



**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
[INFORMATION RIGHTS]**

**EA/2011/0068**

**ON APPEAL FROM:**

**Information Commissioner's Decision Notice: FS50317777  
Dated: 3 March 2011**

**Appellant: ROSE WHITE**

**Respondent: THE INFORMATION COMMISSIONER**

**On the papers**

**Date of hearing: 20 September 2011**

**Date of Decision: 5 October 2011**

**Before**

**Annabel Pilling (Judge)  
Alison Lowton  
and  
Jean Nelson**

**Representation:**

For the Appellant: Rose White  
For the Respondent: Mark Thorogood

**Subject matter:**

FOIA Absolute exemptions – Personal data s.40

**Cases:**

*Blake v Information Commissioner and Wiltshire County Council* EA/2009/0026  
*Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47  
*A v Information Commissioner* EA/ 2006/0012

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**DECISION OF THE FIRST -TIER TRIBUNAL**

The Appeal is refused and the Decision Notice dated 3 March 2011 is upheld.

## **Reasons for Decision**

### Introduction

1. This is an Appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 3 March 2011.
2. The Decision Notice relates to a request made by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to the Calderdale Primary Care Trust (the 'Trust') for information concerning the date, place and time a named individual had received sex change surgery.
3. The Trust refused the request under section 40 of FOIA on the basis that disclosure of the third party's sensitive personal data would lead to a breach of the data protection principles.
4. The Commissioner, in his Decision Notice, concluded that the Trust was exempt from the section 1(1)(a) duty under FOIA to confirm or deny whether it held the requested information under section 40(5)(b)(i) of FOIA. The Appellant now appeals against that decision.

### The request for information

5. On 6 December 2009 the Appellant made a request to the Calderdale Primary Care Trust (the "Trust") under the Freedom of Information Act 2000 (the "FOIA") for information in the following terms –

*"I need to know the following information:*

*The date that [XX] a transsexual was first registered with a GP in NHS Calderdale's area.*

*The date that [XX] was first referred to Dr Richard Curtis in London for overseeing her sex change surgery.*

*The date that funding for [XX]'s sex change was agreed.*

*The date, place and time that[ XX] had sex change surgery.”*

6. The Trust replied on 11 January 2010 and refused to disclose the information on the grounds that it was sensitive personal data relating to XX and was exempt under section 40(2) of the FOIA.
7. The Appellant was dissatisfied and on 7 March 2011 requested an internal review of that decision. The Trust did not provide any internal review.
8. The Appellant contacted the Commissioner on 10 June 2010 to complain about the way her request had been handled. She specifically asked the Commissioner to consider the refusal of the Trust and its failure to provide an internal review.
9. The Commissioner then investigated the substantive complaint, receiving additional information from the Trust regarding its refusal to provide the information to the Appellant. The Commissioner also requested further information from the Appellant; in particular evidence to support her assertion that the information requested was in the public domain. The Appellant did not provide any further evidence.
10. The Commissioner issued a Decision Notice on 3 March 2011. He concluded that the Trust were exempt from the duty to confirm or deny whether it held the requested information under section 40(5)(b)(i) of FOIA as such confirmation or denial in itself would breach the first data protection principle as it would amount to the unfair processing of sensitive personal data, namely whether XX had undergone sex change surgery.
11. Although not forming part of the Decision Notice or relevant to this Appeal, the Commissioner dealt with the failure of the Trust to conduct an internal review of the refusal of the Appellant's request. He indicated that in future he expects the Trust to conduct internal reviews in accordance with the section 45 Code of Practice.

#### The Appeal to the Tribunal

12. The Appellant appealed to the Tribunal on 4 March 2011.

13. In her Notice of Appeal, the Appellant advanced two arguments in the grounds of appeal to support her submission that the Commissioner was wrong to conclude that confirming or denying whether the requested information was held would amount to unfair processing in contravention of the first data protection principle. She submits that:

- i) The information as to the identity of the individual who had undergone sex change surgery was in the public domain through at least one source; and
- ii) The information is necessary for the legitimate purposes of the Appellant in proposed judicial review proceedings against the relevant Primary Health Care Trust.

14. The Commissioner applied for the appeal to be struck out under Rule 8(3)(c) of The Tribunal Procedure (First-tier) Tribunal (General Regulatory Chamber) Rules 2009 (the "Rules") on the basis that there was no reasonable prospect of the appeal succeeding. That application was refused.

15. The Appeal was determined at a hearing on the papers on 20 September 2011.

16. The Tribunal was provided in advance with an agreed Bundle of material, one authority relied upon by the Commissioner and written submissions from the Commissioner. Despite the Appeal being brought by the Appellant, she did not provide any further evidence or submissions in support of her Appeal. We are concerned that if appeals are brought but then not pursued by appellants, particularly in a case where assertions of fact are made but not supported by evidence as in this appeal, this could result in public funds being wasted.

### The Powers of the Tribunal

17. The Tribunal's powers in relation to appeals under section 57 of the FOIA are set out in section 58 of the FOIA, as follows:

*(1) 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.*

18. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives and hears evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether FOIA has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

### The Legal Framework

19. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.

20. The section 1(1)(b) duty of the public authority to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions. Where the information is subject to a

qualified exemption, it will only be 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 (section 2(2)(b)). Section 40(2)(a) of FOIA is an absolute exemption. Information that falls within this section is therefore exempt from disclosure regardless of the public interest considerations.

21. The relevant parts of section 40(2) of FOIA provides:

*(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 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, or*

*(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress)*

22. Section 40(5): *The duty to confirm or deny-*

*(a) ....(re section 40(1), requestor’s personal data)*

*(b) does not arise in relation to other information if or to the extent that either-*

*a) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded...*

23. The data protection principles, set out in Schedule 1 of the Data Protection Act 1998 (the 'DPA'), regulate the way in which a "data controller" (in this instance, the Trust) must "process" personal data. The word "process" is defined in section 1(1) of the DPA and includes:

*"disclosure of the information or data by transmission, dissemination or otherwise making available."*

24. The first data protection principle 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, and*
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.*

25. The conditions in Schedule 2 DPA are:

- (1) The data subject has given his consent to the processing.*
- (2) The processing is necessary –*
  - (a) for the performance of a contract to which the data subject is a party,*  
*or*
  - (b) for the taking of steps at the request of the data subject with a view to entering into a contract.*
- (3) The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.*
- (4) The processing is necessary in order to protect the vital interests of the data subject.*
- (5) The processing is necessary –*
  - (a) for the administration of justice,*



*(b) for the exercise of any functions conferred on any person by or under any enactment,*

*(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or*

*(d) for the exercise of any other functions of a public nature exercised in the public interest by any person.*

*(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 expectations of the data subject.*

*(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.*

26. Sensitive personal data is defined in section 2 DPA and includes personal data consisting of information as to an individual's physical or mental health or condition and sexual life.

27. The Appellant does not dispute that information that reveals that XX is a transsexual who has undergone or is undergoing sex change surgery is sensitive personal data within the meaning of section 2 of the DPA. She does not dispute the reasoning of the Commissioner that to confirm or deny whether that information is even held by the Trust would amount to disclosing sensitive personal data about XX.

28. The relevant conditions in Schedule 3 DPA are:

*Condition 5 – The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject;*

*Condition 6 – The processing –*

*(a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings),*

*(b) is necessary for the purpose of obtaining legal advice, or*

*(c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.*

### Submissions and analysis

29. There is an inherent tension between the objective of freedom of information and the objective of protecting personal data. It has been observed that section 40(2) of FOIA is a “complex provision”<sup>1</sup>. There is no presumption that openness and transparency of the activities of public authorities should take priority over personal privacy. In the words of Lord Hope of Craighead in *Common Services Agency v Scottish Information Commissioner*<sup>2</sup> (referring to the equivalent provisions in the Freedom of Information (Scotland) Act 2002 (the ‘FOISA’):

*“In my opinion there is no presumption in favour of the release of personal data under the general obligation that FOISA lays down. The references which that Act makes to provisions of DPA 1998 must be understood in the light of the legislative purposes of that Act, which was to implement Council Directive 95/46/EC. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data....”*

30. The Appellant is a litigant in person, not legally qualified or trained, and has put forward what she believes to be relevant grounds of appeal.

31. It appears to us that her submissions are to the effect that the Commissioner erred in concluding that confirmation or denial that the information was held would contravene the first data protection principle and should have considered that conditions 5 and 6 of Schedule 3 of the DPA were met on the basis that i) XX’s name is in the public domain, and ii) that the Appellant needs the information to pursue judicial review proceedings against the Trust. The Appellant submits that as at least one of these conditions is met, disclosure of the information would not breach the first data protection principle.

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<sup>1</sup> *Blake v Information Commissioner and Wiltshire County Council* EA/2009/0026

<sup>2</sup> [2008] UKHL 47

32. The Commissioner submits that consideration of Schedule 3 did not arise because he had concluded that the disclosure would be unfair without having specific reference to the Schedules of the DPA. He submits that in order to comply with the first data protection principle, the processing of personal data must be fair, lawful *and in particular* meet one of the conditions in Schedule 2, and where the personal data are sensitive, one of the conditions in Schedule 3. He submits that the use of the words “in particular” demonstrates that there is a general obligation to process data fairly, in addition to the requirement to comply with the detailed conditions listed in Schedules 2 and 3 (*A v Information Commissioner* EA/ 2006/0012).

33. In order to comply with the first data protection principle, there are 3 separate requirements before personal data can be disclosed under FOIA (4 for sensitive personal data):

- (1) The personal data must be processed fairly; would disclosure adversely affect the data subject concerned?
- (2) It must be processed lawfully; for example, would disclosure contravene a duty of confidence?
- (3) Disclosure must satisfy one of the conditions in Schedule 2;
- (4) Sensitive personal data, disclosure must *also* satisfy one of the conditions in Schedule 3.

34. The Commissioner concluded that as confirming or denying that the information was held would amount to the unfair disclosure of sensitive personal data, there was no need to consider steps 2-4.

35. Although, in his Decision Notice and submissions before us the Commissioner approached the question by considering first whether the processing is fair before commencing a consideration of whether a condition in Schedule 2 or Schedule 3 is met, in reaching our decision we considered first whether a condition in Schedule 3 is met before considering whether the processing is fair and lawful<sup>3</sup>, taking that into account “in particular”. If no Schedule 3 condition is met, disclosure of the

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<sup>3</sup> Following *Common Services Agency v Scottish Information Commissioner*, paragraph 30.

information would be in breach of the first data protection principle, irrespective of any consideration of Schedule 2 conditions or the general fairness of disclosure, as the information is sensitive personal data.

Is a Schedule 3 condition met?

36. The Appellant submits that the relevant conditions are Condition 5 and Condition 6, set out in paragraph 28 above.

37. In respect of Condition 5 there is no evidence that the information contained in the personal data has been made public as a result of steps deliberately taken by the data subject. Although the Appellant has repeatedly asserted that the information that XX has had sex change surgery is in the public domain, she has not provided any evidence to that effect despite being asked to do so by both the Commissioner and the Tribunal. In order to meet this condition, we would also need evidence that the information had come into the public domain as a result of steps deliberately taken by XX; an inadvertent disclosure of the information by a third party would not be sufficient.

38. In respect of Condition 6, there is no evidence that the Appellant has commenced legal proceedings against the Trust. Although she submits that the Trust's refusal to provide the requested information is preventing her from pursuing her claim, there is no evidence to that effect. We are therefore not satisfied that this condition is met. In any event, we note that even if there were proceedings being brought or contemplated, there is no suggestion that disclosure of this information is "necessary" for the purpose of or in connection with those proceedings. We also note that limited disclosure could be ordered by the court dealing with those proceedings to the extent that the information is relevant and needed for those proceedings; this disclosure would be for the limited purpose of the those proceedings and not "disclosure to the whole world" that XX has undergone sex change surgery as would be the case if the information is provided following a request under FOIA.

39. For the reasons given above, we do not consider that a condition in Schedule 3 is met. It follows, therefore, that disclosing that XX has undergone sex change surgery would breach the first data protection principle.

Conclusion and remedy

40. For the reasons given above we find that confirming or denying that the information is held would breach the first data protection principle. The Trust was entitled to refuse to comply with the request on the basis of section 40(5)(b)(i) of FOIA.

41. Our decision is unanimous.

Annabel Pilling

Tribunal Judge

Date: 5 October 2011