Tribunals Service
Information Tribunal

Appeal under section 57 of Freedom of Information Act 2000

Information Tribunal Appeal Number: EA/2007/0132
Information Commissioner's Ref: FS50125731

Determined on papers on 6 May 2009 and following a hearing relating to particular issues held at Victory House on 21 September 2009	**Determination Promulgated 22 September 2009**

BEFORE

CHAIRMAN

Murray Shanks

and

LAY MEMBERS

John Randall and Dave Sivers

Between

URSULA RINIKER

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

THE MINISTRY OF JUSTICE

Additional Party

Representation at hearing:
Appellant in person
The Information Commissioner did not appear
Karen Steyn for the Additional Party

Subject areas covered:

Whether information held s.1

Personal data s.40

Cases referred to:

McBride v Information Commissioner and Ministry of Justice EA/2007/0105 27.5.08

Tribunal's determination

The Tribunal:

(1) substitutes the Ministry of Justice for the Privy Council Office as Additional Party;

(2) allows the appeal and substitutes the following decision notice in place of the decision notice dated 23 April 2007.

Information Tribunal **Appeal Number: EA/2007/0132**

SUBSTITUTED DECISION NOTICE

Dated 22 September 2009

Public authority: **The Ministry of Justice**

Address of Public authority: **2 Carlton Gardens, London SW1Y 5AA**

Name of Complainant: **Ursula Riniker**

The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is that the public authority's predecessor (namely the Privy Council Office) failed to deal with the complainant's requests for information dated 26 March, 5 April and 28 May 2006 in accordance with the requirements of Part I of the Freedom of Information Act 2000 in that it:

(1) failed to inform her that it "held" information of the descriptions requested by her as required by section 1(1)(a); and

(2) (save for the decisions on petitions to the Visitor of London University decided by the President of the Privy Council in the 5 years preceding 28 May 2006 which were exempt information under section 40(2)) failed to communicate that information to her.

Action Required

None: the public authority has in the course of this appeal communicated to her all the information required to be communicated.

Dated: 22 September 2009

Signed:

Murray Shanks
Deputy Chairman, Information Tribunal

Reasons for Determination

Background

1. On 27 May 2004 Ms Riniker presented a petition to the Visitor of the University of London. The statutes of the University provided that the Visitor was the Sovereign, acting through the Lord President of the Council (ie the Privy Council), who was at the time Baroness Amos; we understand that for all practical purposes the Lord President was treated as the Visitor and references below to the Visitor should be read as such. On 30 November 2004 the Clerk of the Council, Alex Galloway, wrote to Ms Riniker on Privy Council Office headed paper stating that the Visitor considered that she was precluded by law from exercising any jurisdiction in the complaint and that she could not therefore accept the petition.

2. On 26 March 2006 Ms Riniker wrote to Baroness Amos as President of the Privy Council requesting information under the Freedom of Information Act 2000 in the form of a series of questions about the decision on the petition and how it was reached. On 5 April 2006 she wrote to Mr Galloway at the Privy Council Office requesting similar information. The Privy Council Office refused to supply any information in response to these requests relying on the proposition that any information held by it coming within the terms of the requests was held on behalf of Baroness Amos in her capacity as Visitor and was not therefore "held" by them for the purposes of section 1 of the Act in accordance with the definition at section 3(2)(a).

3. On 28 May 2006 she wrote to the Privy Council Office Freedom of Information Officer stating that it was "… in multiple breach of the FoI Act 2000 in respect of [her] requests…", asking for its complaints procedure and making further requests for information, requests with which the Privy Council Office again refused to comply.

4. Ms Riniker complained to the Information Commissioner under section 50 of the 2000 Act. By a decision notice dated 23 April 2007 (which unfortunately did not come to Ms Riniker's attention until November 2007) her complaint was rejected on the ground that any information of the description requested by Ms Riniker was held by the Privy Council Office on behalf of another person, namely Baroness Amos in her capacity as University Visitor, and did not therefore have to be disclosed under the Act.

The appeal

5. On 8 December 2007 Ms Riniker appealed to the Tribunal against the Commissioner's decision notice. The Privy Council Office was joined as a party to the appeal but before the appeal had got beyond the stage of its Reply a differently constituted Tribunal decided the appeal in another case called *McBride v Information Commissioner (Ministry of Justice (formerly the Privy Council Office), additional party)* (EA/2007/0105 27.5.08). That case also concerned information held by the Privy Council Office relating to a complaint to the Visitor of the University of London; in it the Tribunal decided as a matter of fact that the Privy Council Office held such information on its own behalf. It had not been in dispute (and has not been disputed in this case) that the Privy Council Office was a government department and therefore a public authority for the purposes of the Act.

6. Following this decision the Treasury Solicitor on behalf of the Privy Council Office informed the Tribunal that they would no longer resist Ms Riniker's appeal in this case and the Privy Council Office wrote to her on 9 July 2008 purporting to supply such information as was held by it falling within her requests of 26 March, 5 April and 28 May 2006. Some further information was supplied in a letter dated 8 January 2009 from the Treasury Solicitor but Ms Riniker remained unhappy with the position and a directions hearing took place on 20 March 2009.

7. At that hearing it was agreed on all sides that in the light of the Treasury Solicitor's concession the appeal should be allowed and a substituted decision notice should be issued and the Tribunal recorded that the only outstanding issue on the appeal was what further steps if any were required to be taken in order to comply with the public authority's obligations under section 1(1) of the Act. It was subsequently

accepted that that issue could be dealt with on paper by a full Tribunal and on 6 May 2009 we accordingly considered the written representations made by the parties on the issue (including Ms Riniker's dated 25 March 2009) and reached certain conclusions. However, as explained below in more detail, before these reasons had been finalized the Tribunal came to the view that it required a hearing in relation to certain particular identified issues. That hearing was duly held on 21 September 2009 following which we have issued this determination and our reasons for it.

8. We record our findings and reasons under the following heads:

(1) The position of the Privy Council Office and Baroness Amos;

(2) The response to the requests for information made by paragraph 1 of Ms Riniker's letter of 26 March 2006 and paragraphs 1 and 2 of her letter of 4 April 2006;

(3) The response to her requests for information (i) and (iii) in her letter of 28 May 2006;

(4) Request (ii) in the letter of 28 May 2006 (which relates to decision letters issued by the Visitor of the University of London in the five years preceding the letter);

(5) The request for a copy of the Privy Council Office's publication scheme as approved by the Information Commission and in existence on 17 June 2006.

<u>(1) The position of the Privy Council Office and Baroness Amos</u>

9. Ms Riniker states that the public authorities to whom she made Freedom of Information Act requests were (1) the President of the Privy Council, Baroness Amos, and (2) the Privy Council Office, and not the Ministry of Justice which is named as the Additional Party in the directions order issued by the Tribunal on 20 March 2009. So far as the Privy Council Office is concerned, the Tribunal is satisfied that, sometime after Ms Riniker's requests were made, it was subsumed into the Ministry of Justice as a result of a normal government re-organization and that any information that was held by it will now be held by the Ministry, which

accepts responsibility as the relevant public authority in this matter. In the circumstances we are satisfied that it is appropriate that the Ministry of Justice should be the named Additional Party and that our substituted decision notice should be addressed to it and we will therefore regularize the position by ordering at this stage that the Ministry of Justice is formally substituted for the Privy Council Office as the Additional Party. None of this can possibly cause Ms Riniker any prejudice at all.

10. As for Baroness Amos, Ms Riniker contends that her first request for information dated 26 March 2006 was addressed to her as President of the Council, that as President she was a "government department" and therefore a public authority for the purposes of the Act, and that she failed to answer the request for information made in that letter as she was bound to under the Act. We are slightly surprised by this contention since it appears to have been the common understanding throughout that Ms Riniker's complaints were against the Privy Council Office as a body (see eg her letter of 28 May 2006 referred to at para 3 above) rather than against the President of the Council as an individual minister and, further, it must be the case that all the relevant recorded information was held within the Privy Council Office, regardless of the capacity in which the Office held it, rather than by the Lord President as such. But in any event we are quite satisfied that Baroness Amos, whether in her capacity as Lord President of the Council and/or as Visitor of the University of London and/or as a private individual, was never a "government department" as defined in section 84 of the 2000 Act. It is perhaps enough to state the proposition to see that it must be right but we also note that the (inclusive) definition in section 84 suggests that a "government department" is a "body" or an "authority" (neither of which would cover an individual minister) and that section 84 defines "government department" and "Minister of the Crown" separately without any cross-referencing. There is therefore no question of Baroness Amos being in breach of any requirement in the Act or being made a party to the appeal.

(2) Paragraph 1 of letter of 26 March 2006 and paragraphs 1 and 2 of letter of 4 April 2006

11. Paragraph 1 of the letter dated 26 March 2006 asked Baroness Amos whether she took any decision in respect of the petition of 27 May 2004 and asked for the date

and a copy of such decision. Paragraph 1 of the letter dated 5 April 2006 asked Mr Galloway whether Baroness Amos instructed him to inform her (Ms Riniker) of her decision on the petition and when such instruction was given and asked for a copy of the instruction and decision. Paragraph 2 of that letter asked Mr Galloway whether he advised Baroness Amos on the law in respect of the petition and asked for the date of the advice and a copy of it.

12. In response to these requests for information the Ministry has supplied Ms Riniker with a copy of a submission by Mr Galloway to the Lord President of the Council dated 30 November 2004 which set out the legal position on her jurisdiction as he understood it and stated that if she was content he would write to Ms Riniker and explain that she had no jurisdiction and could not accept the petition. The submission bears the manuscript initials "VA" and the date "30/11" which, the Treasury Solicitors' letter of 8 January 2009 explains, indicates that Baroness Amos read the submission and agreed with it on 30 November 2004 which led to Mr Galloway's letter to Ms Riniker also of the same date to which we refer in paragraph 1 above; there is, the Treasury Solicitors' letter says, no separate document recording Baroness Amos's decision.

13. We are quite satisfied that the material we describe above comprises all the recorded information which the Privy Council Office held of the description specified in these requests and that there is therefore no further information to be disclosed under section 1(1) of the Act. We would observe however that the Privy Council Office's letter of 9 July 2008 was not entirely satisfactory and that Ms Riniker is strictly speaking right in some of her criticisms of the response to her requests for information (in particular, contrary to the answer given to the request at paragraph 2 of the letter of 5 April 2006, the Privy Council Office clearly did hold information recording advice given by Mr Galloway to Baroness Amos as to the law relating to her petition). However, as we have said, she has now been supplied with all the information held which was requested in these two letters: thus, although there has been substantial delay mainly caused by the Privy Council Office's reliance on the arguments ultimately rejected in the *McBride* appeal, there are no further steps to be taken and no basis remaining for such steps to be ordered by the Tribunal.

(3) Letter of 28 May 2006

14. Ms Riniker states in her written representations dated 25 March 2009 that pursuant to her letter of 28 May 2006 the Privy Council Office ought to disclose to her:

> **[a] all the "material on the University Visitor" which was promised on its website in May 2006 [and] …**
>
> **[b] details of all Visitor cases involving the University of London since 1999.**

15. As to [a], the Publication Scheme to which Ms Riniker appears to be referring when she refers to the website effectively stated that some material on the University Visitor would be published by the Privy Council Office notwithstanding the Office's then belief that this was not required by the Act but it did not purport to describe the information that would be published. There would therefore be no basis for any finding that the Privy Council has failed to supply such information to Ms Riniker even if she had clearly asked for it in her letter, which she had not.

16. As to [b], the only requests for information of this nature specified in Ms Riniker's letter of 28 May 2006 were as follows:

> **(i) How many petitions to the Visitor of London University were decided by the President of the Privy Council in the past 5 years?**
>
> **(ii) Where can copies of these decisions be obtained?**
>
> **(iii) Have any of these decisions been published, and if so, where?**

The information requested in paragraph (i) was supplied pursuant to an undertaking given by the Ministry of Justice in the course of the directions hearing on 20 March 2009: the answer given was that six such petitions had been decided, including Ms Riniker's. Request (iii) was sufficiently answered in our view in the Privy Council Office's letter of 9 July 2008 which stated: "Given the personal nature of most of the Visitor's cases, decision letters were not published by this office".

(4) The Visitor's decision letters

17. That left request (ii). Following our deliberations on 6 May 2009 and while preparing these reasons it occurred to the Tribunal that on a fair reading of that

request Ms Riniker could be said to be asking the Privy Council Office for copies of the decisions in the five petitions which they had disclosed had been decided in the five years before 28 May 2006 other than her own and that neither the Privy Council Office nor the Ministry had ever confirmed holding them as *prima facie* required by section 1(1)(a) or given any formal reason for failing to communicate them to her as *prima facie* required by section 17 of the Act. We therefore issued these further directions on 20 May 2009:

(1) By 29 May 2009 Ms Riniker is to indicate in writing to the Tribunal and the other parties whether she in fact now seeks disclosure of those decision letters;

(2) If she does seek disclosure, by 12 June 2009 the Ministry shall serve on the other parties and the Tribunal a notice stating whether they hold the decision letters and, if so, whether they rely on any exemption, and, if so, specifying it and giving, in as much detail as possible, their reasons for saying it applies and why they should be allowed to rely on it at this late stage;

(3) The Ministry shall also serve on the Tribunal by the same date on a confidential basis copies of the decision letters (which shall not be disclosed to Ms Riniker unless the Tribunal orders);

(4) Ms Riniker may reply in writing to the Ministry's notice by 26 June 2009.

18. Pursuant to those directions Ms Riniker indicated that she did indeed seek disclosure of the decision letters. The Ministry confirmed in a letter from the Treasury Solicitor dated 12 June 2009 that they held the decision letters but sought to rely on the exemption at section 40(2) of the Act relating to personal data as a ground for withholding disclosure of them. The Ministry also supplied copies of the five decision letters to the Tribunal. Following Ms Riniker's response to the letter of 12 June 2009 (itself dated 7 July 2009) it was apparent that the following issues arose in relation to the decision letters:

(a) whether on a proper interpretation of her letter of 28 May 2006 Ms Riniker had requested the decision letters;

(b) whether it was open to the Ministry to rely on section 40(2) at such a late stage in the proceedings;

(c) whether (and to what extent) the information in the decision letters was exempt by virtue of section 40(2);

(d) if so, to what extent (if at all) the contents could nevertheless be disclosed to Ms Riniker in redacted form.

19. The Tribunal was able to resolve issues (a) and (b) without a further hearing on the basis of written submissions. We considered, however, that we required a hearing on issues (c) and (d) and accordingly on 13 July 2009 the Tribunal issued directions for a hearing to be held on 21 September 2009 confined only to those two issues, with directions for evidence and skeleton arguments. Shortly before the hearing and in order to obviate the need for it the Ministry disclosed to Ms Riniker very heavily redacted versions of the letters which failed to satisfy her or the Tribunal and the hearing went ahead. We deal below with issues (a) and (b) in turn and then (c) and (d) together.

20. *(a) Proper interpretation of the request*: The Treasury Solicitor's letter dated 12 June 2009 takes issue with the Tribunal's provisional reading of the scope of request (ii). It is said that Ms Rinker's request should be read simply as asking for a place where the decisions could be obtained and not for the decisions themselves and that the answer given to the effect that the Privy Council Office did not publish the decision letters was sufficient because it made clear to her that they could not be obtained anywhere. We are bound to say we find this approach rather disappointing. We are of the view that Ms Riniker's request read in context and in the light of sections 1 and 16 of the 2000 Act clearly required an answer to the effect that copies of the decisions were held by the Privy Council Office but (if it was the case) would not be disclosed by virtue of section 40(2). We are also slightly surprised that the Information Commissioner in his written submissions prepared for the hearing appears to support the stance taken by the Ministry but, as we say, we are satisfied that the request should be read in the way we have indicated.

21. *(b) Late reliance on section 40(2)*. We are in no doubt that we should allow the Ministry to seek to rely on the section 40(2) exemption even at this late stage, given the unusual history of this case and the way the issue has emerged and the fact that the section 40(2) exemption is designed to protect the interests of third parties.

22. *(c) and (d): Is the information exempt by reason of section 40(2) and can it nevertheless be disclosed in redacted form?* Section 40(2) of the 2000 Act provides an absolute exemption in respect of information (a) which "constitutes personal data" of someone other than the applicant and (b) the disclosure of which to a member of the public would contravene inter alia the first data protection principle, which requires that it is "processed" fairly and that one of the conditions in Schedule 2 to the Data Protection Act 1998 is met and, in the case of "sensitive personal data" [as defined in section 2 of the 1998 Act], that one of the conditions in Schedule 3 is also met. The most relevant condition in Schedule 2 to the 1998 Act is set out in para 6(1) as follows:

> **The processing is necessary for the purposes of legitimate interests pursued by … the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.**

23. Having seen the decision letters in their entirety (and received submissions on them from Ms Steyn for the Ministry in the absence of Ms Riniker) we are quite satisfied that all the information in them does indeed constitute the "personal data" of the various petitioners to the Visitor as defined in section 1(1) of the 1998 Act. The letters all contain recorded information held by a public authority about petitions brought by students against decisions by the University of London relating to exams and PhDs and contain information about their academic performance and opinions expressed about them and the outcomes of their petitions and the reasons for them. There is also within the letters information which either certainly or arguably comes within the definition of "sensitive personal data" being information as to racial origins, political opinions, religion, or the commission or alleged commission of an offence.

24. Ms Riniker submitted that if the letters were redacted in such a way that the identities of the petitioners were not disclosed they would no longer contain "personal data" and could be disclosed without reference to section 40(2) or the data protection principles. We were initially attracted to investigating only how much material needed to be redacted to be sure that the identities of the petitioners would not be disclosed to the public but, having heard Ms Steyn for the Ministry and

having regard to the definition of "personal data" in section 1(1) of the 1998 Act, we are satisfied that regardless of any redaction the contents of the letters still constitute "personal data" (and "sensitive personal data" as the case may be). This is because it is the information in the possession of the "data controller" (here the Ministry of Justice) which is relevant in determining whether the individual concerned can be identified and not the information that would be in the possession of the putative member of the public to whom the redacted document is disclosed. Redaction is therefore irrelevant to the issue whether the contents of the decision letters constitute personal data although it was accepted that it may well be relevant to the balancing exercise potentially raised by the first data protection principle and para 6 of Schedule 2 to the 1998 Act.

25. We must therefore consider whether disclosure of the decisions to Ms Riniker (and from her potentially to the world) would be "fair" as required by the first data protection principle and whether one of the conditions in Schedule 2 and, if appropriate, in Schedule 3, would be met. We first make the following findings of fact which are potentially relevant to our consideration of this issue:

    (a) Petitions to the Visitor are private and the decisions are not normally published; the published decisions cited by Ms Riniker were in cases where the petitioner actively wanted publicity or some general public interest arose;

    (b) The expectation of those petitioning the Visitor would therefore have been that the contents of the decision letters would remain private and would not be publicly disclosed;

    (c) Their public release may be upsetting to the petitioners (containing as they do discussions, for example, of academic shortcomings as well as "sensitive personal data");

    (d) There is no evidence that any of the petitioners is willing for their decision letter to be disclosed to the public;

    (e) Although redaction of the extreme kind proposed by the Ministry would probably not be necessary to prevent the identity of individual petitioners being disclosed to members of the public in every case, redaction only of

names and addresses of petitioners would certainly not be sufficient; further, the small number of petitions concerned and the fact that even a university of the size of London University comprises a relatively small community would mean that great care would be needed to be sure that there was no risk of individual petitioners being identified by other members of that community;

(f) Ms Riniker is associated with the University of London and has a genuine and legitimate interest in how the Visitorial system works and whether it works properly and she has no prurient interest in the private affairs of the individual petitioners;

(g) Ms Riniker's interest in the proper functioning of the Visitorial system reflects a general public interest but the strength of that public interest had to a great extent diminished by May 2006 when she made her request because, at least in relation to academic matters (which form the subject matter of the decision letters we are concerned with), the jurisdiction of the Visitor had been replaced by that of the Office of the Independent Adjudicator for Higher Education. We accept Ms Riniker's evidence that the Visitor retains a residual jurisdiction and that accordingly there remains some pubic interest in seeing that the system as a whole has functioned properly in the past and continues to do so.

26. As we have indicated, some of the information in the decision letters undoubtedly constitutes "sensitive personal data" as defined in section 2 of the 1998 Act. So far as this information is concerned, we cannot see that any of the conditions in Schedule 3 to the Act is even arguably met. This means that its disclosure would contravene the first data protection principle and it is therefore absolutely exempt under section 40(2).

27. As to the balance of the information, we have considered whether it would be fair for it to be disclosed and in particular whether para 6(1) of Schedule 2 is met. We have considered the terms of the decision letters and have concluded in the light of our findings of fact set out above that, although disclosure of their contents may just be "necessary for the purposes of legitimate interests pursued by" Ms Riniker and others, it cannot be warranted in any case given the likely prejudice to the rights

and interests of the individual petitioners caused by any disclosure, even taking into account the possibility of redaction. It is relevant to observe in relation to the balancing exercise that the decisions which we consider likely to be of greatest legitimate public interest concern matters which, even if not technically "sensitive personal data" (in which case there would be no question of disclosure as we have said), are also likely to be of greatest sensitivity to the individuals concerned.

28. Accordingly, we find that although the Privy Council Office ought to have informed Ms Riniker that it held the decision letters under section 1(1)(a) of the Freedom of Information Act 2000 it was not obliged to communicate them to her under section 1(1)(b) since they comprised exempt information under section 40(2).

(5) The Privy Council Office's publication scheme

29. Whatever the position previously, a copy of the Privy Council Office Freedom of Information Publication Scheme dated December 2004 and expressed to have been approved by the Information Commissioner has now been sent to Ms Riniker and supplied to the Tribunal in response to her written submissions dated 25 March 2009. We are therefore satisfied that, if there was ever a proper request under the Act for a copy of the scheme as approved by the Information Commissioner and as it was on 17 June 2006 and if there was indeed an earlier failure to supply it, then any such failure has now been fully rectified.

Conclusion and remedy

30. As we have said, it was agreed that the appeal should be allowed and that a substituted decision notice issued to reflect the fact that the Privy Council Office ought to have informed Ms Riniker of the information it held of the descriptions specified in her requests and to have supplied it to her, save for the decisions referred to above which were covered by the section 40(2) exemption. We are satisfied that all such information has now been supplied to her and that no further steps are therefore required to be taken by the Ministry.

31. We should record that at the conclusion of her submissions at the hearing on 21 September 2009 before we went into "closed session" Ms Riniker expressed the view in quite intemperate language that the Tribunal had somehow deliberately

misled her in relation to the procedure being followed and deprived her of the opportunity to put forward written submissions in support of her appeal so far as it related to issues already dealt with by the hearing on the papers on 6 May 2009 which were not the subject of the oral hearing. As we hope the detailed history of the proceedings set out above demonstrates there is no truth in those assertions and we are confident that Ms Riniker has had a fair "hearing" (in the widest sense of the term) and that we are now in a position to reach a fair decision on all issues without further material from the parties.

32. Our decision is unanimous.

Signed:

Murray Shanks
Deputy Chairman

Date: 22 September 2009