



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2009/0054
Information Commissioner's Ref: FS50195769

Determination on the Papers Alone

Decision Promulgated
22 January 2010

BEFORE

DAVID MARKS QC

and

LAY MEMBERS

MARION SAUNDERS
DAVID WILKINSON

Between

BRIAN GIBSON

Appellant

and

INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: Brian Gibson represented himself

For the Respondent: Mark Thorogood (Solicitor for the Information Commissioner)

Decision

The Tribunal dismisses the Appellant's appeal and upholds the decision of the Information Commissioner (the Commissioner) in the Commissioner's Decision Notice dated 8 June 2009, Ref. No. FS50195769

Reasons for Decision

Introduction

1. The appeal deals with an increasingly common problem which occurs under the Freedom of Information Act 2000 (FOIA). This is when certain of the key terms and conditions of a written contract of employment, relating in this case as in many others, to a senior employee within a public authority are sought to be disclosed under the Act.
2. The public authority in this case is the Ferryhill Town Council (the Council). The Appellant is a Councillor. The request in question deals with the precise figures of the annual salary and overtime payments made to the Executive Officer of the Council. The Council refused to supply the information. Reliance was placed on section 40(2) of FOIA which deals with personal information and represents an absolute exemption under the Act.

Section 40(2) of FOIA and the related principles

3. Section 40 of FOIA provides as follows, namely, that:
 - “(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 satisfied.
 - (3) The first condition is that:

(a) in a case where the information falls within any of paragraphs (a) to (d) of the 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 –

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

(7) In this section –

“the data protection principles” means the principles set out in Part 1 of Schedule 1 to the Data Protection Act 1998, as read subject to Part 2 of that Schedule and section 27(1) of that Act;

“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;”

4. “Personal data” is defined in section 1(1) of the Data Protection Act 1998 (DPA) as:

“... data which relates 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 ...”

5. The first data protection principle is set out in Schedule 1 of the DPA and provides:

“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 ...”

6. The conditions in Schedule 2 provide as follows, namely:

“(1) The data subject has given his consent to the processing.

- (6) The processing is necessary for the purposes of legitimate interest pursued by the data controller or 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.”

The request, the investigation prior to the Decision Notice

7. In November 2007, the Appellant requested the following, namely:
 - “1. The annual salary, expenses, job description and all terms and conditions of employment of the Town Council’s executive officer.
 2. The annual salary, expenses, job description and all terms and conditions of employment of the Town Council’s Senior Finance & Administration Officer.”
8. There was regrettably some delay on the part of the Council in dealing with these requests, but for present purposes, nothing turns on this and related matters connected with any delay. In December 2007, a copy of the employment contract of the Executive Officer and of the Senior Finance Officer were provided with copies of the former’s job specification and job description. Salary details, however, were withheld in relation on section 40(2). A review conducted by the Council later confirmed its earlier decision.
9. In his later exchanges with the Council and with the Commissioner, the Appellant required details of:-

“... any overtime payments made to the executive officer or the Senior finance officer of the council.”
10. Although the Council refused to provide the latter information, it provided details of the total amount of overtime referred to and/or included in the budget of which the Appellant in his role as Councillor was already aware. The Commissioner’s subsequent Decision Notice stated that the Commissioner did not know whether a review was requested and/or held on the basis of that refusal.

11. In early 2009, the Council informed the Commissioner that it had provided the Appellant with a list of the full pay scales of local council clerks, along with figures as to the aggregated overtime payments made to all council staff. What it refused to disclose, however, were specific figures for each of the two individuals in question.
12. In due course the Appellant withdrew his request for the information regarding the Senior Finance Officer. No further mention was made of the original request for expenses and neither the Information Commissioner nor the Council nor the Appellant has indicated that this is a matter for consideration on this appeal.
13. As to the Executive Officer, the Council pointed out to the Commissioner that in his position as a Councillor, the Appellant would be able to find out more about the figures from the salary bands provided. Subsequently, the Council confirmed it would provide figures of the salary bands if requested to. The Commissioner responded by suggesting that salary figures to the nearest £5,000 might be appropriate to be disclosed. Again, the Council confirmed it would disclose such figures if requested to do so.
14. Nonetheless, the Council stated it would not disclose specific overtime figures relating to the Executive Officer. It stated that the aggregated figures it had provided were separated into internal and external staff. Moreover, the aggregated figure of the internal staff related to five individuals only. It contended that separating that figure any further would disclose the specific personal data which was the subject of the request with regard to the Executive Officer. As for the remaining request, the Council duly confirmed that it had disclosed the grade of the Executive Officer, together with information showing what were called salary spine points relevant to that grade. The salary spine points give the value of the annual increments awarded within a given grade.

The Decision Notice

15. The decision is dated 8 June 2009. Paragraphs 34 to 45 inclusive deal with the first data protection principle to which reference has already been made. The main issue put shortly is whether or not the personal information was dealt with fairly and lawfully.

16. In short, the Commissioner determined:

- (1) publicly funded individuals had an expectation, but only in generalised terms, that some details of their salary would be disclosed;
- (2) equally, some protection was justified especially if the information related to personal financial circumstances;
- (3) each case would therefore have to be determined on its own merits: and much would depend on the following factors which were by no means exhaustive, namely:
 - (a) what the individual in question was told at the commencement at or during its employment; and/or
 - (b) the relevant contractual or non-contractual provisions and conditions surrounding the employment as well as the surrounding circumstances, generally;
 - (c) the level of the individual's grade and position within the public authority;
 - (d) the expectation and the degree to which other salary-related information was publicised and/or otherwise made available, eg. salary/pay bands and other general taking into account the contents of any published accounts;
 - (e) at all times a balance had to be struck between information relating to the public position of the individual in question and on the other, his or her private life: see eg *House of Commons v ICO and Norman Baker MP* (EA/2006/0015 and 0016 especially at paragraph 78); and
- (iv) in the circumstances of the present case, revelation of exact details of salary and overtime payments would be intrusive.

17. The next and related issue dealt with at paragraphs 46 to 66 inclusive of the Decision Notice to which the Commissioner then turns was whether any of the Schedule 2 conditions referred to above applied on the basis that at least one of

the latter had to be applicable before personal data could be processed. In any event, in the words of paragraph 46 of the Decision Notice, the application of the Schedule 2 conditions “can often inform the view as to whether a disclosure would be fair or not.” The Commissioner also, quite properly in the Tribunal’s view, went on to point out that an applicable reason drawn from Schedule 2 “will not however automatically make the processing fair”.

18. Reference was made to another significant decision of this Tribunal, namely, *The Corporate Officer of the House of Commons v ICO* (EA/2007/0060, 0061, 0062, 0063, 0122, 0123, 0131). Here, the Commissioner pointed out that the terms of Schedule 2, especially at paragraph 6(1) referred to above, involved a balancing of interests, not necessarily exclusively public in quality, which balancing test was broadly comparable with the public interest balancing test with regard to qualified exemptions under FOIA generally.
19. Put shortly and somewhat self-evidently, for disclosure to be justified, the public’s legitimate interest had to outweigh the rights, freedoms and legitimate interests of the data subject. That equation was expressed in the following way in the *Corporate Officer* decision referred to above, in terms which were subsequently endorsed by the High Court by means of a three-fold test, namely:
 - (1) there must be a legitimate public interest and disclosure;
 - (2) that disclosure had to be necessary to meet that public interest; and
 - (3) the disclosure in question must not cause unwarranted harm to the interests of the individual.

It is doubtful whether that three-fold formulation adds very much, if anything to the statutory language in Schedule 2, paragraph 6(1) in any event.

20. Much of the written contentions and considerations by the Commissioner in the latter part of the Decision Notice, not only reflect his overall determination that the Council decision be upheld, but need not be revisited at length given the fact that the appeal launched by the Appellant is done on a fairly limited basis. Nonetheless, in brief, the Commissioner confirmed and found that:

- (1) the details of exact salary payments and of overtime would indicate the individual's "financial standing"; revelation of this might lead to concerns that his salary levels were "perhaps excessive" or even extraordinary as against those of other local government officials;
- (2) disclosure of salary bands should be to the nearest £5,000 which when coupled with the provision of a grade showing the range of salary points within the grade, would be neither so broad as to be meaningless, nor so narrow as to risk intrusion of privacy.;
- (3) however, on further consideration in the present case, the spine point profile provided a band of some £6,075 which of itself in the Commissioner's view did not establish what the Executive Officer actually received to the nearest £5,000; however in the circumstances, the Commissioner was satisfied that because of the nature of the figures in the band, doing so would in fact allow details of the Executive Officer's salary to be calculated; in the circumstances therefore, the Commissioner felt that the Council needed to provide no further specific information regarding the Executive Officer's salary levels to the Appellant;
- (4) disclosure of overtime payments would in effect provide further personal information impinging upon the Executive Officer's private life, and if anything, this would be more intrusive than a disclosure of salary levels alone; and
- (5) on further consideration of the latter issue, the Commissioner was of the view that disclosure of the overall budget for Council staff generally showed that overtime as a whole was approximately £8,000, but that that figure had not been exceeded or, at most, would only be slightly exceeded, at the end of the financial year in question.

The Appellant's Notice of Appeal

21. The Appellant's Notice of Appeal is dated 1 July 2009. There are three grounds of appeal which are relied upon. They reflect the following contentions, namely:

- (1) the Commissioner failed to consider whether the Executive Officer ever consented to disclosure of the disputed information (this can be called the issue of consent);
- (2) the Executive Officer had in any event agreed for the amount of overtime to be openly discussed (this can be called the overtime disclosure issue); and
- (3) between 1998 and 2005/2006, the total salary was disclosed annually (this can be called the accounts issue).

Consent

22. No witness statements have been provided to the Tribunal. Although there is a bundle of documents which has been prepared for the appeal, there is no evidence contained in, or suggested by, the contents of that material which in any way suggests that any such consent was ever given.
23. The Tribunal has been shown, and examined, a copy of the Executive Officer's Contract of Employment. Section 6 deals with the salary. Nothing is said or intimated there about consent. The Tribunal feels it is unnecessary to quote from the contract's terms and conditions. Section 6.2 refers to the fact of annual increments. Section 11 deals with annual appraisals and section 13 with additional hours. Nothing in those sections can be said to reflect or in any way constitute the consent contended for. Whilst expenses has not been raised as a point of contention in this appeal, for the sake of completeness, Section 9 deals with expenses and states that any travel, mileage, subsistence expenses incurred and approved by the council will be paid at the nationally agreed National Joint Council rate laid down at the time.
24. The Appellant contended in his exchanges with the Commissioner that section 13 with its reference to the processing or treatment of additional working hours necessarily entailed disclosure of the amounts of overtime carried out. The Tribunal respectfully agrees with the Commissioner's written submissions that the fact of Council approval, which might or might not be required in a case of additional hours, did not of itself amount to any form of consent as to all and any specific amounts paid by way of overtime.

25. The Appellant had also made various points about being able to “track” the salary in question by dint of cross-reference to National Guidelines so that it would be possible for any member of the public to work out or calculate the Executive Officer’s salary in any given year.
26. The Commissioner pointed out in response, however, that the contract itself allowed for the provision or award of additional salary points which would in effect prevent any member of the public from being fully aware, and therefore, fully knowledgeable about any salary increments awarded to the Executive Officer so as to be able to track the salary in the way suggested. The Tribunal respectfully agrees and can find no fault in the Commissioner’s reasoning.

Disclosure

27. Here again, there is no evidence whatsoever that the Executive Officer consented to disclosure of his pay and/or to any revelation of it, at least not on the evidence shown to the Commissioner and reconsidered by this Tribunal.
28. In the bundle prepared for the appeal, the Appellant provided a report, apparently discussed at a meeting of the Council held on 10 December 2008.
29. The report is dated 25 November 2008. Item 16 refers to actions to deal with “high volume of correspondence, complaints and Freedom of Information Act appeals to” the Council. In the report, there appears to be a reference to a number of hours “typically” worked by the Executive Officer said to be in excess of 50. The Executive Officer was contracted to work for 37 hours. The Council considered how to alleviate the situation. It appeared as if the increase in the hours was attributable to dealing with a large number of FOIA related requests, a large proportion of which were it seems in turn generated by the Appellant himself.
30. Again, the Tribunal respectfully agrees with the Commissioner in his written submissions when he contends that:
 - (a) it is not clear that this item in the Agenda was intended to be publicly disclosed, although it may well be that the Appellant disputes this fact;

- (b) in any event, no specific payments are alluded to in relation to the overtime which is discussed and debated; and
- (c) there is no evidence that the Executive Officer was actually paid for/or in respect of any overtime in relation to the additional 21 hours per week identified in the report.

Disclosure in the annual accounts

31. Yet again, there is no evidence that the annual salary of the Executive Officer for the year 2005/2006 was disclosed for that year, or indeed for any year although the contract in force prior to 2007/8 included a straight incremental pay scale with no performance element and it would have been possible for the spot salary to be deduced if the starting salary and the number of years in post were known. However, the Tribunal respectfully agrees with the Commissioner that disclosure of the salary band and total overtime payments in 2007/2008 was, and is, sufficient to meet the public interest reflected in the data protection principles in particular in relation to Schedule 2 which has been referred to above.

Miscellaneous

32. In correspondence since the provision by the Commissioner of his written submissions, the Appellant has disputed any suggestion that he ever agreed that the information sought constituted personal data within the meaning of the DPA. Whether or not these matters were common ground between the parties is, in the Tribunal's view, totally irrelevant. Whilst the appellant argues that the information relates to the post of Executive Officer and not the individual, the Tribunal is clear that the information sought is clearly personal data and may indeed be said to be a paradigm example of personal data.
33. Issue is also taken by the Appellant as to whether, and if so to what extent, the disclosure of salary bands could be said to lead directly or otherwise to disclosure of earnings of Executive Officers. This has been touched on above and the Tribunal sees nothing new in the submissions made by the Appellant in the wake of the Commissioner's written submissions that would lead him to change his mind or question the basis on which the Commissioner reached his decision.

The merits of the Appeal : conclusions

34. Section 58 of FOIA entitles the Tribunal to allow the appeal or substitute such other Decision Notice as it thinks fit on one of two grounds. These are first, that the Notice against which the appeal is brought is not in accordance with the law and/or to the extent that the Notice involved in exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently.
35. The second of these grounds is not an issue. The balancing test conducted by the Commissioner represents a mixed question of law and fact and in an appropriate case, a Tribunal can substitute its own decision for that of the Commissioner.
36. As for the second ground, it is clear from the judgment and the findings of the Tribunal set out above that there is no basis for alleging that the Commissioner, in his Decision Notice, committed any error of law. In the circumstances, the appeal is dismissed.
37. The Tribunal's decision is unanimous.

Signed:

David Marks QC
Deputy Chairman

Date: 21 January 2010