. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with Rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered an open bundle of evidence comprising 131 pages and a closed bundle comprising the withheld information.
4. This determination was conducted by a Judge, sitting alone. The Tribunal was satisfied that it was appropriate to compose the panel in this way, having regard to paragraph 6(a) of the Senior President’s Pilot Practice Direction dated 14 September 2020 and the desirability of determining cases by the most expeditious means possible during the Coronavirus pandemic.
5. The background to the request is summarised below. References to page numbers are to pages of the open bundle.

### *Background to Appeal*

6. The Appellant asked the Housing Ombudsman Service (“HOS”) in February 2019 how many complaints it had determined against the Curo Group (“the Landlord”) from 1 April 2015 to 31 January 2019. The HOS responded on 6 March 2019 that it had determined 26 complaints, of which 8 had resulted in an order or recommendation for compensation
7. On 6 March 2019, the Appellant made a further request for information as follows:

*“Thank you for this. How can I now see the detailed reports of these 26 complaints?”*

*“Do I apply to you? Or do I apply to Curo? If I did they would be sure to refuse me access.”*

*“Are these 26 complaints private or public?”*

*“If they are public knowledge or have become public knowledge after these complaints were upheld did the Housing Ombudsman also order the details of the outcomes to be published anywhere and if so where?”*

8. The HOS refused to disclose the requested information on 11 March 2019 on the basis that its reports were confidential to the parties to the complaint and that it must comply with data protection legislation.

9. The Appellant requested a review of the decision and suggested that the HOS change or redact the names of complainants from the reports. He said that he needed the information to support a complaint about the Landlord to the Energy Ombudsman. On 2 April 2019, the HOS again refused to disclose the reports on the basis that none of the exemptions to the Data Protection Act 2018 applied (page 35).

10. The Appellant complained to the Commissioner. He explained that he was a tenant of the Landlord and preparing to take them to the Housing Ombudsman himself. He alleged that the Landlord regularly broke the law; for example, in relation to deposit protection and its statutory duties under the Anti-Social Behaviour Crime and Policing Act 2014. The Appellant said that he wanted to see the full, detailed case reports, not only brief outlines, but that complainants’ personal data could be redacted (page 44).

11. The HOS confirmed to the Commissioner on 23 September 2019 that they were relying on the exemption in section 40(2) FOIA on the basis that all the information in the investigation reports, determination letters and review reports relating to the 26 complaints (“the withheld information”) was the personal data of the complainants. The withheld information also included personal data of other individuals who could be identified from the information, such as neighbours of the complainants. Some of the data related to criminal offences and health.

12. The HOS said that it did not have consent to publish this personal data, that the data subjects would not reasonably expect their data to be disclosed, and that there was an expectation of confidentiality when a formal complaint was made to the HOS.

13. The HOS considered that it would not be appropriate to seek the consent of complainants to release the withheld information to the Appellant and that even if personal data were redacted, it would be possible to identify individual data subjects from the withheld information because the Landlord operated in a small geographical area. Disclosure was likely to cause embarrassment and distress, and where complaints related to anti-social behaviour, it could place the complainant in physical danger.

14. The Commissioner issued Decision Notice FS50834555 on 1 November 2019. The Commissioner upheld the HOS’ decision, finding that the HOS was entitled to rely on section 40(2) FOIA. The Commissioner was satisfied that the withheld information constituted “personal data”, and in some cases, “special category data” or personal data about criminal offences, even if specific names and addresses were redacted.

15. The Commissioner found that disclosure would breach the data protection principle in Article 5(1)(a) of the General Data Protection Regulation (Regulation (EU) 2016/679) (“GDPR”) that personal data shall be processed lawfully, fairly and in a transparent manner. None of the lawful bases in Article 6 applied. In particular, the Commissioner considered that Article 6(1)(f) did not apply. While the Appellant had a legitimate interest in requesting the withheld information and disclosure was necessary to meet this legitimate interest, the legitimate interest did not override the legitimate interests or fundamental rights and freedoms of the data subjects in question. The Commissioner agreed with the HOS that those individuals had a reasonable expectation that their information would not be disclosed and disclosure was likely to cause distress. Furthermore, none of the conditions for processing data about health or criminal offences were satisfied.

16. The Commissioner considered that the wider public interest was met through the information which had already been released by the HOS and that the Appellant could request information about the types of complaints made against the Landlord, without necessitating the release of third-party personal data (paragraph 36).

#### *Appeal to the Tribunal*

17. The Appellant appealed to the Tribunal. His Notice of Appeal dated 4 November 2019 submitted that the Commissioner’s decision was manifestly unfair. The withheld information was highly relevant to a complaint he was making about the Landlord and his local authority. The Appellant highlighted that unlike the HOS, the Local Government and Social Care Ombudsman (LGSCO) published anonymised reports of its investigations into complaints against local authorities, detailing the nature of the complaint and outcome. It was unfair that the Appellant could obtain information about complaints against his local authority, but not his landlord. The Appellant relied on caselaw relating to open justice and disclosure of documents in Court proceedings.

18. The Appellant pointed out that the HOS had committed in its Business Plan 2020-2021 to publishing its decisions, including “*the name of the landlord, the nature of the complaint and our findings, but excluding any details that would identify the complainant*”. The Appellant asked the First-tier Tribunal to order that the HSO must publish its decisions in the same way as the LGSCO.

19. The Respondent’s Response dated 9 December 2019 maintained the analysis in the Decision Notice. The Respondent submitted that the practice of the LGSCO had no bearing on the appeal and that the HOS’ future plans for disclosure were not relevant.

20. In further Submissions dated 13 January 2020, the Appellant drew the Tribunal’s attention to Mr Justice Warby’s comments on open justice in *Clarkson v Person or Persons Unknown* [2018] EWHC 417 and a case in the Central London County Court concerning an anonymity order, *CT v the Home Office*. He asked the Tribunal to direct that the withheld information be redacted by substituting the names and

addresses of any individuals and that all case reports relating to complaints against the Landlord since 31 January 2019 also be disclosed.

21. In its further submissions, the HOS said that all Ombudsmen were required to comply with principles of openness and transparency laid down by the Ombudsman Association, but that they could take different approaches to publishing decisions. The HOS confirmed that it intended to publish all decisions where there was no risk of an individual being identified by 31 March 2021, but that the change would not be retrospective, meaning that the withheld information would not be published.

### *The Law*

22. Section 1(1)(b) FOIA provides that any person making a request for information to a public authority is entitled to have that information communicated to him. However, section 1(1)(b) does not apply where information is exempt. Section 40(2) FOIA provides that information is exempt if it constitutes personal data (other than personal data of the applicant) and one of three conditions is satisfied.

23. Section 40(2) is an absolute exemption. There is no presumption in favour of release of personal data in the public interest and no reason why the right to freedom of information should be favoured over the rights of data subjects in their personal data.

24. The first condition, in section 40(3A), is that disclosure other than under FOIA would contravene any of the data protection principles. One of those principles, set out in Article 5(1)(a) GDPR, is that:

*“Personal data shall be: (a) processed lawfully, fairly and in a transparent manner in relation to the data subject (‘lawfulness, fairness and transparency’)”*

25. Any disclosure of personal data under FOIA must therefore be lawful, fair and transparent. One of the lawful bases for processing under Article 6(1) GDPR must apply. In particular, Article 6(1)(f) provides that it is lawful to process personal data only if and to the extent that:

*“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”.*

26. In *South Lanarkshire Council v. The Scottish Information Commissioner* [2013] UKSC 55 and *Goldsmith International Business School v The Information Commissioner and Home Office* [2014] UKUT 563, it was established that in applying the test in Article 6(1)(f) in the context of FOIA, three questions must be addressed:

(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?”.*

27. According to UTJ Wikeley in *Goldsmith*, necessity carries its ordinary English meaning of “reasonable necessity” reflecting the European jurisprudence on proportionality, being more than desirable but less than indispensable or absolute necessity. The test of reasonable necessity involves consideration of alternative measures: a measure would not be necessary if the legitimate aim could be achieved by something less.

28. In addition, Article 9 and 10 GPDR prohibit the processing of personal data about health, criminal convictions and offences unless other more restrictive conditions are satisfied. In the context of this appeal, personal data about health and criminal convictions and offences can only be disclosed under FOIA with the explicit consent of the data subject or where the processing relates to personal data which has clearly been made public by the individual concerned.

29. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA:

*“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.*

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

30. I note that the burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

### *Conclusion*

31. This appeal relates to the refusal of the HOS to release to the Appellant investigation reports, determination letters and review reports arising from 26 complaints by tenants of the Landlord to the HOS over a specified period.

32. According to the Housing Ombudsman Scheme approved by the Secretary of State under the Housing Act 1996, the role of the HOS is to resolve disputes involving members of the Scheme, including making awards of compensation or other remedies when appropriate.

33. The Landlord is a housing association and a member of the Scheme. The Landlord is based in Bath and operates across the west of England. All but four of the complaints in the withheld information relate to properties in Bath and Bristol. The Appellant is a tenant of the Landlord and at the time of his request, was in the process of making a complaint himself to the HOS and to the Energy Ombudsman about the Landlord.

34. When the HOS receives a complaint within its jurisdiction, the complaint is investigated by an adjudicator. The adjudicator gathers information and then writes a determination letter to the complainant, or a formal report, setting out the background to the complaint, a summary of events, the information considered during the investigation, the adjudicator's decision and reasons. The adjudicator may make recommendations, including for the payment of compensation by the Landlord to the complainant.

35. The complainant may then request a review of the determination. Reviews are carried out by a Disputes Resolution Manager at the HOS who writes a final determination letter, summarising the complaint and advising whether the adjudicator's decision is confirmed or amended.

36. The determination letters and investigation reports are lengthy and thorough. They include detailed accounts of the circumstances of the complaint with specific dates of incidents, content of correspondence and steps taken by both parties. Some contain details of maintenance issues and remedial works, the condition of flats and damage caused to property. Some contain detailed financial information about sinking funds and service charges, rent arrears, compensation paid to tenants, lease terms, moving in dates and transfer applications. Some detail the physical and mental health conditions of complainants and their neighbours and receipt of benefits. In complaints involving allegations of anti-social behaviour, the letters and reports contain detailed accounts of incidents with dates and descriptions of language and behaviour and in some cases, the involvement of police and details of evictions, criminal prosecution and conviction.

37. The final determination letters following review are less detailed, but again summarise the background and specific details of the complaint and information considered in the investigation.

38. The detailed nature of the withheld information means that even if basic identifying information, such as the name and address of the complainant, was redacted, as proposed by the Appellant, it would still be possible to identify the complainants, and in some cases, other individuals involved in incidents. Details are given about properties, works and incidents which would be recognisable by tenants of those properties. This is the case in particular as the Landlord operates in a

relatively small geographic area and owns a limited number of properties. Complainants may have discussed some aspects of their complaint with other tenants which would enable them to identify the complainant, even if names and addresses were removed.

39. I conclude that all the withheld information is third party personal data and that individuals would be identifiable from the information even after redaction. If the information was redacted to the extent that all potentially identifying information was removed, there would be little text remaining and the information would not be of value to the Appellant.

40. I further find that the condition in section 40(3A) FOIA is satisfied because disclosure of the withheld information would contravene the data protection principle of lawfulness, fairness and transparency in Article 5(1)(a) GDPR. This is because none of the lawful bases for processing under Article 6(1) GDPR apply. In particular, I find that Article 6(1)(f) does not apply.

41. Applying the three questions from *South Lanarkshire Council and Goldsmith*, I conclude that the Appellant is pursuing a legitimate interest, both his personal interest in gathering evidence to support a complaint against his landlord, and also a wider public interest in relation to the Landlord's compliance with its statutory duties as a social landlord.

42. I find that the release of the withheld information is reasonably necessary for the purposes of the Appellant's legitimate interests. The HOS was unable to provide any information about the nature of the complaints made against the Landlord, the type of issues raised by complainants nor the findings of the adjudicators (other than in relation to compensation). In order for the Appellant to pursue his legitimate interests, it is reasonably necessary for him to know how many complaints relate to those issues he is concerned about and the outcome. On the evidence before me, it appears that that information is held only in the form of the withheld letters and reports. In order to provide anonymised reports in the future, the HOS is having to undertake a process requiring budget approval, changes to its casework process and technology, and staff training on anonymisation.

43. However, the release of the withheld information is not warranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the complainants and, in some cases, other individuals identifiable from the reports. I accept that when these individuals complained to the HOS about the Landlord, they did not expect their complaints to be published. They were told by the HOS that information would be shared with their landlord and other relevant bodies in order to deal with the complaint and for purposes within the HOS' terms of reference. The Housing Ombudsman Scheme provides that in publishing any determination, the HOS must "*maintain as far as practical, the anonymity of the complainant and any third parties and must exclude any matter which relates to: a. the private affairs of an individual where publication would seriously prejudice the interests of that individual*" (page 120).



44. The withheld information contains considerable detail about the complainants' homes, their families and personal lives, their financial affairs and relationships with their neighbours (see paragraph 36). The letters and reports date back to 2015, but some of the events described date back decades. I accept that the release of this amount of personal information is likely to result in embarrassment and distress for the complainants, and in some cases, their neighbours and other individuals. In some cases, publication could result in reprisals against the complainants, potentially putting them and their property at risk. The release of the withheld information to the Appellant does not warrant, in this case, the prejudice caused to the rights and freedoms and legitimate interests of the complainants and other individuals identifiable in the reports.

45. None of the other bases in Article 6(1) GDPR apply.

46. In addition, some of the withheld information concerns the mental and physical health of the complainants, their family members and neighbours; some concerns police investigations, criminal charges and convictions. I find that release of this information would contravene Article 5(1)(a) GDPR because it is prohibited under Article 9 and 10 GPDR. None of the relevant conditions are satisfied: the data subject has not given explicit consent and the data has not been made public by the individual concerned.

47. I have noted that other Ombudsmen, such as the LGSCO, publish more detailed, anonymised reports of their investigations, and indeed that the HOS intends to do so in the future. However, the request for information which is the subject of this appeal concerns the HOS and complaints determined by the HOS from 1 April 2015 to 31 January 2019. It does not concern other Ombudsmen nor anonymised reports which the HOS may create when investigating future complaints.

48. The cases referred to by the Appellant concern general principles of open justice and the disclosure of documents in Court which are not relevant to this appeal because this appeal concerns the interpretation of FOIA.

49. For these reasons, the appeal is dismissed. I decline to make an order for the redaction of the withheld information or for release of case reports of complaints against the Landlord since 31 January 2019 as requested by the Appellant.

**(Signed)**

**JUDGE CL GOODMAN**

**DATE: 16 October 2020**

**Promulgated**

**DATE: 6 November 2020**