IAC-AH-CJ-V1

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights

Appeal Reference: EA/2016/0296

Decided at Field House Without a Hearing
On 22 February 2017

Before

JUDGE PETER LANE

Between

ROBERT ROWLANDS

Appellant

and

(1) THE INFORMATION COMMISSIONER

(2) HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

DECISION UNDER RULE 8(3)(C) OF THE TRIBUNAL PROCEDURE (FIRST-TIER TRIBUNAL) (GENERAL REGULATORY CHAMBER) PROCEDURE RULES 2009

1. The appellant wrote to the Valuation Office Agency in July 2016 in the following terms:–

   "The information I require relates to Key Properties identified as part of a valuation process linked to the introduction of Council Tax … Please provide me with the

addresses used as key properties in Westwoodside, Haxey and Epworth in Lincolnshire, all of which are in the DN9 postcode. The information can be limited to those key properties that were then banded as either D, E and F for taxation purposes. The information should include form VO7400 (or equivalent) for each relevant property. An example of form VO7400 is shown in the Council Tax Manual. In accordance with the Council Tax Manual these documents should have been retained on a 'not for destruction' basis. They should be held in binders and should therefore be reasonably accessible and a refusal to provide on cost basis is not anticipated."

2. The VOA refused the request on 27 July 2016, relying upon section 44(1)(a) of the Freedom of Information Act 2000. The appellant was unsuccessful in an internal review of that decision and, as a result, contacted the Information Commissioner on 10 September 2016 to complain about the way his request had been handled.

3. Section 44 of FOIA provides as follows:–

> "(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –
>
> (a) is prohibited by or under any enactment,
>
> (b) is incompatible with any EU obligation, or
>
> (c) would constitute or be punishable as a contempt of court.
>
> … …"

4. The relevant enactment for the purposes of section 44(1)(a) is, in the present case, the Commissioners for Revenue and Customs Act 2005. So far as relevant, section 18 of that Act provides as follows:–

> "Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs."

5. The scope of section 18(1) is, however, restricted by section 23 of the 2005 Act:–

> "(1) Revenue and customs information relating to a person, the disclosure of which is prohibited by section 18(1), is exempt information by virtue of section 44(1)(a) of the Freedom of Information Act 2000 (prohibitions on disclosure) if its disclosure –
>
> (a) would specify the identity of the person to whom the information relates, or
>
> (b) would enable the identity of such a person to be deduced.
>
> … …

(2) Except as specified in subsection (1), information the disclosure of which is prohibited by section 18(1) is not exempt information for the purposes of section 44(1)(a) of the Freedom of Information Act 2000."

6. The Information Commissioner's decision notice records that the appellant contended that the second respondent could not be prohibited from disclosing data which, in his view, had already been published. According to the appellant, virtually every household in the United Kingdom consents to their address being in the public domain, by placing a number or name on their property. The appellant further asserted that the VOA was part of "the state" and that virtually all the avenues which linked a person to an address were by means of processes whereby "the state" either sells the relevant data or it is provided via a register. On this basis, it was arguable that the person concerned had consented to their address being in the public domain.

7. The Information Commissioner then observed that the VOA's response was that it was possible to identify a person, or to deduce his or her identity, through linking address information already in the public domain with the information sought by the appellant. Section 23(1) of the 2005 Act was, thus, engaged with the result that there was a prohibition on disclosure by reason of section 44(1)(a) of FOIA.

8. The Information Commissioner accepted that disclosure under FOIA was not a function of HMRC (nor, accordingly, the VOA) and it was therefore not a function engaged by section 18(2)(a)(i) of the 2005 Act. It was, accordingly, clear that the VOA could not under FOIA disclose any information which would identify a person or enable identification of a person. The Information Commissioner considered that the requested information was not already effectively published. The appellant's contention that the maintenance by the VOA of a council tax valuation list meant that the information was already in the public domain, was rejected by the Information Commissioner.

9. The Information Commissioner then turned to the contention that the information which could be accessed to deduce the identity of a person was already published by "the state". The Information Commissioner made plain that her remit was to consider whether the request for information under FOIA had been handled in accordance with the Act. Although she understood the appellant's stance, that it could be said to be paradoxical that the information which could be used in conjunction with the requested information in order to identify a person was, in fact, available via government sources, "the Commissioner considers that the CRCA prohibits the disclosure of the information and that this prohibition is not subject to the availability of any additional information which may enable identification".

10. Finally, the Information Commissioner was of the view that, once section 44(1)(a) of FOIA was engaged, "there is no consent issue as the requested information is prohibited from disclosure under the FOIA".

11. In his grounds of appeal, the appellant contended that the "decision to invoke section 23(1)(b) [of the 2005 Act] involves an administrative judgment as to whether a person

can or could be identified from the data requested. This judgment called by the public authority must adhere to 'Wednesbury' principles. I believe the decision, albeit that a person might be identified from their address, does not adhere to those principles and is consequently wrong". In determining whether the VOA/HMRC had acted reasonably in "Wednesbury" terms, the appellant contended that decisions made by the state/executive in effect fell to be treated in the round. In this regard, the appellant pointed out that the data sources, which would enable a person to be linked with a Key Property were, in fact, those made available through HM Land Registry online.

12. The appellant also said that the identity of the persons concerned could be derived from such things as telephone directories, which stemmed from a time when BT was part of the "state/executive". In his view, the "state/executive" must be "consistent in the operation of law. It cannot face both ways at the same time (profit from address data on the one hand and refusal to disclose it on the other)".

13. In its response to the notice of appeal, the second respondent applied for the appeal to be struck out under rule 8 of the 2009 Rules. In its submission, the matter was plain. Section 23(3) of the 2005 Act provides that "Revenue and Customs information relating to a person" has the same meaning as in section 19. That section defines the information as "information about, acquired as a result of, or held in connection with the exercise of a function of the Revenue and Customs … in respect of the person". According to the second respondent, the persons who may be identifiable, if the requested information was disclosed, were the residents and/or titleholders of the addresses in question. A person's address is, self-evidently, information about that person. If the addresses were disclosed, they could easily be cross-referenced with various publicly available datasets, including Land Registry records, the electoral roll or telephone directories. The statutory provisions in question impose an absolute statutory bar on the disclosure of the disputed information. As a result, there is, according to the second respondent, no reasonable prospect of the appellant's appeal succeeding.

14. In his written response to the application to strike out, the appellant seeks to rely upon the Data Protection Act 1998. In section 1(1) "personal data" is defined as follows:–

> "'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 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 intentions of the data controller or any other person in respect of the individual."

15. According to the appellant, there is a "similarity between the Data Protection Act definition of personal data and the CRCA 2005 provision [which] is too close to be coincidental". According to the appellant, if the controller of HMSO has no objection to the Land Registry publishing a dataset that includes addresses, sale prices and sale dates of property, then the clear conclusion must be that a combination of that information is not personal data and does not fall foul of the Data Protection Act. There is, accordingly, a lack of consistency, in the appellant's view, and as a result "the decision to refuse my request for information because it includes address, sale price and sale date by virtue of s23 CRCA 2005 is so unreasonable that no reasonable authority would ever consider imposing it. That falls foul of the third '**Wednesbury'** test".

16. I have considered whether it is necessary, in the interests of the overriding objective, to hold a hearing of the second respondent's application. I have concluded that it is unnecessary to do so. I consider that the arguments for and against striking out are sufficiently disclosed by the written materials, to which I have referred. I also note that the appellant did not request a hearing of his appeal.

17. I have carefully considered the arguments put forward by the appellant but have reached the clear conclusion that none of them, either alone or in combination, discloses a reasonable prospect of his case, or any part of it, succeeding.

18. The appellant appears to accept that the disclosure of the requested information would enable the identity of the owner etc. of a Key Property within the scope of the request to be deduced. Indeed, the appellant points to the fact that the information that would bring about this result is, at least in large measure, in the public domain as a result of the actions of bodies which he collectively describes as the "State/Executive".

19. There is, I find, no reasonable prospect of any Tribunal coming to a different conclusion. This means that the absolute exemption in section 44(1)(a) of FOIA applies: the information's disclosure is prohibited by or under an enactment; namely, the 2005 Act.

20. There is no scope whatsoever for the application of any "Wednesbury" test, such as to render the Information Commissioner's decision notice "not in accordance with the law". Neither the second respondent nor the Information Commissioner had any discretion to exercise. If disclosure "would enable the identity of such a person to be deduced", then section 18 of the 2005 Act prohibited the second respondent (including the VOA) from disclosing the information, which is exempt information for the purposes of section 44(1)(a) of FOIA. The question is purely one of fact.

21. There is, accordingly, no merit in the "Wednesbury" arguments advanced by the appellant. This includes his deployment of that argument by reference to the Data Protection Act 1998. Although the appellant's invocation of the 1998 Act appears to be linked to his "Wednesbury" argument I have additionally considered whether

there is any reasonable likelihood of the appeal succeeding on the basis that the 1998 Act may inform the way in which section 23(1)(b) of the 2005 Act should be interpreted.

22. Having done so, I have concluded that the 1998 Act simply cannot serve that function. Section 23(1)(b) is plain in its own terms. There is, accordingly, no need to invoke the 1998 Act as an aid to the construction of that provision. In any event, the 1998 Act is a separate statutory scheme. Amongst other matters, the definition of "personal data" in section 1 provides that, where the identification of a living individual is not possible from the data itself, the issue is whether there is data or other information "which is in the possession of, or is likely to come into the possession of" the data controller. That requirement finds no parallel in the 2005 Act.

23. The protective mechanisms of the 1998 Act are, for relevant purposes, contained in section 4 and in the data protection principles set out in Schedule 1, together with the conditions set out in Schedule 2. An examination of these provisions makes it plain that there is, in fact, no close similarity between the 1998 Act and the 2005 Act.

24. These matters not only preclude any attempt to invoke the 1998 Act as a means of statutory construction of the 2005 Act; they also further undermine the appellant's contention that the second respondent may have acted contrary to the requirements of "Wednesbury" reasonableness.

25. The appellant plainly feels it is inappropriate for the government to publish data online, which then becomes the means whereby the absolute exemption in the 2005 Act is triggered. That, however, is the effect of the primary legislation, which only Parliament can change.

26. This appeal is struck out pursuant to rule 8(3)(c).

Judge Peter Lane

2 March 2017