IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2010/0190
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50256973
Dated: 4 November 2010

Appellant: Mr Joe Gilbert

Respondent: Information Commissioner

Date of paper hearing: 4 March 2011

Before
Melanie Carter
(Judge)

and

Andrew Whetnall
Ivan Wilson

Subject:
Freedom of Information Act s.40 personal data

Cases:
Corporate Officer of the House of Commons v Information Commissioner and Norman Baker MP EA/2006/0015 and 0016
Baker v Information Commissioner & DCLG EA/2006/0043

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal decided to uphold the Decision Notice and reject the appeal.

REASONS FOR DECISION

Introduction

1. This appeal concerns a letter of request from Mr Gilbert, the Appellant, to the Local Government Ombudsman ("LGO") about his local authority. The Appellant was dissatisfied with the LGO's handling of his complaint and in particular he had concerns as to the independence and impartiality of the case officer who dealt with it. By a letter dated 1 May 2009 he requested information under the Freedom of Information Act 2000 ("FOIA") in answer to a number of questions, as follow:

> *"1. When was [case officer A] appointed as an investigator?*
> *2. Since that date, in how many cases has [case officer A] issued, or recommended the issuing of, a public report.*
> *3. During the last twelve months, how many complaints has [case officer A] dealt with?*
> *4. In how many of these cases has [case officer A] found maladministration?*
> *5. In how many of these cases has he found injustice?*
> *6. In how many of these cases has [case officer A] made recommendations to the Councils concerned>*
> *7. During the last twelve months, in how many cases has [case officer A] not found maladministration?*
> *8. In how many of these cases has [case officer A] not found injustice?*
> *9. During the last twelve months, in how many cases has [case officer A] found no fault at all in the Council complained of?*
> *10. During this period, in how many cases has [case officer A] made no recommendations at all to the Council concerned?*
> *11. During the last twelve months, on how many occasions has [case officer A] issued, or recommended the issuing of, a public report.*

12. Does the Local Government Ombudsman currently retain on computer copies of letters of complaints dealt with by [case officer A] over the last twelve months.

13. Does the Local Government Ombudsman currently retain on computer copies of provisional findings made by [case officer A] over the last twelve months.

14. Does the Local Government Ombudsman currently retain on computer copies of final decisions made by [case officer A] over the last twelve months.

15. If the answers to 12, 13 and 14 is "No", for what period does the Ombudsmen retain the three types of records referred to?

16. What records does the Ombudsman keep of the outcome of complaints?

17. What records does the Ombudsman hold of the outcome of complaints dealt with by [case officer A] during the last twelve months?

18. Please supply any of these records not covered by previous questions."

2. The LGO refused to disclose most of the information in question on the basis that it was "personal and a personnel matter". It did however provide information and advice on the LGO's general policy on storage and retention of communications and decisions. It upheld this decision on internal review. The Appellant complained to the Information Commissioner ("IC") who, after investigating, issued a Decision Notice dated 4 November 2010. His decision supported the LGO concluding that the requested information which had not been disclosed was exempt under section 40(2) FOIA.

The appeal

3. The Appellant's grounds of appeal are in essence that the IC was incorrect in finding that:

a) the disputed information was "personal data";
b) disclosure of that data would be unfair and thus contravene the First Data Protection Principle.

Evidence and submissions

4. The Tribunal was provided with a small bundle of documents by the IC and written submissions, also from the IC. The Appellant in this case produced no evidence or any submissions subsequent to the early stages of the proceedings.

5. It was a particular feature of this case that the Tribunal was not provided with the requested information. It considered whether it needed to see this information or indeed more evidence in order to decide the appeal. In its view, given that the nature of this information (vis detailed information as to the performance of a junior individual officer) was not in dispute, it was satisfied it could make a decision properly on the evidence and the arguments before it. It was satisfied moreover that this was a proportionate approach to this appeal.

The Law

6. The Tribunal's jurisdiction on appeal is governed by section 58 of FOIA. As it applies to this matter it entitles the Tribunal to allow the Appeal if it considers that the Decision Notice is not in accordance with the law or, to the extent that it involved an exercise of discretion, the IC ought to have exercised his discretion differently.

7. The starting point for the Tribunal is the Decision Notice of the IC but the Tribunal also receives evidence, which is not limited to the material that was before the IC. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the IC and come to the conclusion that the Decision Notice is not in accordance with the law because of those different facts.

8. Under section 1 of FOIA, any person who has made a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information. Under section 2, the duty on the public authority to provide the information requested does not arise if the information is exempt under Part II of FOIA.

9. The exemptions under Part II are either qualified exemptions or absolute exemptions. Information that is subject to a qualified exemption is only exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Where, however, the information requested is subject to an absolute exemption, then, as the term suggests, it is exempt regardless of the public interest considerations.

10. Section 40 FOIA, an absolute exemption, provides in the relevant parts:

"(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 all within subsection (1), and

(b) either the first or the second condition below is satisfied.

(3) The first condition is –

(a) in a case where the information falls within any of the 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—

...

'data subject' has the same meaning as in section 1(1) of [the Data Protection Act 1998];

'personal data' has the same meaning as in section 1(1) of that Act."

11. The data protection principles are set out in Part 1 of Schedule 1 to the Data Protection Act 1998 ("DPA"). The main one having application to the facts of this Appeal is the First Data Protection Principle. It reads:

"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 …"

12. Schedule 2 then sets out a number of conditions, the relevant one to the facts of this case being set out in paragraph 6(1):

> *"The processing is necessary for the purposes of legitimate interests 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."*

Does the requested information constitute personal data?

13. The Appellant argues that the information "was purely professional and not personal at all" and that to claim otherwise "defies the known meaning of the English language" .

14. The Tribunal was clear that most of the information requested was "personal data" within the meaning of section 1(1) DPA. This definition includes any data that "relate to a living individual who can be identified from those data" and makes no distinction between personal and professional information. By the very nature of the information requested, it was clear that it would identify the officer in question and that he would be the focus of that disclosed. The Tribunal noted that certain of the information that fell within the letter of request, that which was not "personal data", had already been disclosed.

Would disclosure of the requested information contravene the first data protection principle?

15. The questions for the Tribunal in this regard, were whether disclosure would be fair and lawful and whether it would satisfy the condition in paragraph 6 of Schedule 2 to the DPA.

16. In considering first whether the disclosure would be fair, the Tribunal had regard to the expectations of the LGO officer who was the subject of the letter of request. The Tribunal had no hesitation in concluding that given the apparent junior status of this officer, he or she would have a reasonable expectation that the information requested would not be disclosed. Senior officers can be expected to be accountable in public for the performance of their organisation. There is no presumption that junior officers should be directly accountable to the public if bias is alleged. They are accountable to their employer for their performance and their employer is accountable for ensuring that they discharge their role objectively and competently. The appropriate course for any person dissatisfied or suspecting bias is to rely on internal complaints procedures or, if the circumstances justify it, to seek judicial review. Even if the statistics requested on the outcome of the investigating officer's caseload had been provided, they could not, without more exploration, have substantiated an allegation of bias in any single case.

17. The Tribunal concluded therefore that disclosure would be unfair to the data subject, the officer in question, such that it would be in breach of the First Data Protection Principle. For completeness, the Tribunal also considered whether the conditions for processing, disclosure in this case, met the tests in paragraph 6, Schedule 2 to the DPA.

18. The first part of this condition can only be satisfied where the disclosure is 'necessary' for the purposes identified. The second part of the condition in paragraph 6 is an exception: even where the disclosure is necessary, the Tribunal must still go on to consider whether the processing is unwarranted in the particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

19. In relation to the first part of the condition, whether disclosure is "*necessary for the purposes of legitimate interests*" of the requester, the test described in the case of *Corporate Officer of the House of Commons v Information IC EA/2006/15 & 16* , adopted by this Tribunal and applied to this case, is:

a) whether the legitimate aims pursued by the requester could be achieved by means that interfere less with the privacy of the employee in question; and

b) if the aims could not be achieved by means that involved less interference, whether the disclosure would have an excessive or disproportionate adverse effect on the legitimate interests of that employee.

20. With regard to the enquiry under subparagraph (a), the Tribunal asked itself what were the "legitimate aims" of the requester. Clearly the intention, although for the reason given in paragraph 16 above we believe this to be misconceived, was to render the LGO accountable in its handling of its case work and enhancing transparency in decision making. The Tribunal noted that the requester had already received certain information with regard to case handling in the relevant period . There was moreover information as to the LGO's performance publically available. The Tribunal agreed with the IC that any concerns the Appellant has can, and should, properly be addressed through the LGO's internal complaints procedure. There was no evidence before the Tribunal that the Appellant could not be expected to rely upon the internal complaints procedure.

21. In the Tribunal's view, the "legitimate aims" of the requester could be achieved by a means that interfered less with the privacy of the particular officer.

22. In this regard, the Tribunal was of the view that the degree of accountability called for in these circumstances was limited on the basis that the primary need for accountability in what was essentially a staffing matter was as between employees and the employer, the LGO. The public's interest in these matters could be met by information at a lower level of detail than was to be found in the information requested.

23. Given these considerations, the Tribunal concluded that it was not "necessary" within the terms of paragraph 6 of Schedule 2 for there to be disclosure.

24. With regard to the second part of the test set out in paragraph 18 above, unlike section 2(2)(b) FOIA, it is only where the interests of the public outweigh the interests of the data subject that the information should be disclosed: *Corporate Officer of the House of Commons v Information Commissioner and Norman Baker MP* EA/2006/0015 and 0016.

25. It is not our role to review the decisions of the LGO. Perhaps if evidence had been presented which made a prima facie case that anything was amiss with the LGO decision, there would have been a stronger although not necessarily conclusive case for disclosure of some of the information requested. The Appellant had however provided no evidence at all as to the nature of his dissatisfaction or reasons for suspecting bias. In these circumstances the Tribunal did not give much weight to the arguments in favour of disclosure

26. Set against this was the possible prejudice to the "rights and freedoms of the data subject". The Tribunal agreed with the IC that disclosure of the requested information might lead to the type of "direct, virulent criticism" envisaged by the Tribunal in the case of *Baker v Information Commissioner & DCLG* EA/2006/0043 (at §17). The Tribunal accepted that disclosure would be likely to cause some distress to the officer in question.

27. The Tribunal was of the view that disclosure would not satisfy paragraph 6 of Schedule 2 to the DPA and on this ground, as well as the disclosure being unfair, it would be a breach of the First Data Protection Principle. It followed that the IC had been correct in upholding the LGO's decision not to disclose the requested information on the basis that the absolute exemption in section 40(2) applied.

Conclusion

28. For the reasons set out above the Tribunal upheld the Decision Notice of the IC and rejected the appeal.

29. Our decision in unanimous.

Signed

Melanie Carter
Judge Date 21 March 2011