



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

EA/2011/0169

**ON APPEAL FROM:
The Information Commissioner's Decision
No: FS50315491 dated: 28 June 2011**

Appellant: Ms Siobhan Mcilfattrick
Respondent: Information Commissioner
Determined: On the papers
Date of decision: 27 February 2012

Before

**Anisa Dhanji
Judge**

and

**Suzanne Cosgrave and Dave Sivers
Panel Members**

Subject matter:

Freedom of Information Act 2000 – whether the public authority has complied with section 1(1); whether information is personal data within the scope of section 40(1).

Cases:

Durant v Financial Services Authority [2003] EWCA Civ 1746

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DECISION

The Tribunal allows the appeal in part and substitutes the following Decision Notice in place of the Decision Notice dated 28 June 2011.

**IN THE FIRST-TIER TRIBUNAL
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EA/2011/0169

SUBSTITUTED DECISION NOTICE

Dated: 27 February 2012

Public Authority: Surrey County Council

Address of Public Authority: County Hall
Penrhyn Road
Kingston Upon Thames
Surrey
KT1 2DN

Name of Complainant: Siobhan Mcilfattrick

The Substituted Decision:

We allow the appeal in part and substitute the following Decision Notice in place of the Commissioner's Decision Notice dated 28 June 2011.

The Tribunal finds that the information in request 6(b) as set out at paragraph 26 of the determination is not exempt under section 40(1) of the Freedom of Information Act 2000 ("FOIA").

Action Required

Within 20 working days of the Tribunal's determination being promulgated, the Public Authority must disclose to the Complainant such information as it holds coming within the scope of request 6(b).

Signed

**Anisa Dhanji
Judge**

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REASONS FOR DECISION

Introduction

1. The Appellant appeals against a Decision Notice of the Information Commissioner dated 28 June 2011 in relation to various requests for information she had made to the Surrey County Council (the "Council") on 12 November 2009.
2. The background to the request as explained by the Appellant is briefly as follows: She lives in Spain. Her ex-partner and the father of her two daughters, lives in Surrey. In 2008, the daughters visited their father. He refused to return them, until ordered to do so by the High Court. At those proceedings, her daughters were accompanied by Ms KA, a social worker employed by the Borough of Poole Social Services. Subsequently, in 2009, as the result of a request from Social Services in the UK, made through the Red Cross, the Appellant was visited by Social Services in Spain, to assess her lifestyle and her relationship with her daughters. She says she was then subjected to a custody hearing in Spain which caused immense distress to her and daughters.
3. In an effort to understand the involvement of Social Services here, and the propriety of KA's conduct, the Appellant has made a number of requests for information, including to both Surrey County Council (which form the subject of this appeal), and the Borough of Poole (which form the subject of a separate appeal under numbers EA/2011/0171 and 0172).

The Requests

4. On 12 November 2009, the Appellant made six requests for information to the Council. The Council replied on 16 March 2010. It provided certain information. It did not provide other information on the basis either that it was not held, or that it comprised the personal data of third parties.
5. The Appellant requested an internal review. This was carried out and on 1 April 2010, the Council provided certain further information to the Appellant.

The Complaint to the Commissioner

6. On 17 May 2010, the Appellant contacted the Commissioner to complain about the way in which her requests had been dealt with. The Commissioner considered that two of the Appellant's requests, being requests 4 and 6, were for her own personal data and fell to be considered under the Data Protection Act 1998 ("DPA") but that the other four, being requests, 1, 2, 3 and 5, came properly within the scope of the Freedom of Information Act 2000 ("FOIA").

7. In relation to requests, 1, 2 and 3, the Commissioner accepted that the Council's assertion that it held no relevant information. In relation to request 5, he considered that the request was in fact for the Council's policies and protocols in relation to potential conflicts of interest and confidentiality. The Council agreed to process the request on this understanding. Prior to the date of the Decision Notice, this information was provided to the Appellant.
8. The Commissioner also found that the Council had breached section 1(1)(b) of FOIA because it had failed to provide the information in response to request 5, prior to the Commissioner's investigation. The Commissioner further found that the Council had breached section 10(1) of FOIA because it had failed to answer the request for information within 20 working days. However, he did not require any steps to be taken in relation to these breaches. The Council has not appealed against these findings.

The Appeal to the Tribunal

9. The Appellant has appealed to the Tribunal against the Decision Notice.
10. The parties requested that the appeal be determined on the papers without an oral hearing. Having regard to the nature of the issues raised, and the nature of the evidence, the Tribunal was satisfied that the appeal could properly be determined without an oral hearing.
11. In determining the appeal, we have considered all the documents and written submissions received from the parties (even if not specifically referred to in this determination), including in particular, the documents contained in the agreed open bundle of documents. We did not consider it necessary to see the disputed information.

The Tribunal's Jurisdiction

12. The Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the notice is not in accordance with the law, or to the extent the notice involved an exercise of discretion by the Commissioner, he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
13. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, the Tribunal will often receive evidence that was not before the Commissioner.

Statutory Framework

14. Under section 1 of FOIA, any person who makes 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.

15. The duty on a public authority to provide the information requested does not arise if the information sought is exempt under Part II of FOIA. 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.
16. In the present case, the Commissioner found that certain of the information requested was exempt under section 40(1) of FOIA. Under this provision, personal data of the applicant is exempt under FOIA. The exemption it attracts is absolute. However, such information can form the basis for a subject access request under section 7 of the DPA.

Issue

17. In her grounds of appeal, the Appellant asserts that:
 - She does not accept that requests 4 and 6 are about her own personal data and therefore exempt under FOIA; and
 - She does not agree with the Commissioner's findings in relation to her requests 1, 2, 3 and 5.

Findings

Requests 4 and 6

18. Requests 4 and 6 were as follows:
 - “4. *In January/February of this year [2009], Social Services in England instigated contacting the Social Services here in Spain. Who authorised this request? Why was it done? Why was I not contacted first? I request copies of all documentation between the two Services.*
 6. *Under what circumstances, and upon whose authority, did KP interview my daughters, without my expressed permission. Again, is it not common decency, to inform myself, as parent and lawful custodian, of the interview taking place, and the reasons why?”*

The names of the individuals referred to in these and the other requests were stated in full in the requests, but have been redacted for the purposes of this determination.

19. As already noted, the Commissioner considered that these requests were for the Appellant's own personal data and were therefore exempt under section 40(1) of FOIA. He did not, therefore, deal with them further in his Decision Notice.
20. The Commissioner says that since no decision under section 50 of FOIA has been made in respect of requests 4 and 6, the Tribunal has no jurisdiction to deal with the Appellant's appeal on these points. Leaving aside the wider question of whether the Tribunal has jurisdiction to consider points that the Commissioner did not, in the present case the Commissioner made a finding in relation to requests 4 and 6 in that he found that these were requests for the Appellant's personal data and therefore exempt under section 40(1) of FOIA. In our view there can be no question that the issue of whether the information is in fact personal data and therefore exempt is a matter that is proper for the Tribunal to consider. If the Commissioner fell into error on whether the information is or is not exempt, then the notice against which the appeal is brought would not be in accordance with the law.
21. As also already noted, the Appellant disagrees that these two requests were for her own personal data, although she has not explained why she disagrees. The legal definition of "personal data" as found in section 1(1) the DPA (and incorporated into FOIA by section 40(7)), is 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 the 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;

22. The DPA gives effect to Directive 95/46/EC of 24 October 1995 on The Protection Of Individuals With Regard To The Processing Of Personal Data And On The Free Movement Of Such Data which defines "personal data" as follows:

"... any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity"

23. In the Court of Appeal's decision in Durant v Financial Services Authority "personal data" was defined by Auld LJ as follows:

"...not all information retrieved from a computer search against an individual's name or unique identifier is personal data within the Act. Mere mention of the data subject in a document held by a data

controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity."

24. Applying these principles to the present case, we find that the information requested in 4 is the Appellant's personal data. It is information which identifies and relates to the Appellant and her children. By her own evidence, the circumstances in which Social Services in England contacted Social Services in Spain arise from their concerns (however unfounded such concerns may have been), about her lifestyle and relationship with her children. As such we find that the information is exempt under section 40(1). This does not mean that the Appellant cannot access this information. It is just that she must do so, under section 7 of the DPA rather than under FOIA. It appears from the Decision Notice that she may have done so, already in any event.
25. In relation to request 6, we consider that the Commissioner erred in treating this as a single request. In the first part of the request (which we will refer to as request 6(a)), the Appellant seeks information about how KP came to interview her daughters. Since the interview related to a custody dispute between the Appellant and her ex-partner, we accept that this was a request for information comprising her own personal data. Therefore, for the same reasons as set out above in relation to request 4, it falls outside the scope of FOIA.
26. However, we find that the second part of request 6 (which we will refer to as request 6(b)), is a request for generic information in relation to whether a parent must be informed before his or her children are interviewed. This is a request for information not specific to the Appellant and may be addressed in the form of the Council's policies or guidelines on the subject. We consider that request 6(b) is not exempt therefore under section 40(1), and that this information should have been provided to the Appellant under FOIA. The Appellant's appeal succeeds in relation to request 6(b) and the Council must provide such information as it holds coming within the scope of request 6(b) to the

Appellant within 20 working days of the Tribunal's determination being promulgated.

Requests 1, 2, 3 and 5

27. The Appellant's grounds of appeal have not clearly set out the basis on which she disagrees with the Commissioner's findings in relation to these requests. The Tribunal explained to the Appellant, in a directions hearing on 4 November 2011, the importance of doing so. Directions were made for the Appellant to lodge amended grounds of appeal setting out her position in relation to each request, and stating whether she accepted the Commissioner's findings or disagreed with them, and if the latter, the basis on which she disagreed. Although in keeping with the Tribunal's directions, the Appellant did lodge amended grounds of appeal on 29 November 2011, for the most part, she has not said much more than that she does not believe the truth of the information she has been provided, and takes issue with how the Council has dealt with her and her children.
28. For the reasons set out below, we find no reason to set aside any of the Commissioner's findings in relation to requests 1, 2, 3 and 5.

Request 1

29. Request 1 was in the following terms:

"Has KP of Guildford/Surrey Social Services, and KO also known as KA ever worked together for Surrey/Dorset Social Services, and during what period? Your personnel department, and/or, relevant pay sections can supply this information instantly."

30. On 16 March 2010, the Council informed the Appellant that KP had worked for it for 18 years and that she had never worked with, nor did she have any knowledge of KO/KA. In addition, the Council stated that there was no record of KO/KA ever being employed by the Council.
31. The Appellant does not accept the Council's answer. She says that she has it on good source that prior to 2001, KO/KA in question did work for the Council before being transferred to Poole. Her source would not, however, give evidence to the Tribunal. An unsubstantiated assertion of this kind is not evidence, and it does not give sufficient grounds for the Tribunal to doubt the veracity or reliability of the Council's response.
32. We also note that during its investigations, the Commissioner asked the Council to explain in detail how it had searched its records and why it was sure that the answer it had given was correct. We have considered the Council's reply and note that it had searched both its manual and its electronic systems. We are satisfied that the Council did undertake proper searches. We accept, on a balance of probabilities, that the Council does not hold further relevant information in response to request 1.

33. We would note for completeness that subsequently, in its letter of 6 December 2010, the Council relied on section 40(2) of FOIA, stating that the information was exempt because it constituted the personal data of third parties. We do not need to consider whether the exemption properly applies. We find that the Council disclosed such information as it held, whether or not it was required or indeed entitled under the DPA to do so.

Request 2

34. Request 2 was in the following terms:

“Is KO/KA now employed by Dorset/Poole Social Services?”

35. The Council said that it could not answer the question. It did not hold this information in its own records and did not have access to the Dorset/Poole Social Services’ records.

36. We have no basis to doubt this reply. The Appellant says she has received inconsistent information from the Council and from another public authority. However she has not provided evidence of such inconsistency. There would also be no logical reason why the Council would hold information about who is employed by another public authority. It is of course open to the Appellant to direct her question to Dorset/Poole Social Services, to the extent she has not already done so.

Request 3

37. Request 3 was as follows:

“On the 17th November 2008, what was Ms KO’s rostered duty? Again the relevant pay section can verify this instantly.”

38. The Council replied that as it did not employ KO/KA, it did not hold any information about what her duties were on that day. This answer follows logically, of course, from the answer given in respect of request 2. In line with our findings in relation to that request, we accept that this information too, was not held.

Request 5

39. The request here was framed in the following terms:

“Is it deemed normal Social Services practice for one of your staff, emotionally involved with a party to an unlawful abduction of children, to remain involved during legal Court proceedings? Is there nothing in place where that person MUST declare a conflict of interest and remain impartial and uninvolved throughout said proceedings?”

40. The Council explained to the Commissioner that in its view, this request amounted to an allegation, and it is an allegation which they refuted. However, the Commissioner considered and we agree that the request

amounted to a request for the policies and protocols that the Council held on the date of the request in relation to potential conflicts of interest and confidentiality. The Council agreed to process the request on this basis and the Appellant was provided the relevant policies (as set out at pages 84 – 107 of the agreed bundle). We consider that this request has been met and that the Council has provided the Appellant with the information that it holds relevant to her request.

Other

41. There are a few additional points which have arisen which we should briefly address. First, the Appellant takes issue with what she says are factual errors in the Commissioner's Decision Notice. We have considered the errors identified by the Appellant. Although we understand that the Appellant would wish matters concerning her personal history to be recorded accurately, such matters were not material to the Commissioner's findings. In any event, we have reviewed the Commissioner's findings of fact.
42. Second, the Appellant has raised concerns about the conduct of the Council and about the social workers involved in her case. We accept that the events giving rise to the Appellant's requests for information have been distressing for her and her family. The Tribunal's jurisdiction, however, only extends to considering whether the Council has responded to her requests for information as required of it under FOIA. The Tribunal does not have the jurisdiction to consider any broader issues about the Council's conduct or the conduct of individual social workers.
43. Third, the Appellant takes issue with the Commissioner's decision not to require any steps to be taken in relation to the breaches by the Council referred to in paragraph 8 above. Pursuant to section 50(4) of FOIA, the Commissioner has powers to require steps to be taken only where there has been a breach of section 1(1), 11 or 17. There is no such power in relation to a breach of section 10. Although the Commissioner found that the Council had also breached section 1(1)(b) because it had failed to provide the information in response to request 5, that information was provided prior to the date of the Decision Notice. Since compliance had been achieved, there were no steps that could properly have been ordered.

Decision

44. For all the reasons set out above, this appeal is allowed in relation to request 6(b). On all other grounds, it is dismissed. Our decision is unanimous.

Signed:

Anisa Dhanji
Judge

Date: 27 February 2012