



IN THE FIRST-TIER TRIBUNAL

Case No. EA/2011/0216

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM:

Information Commissioner's Decision Notice No: FS50357370

Dated: 21st September 2011

BETWEEN

MR PETER BOLTON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

EAST RIDING YORKSHIRE COUNCIL

Second Respondent

Decided on the papers at Field House on 30th January 2012

with additional written submissions thereafter

Date of decision 26th March 2012

BEFORE:

Fiona Henderson (Judge)

Michael Hake

And

Roger Creedon

Subject matter:

FOIA – s 40 data protection

Cases:

Corporate Officer of the House of Commons [2008] EWHC 1084

Corporate Officer of the House of Commons v IC and Norman Baker MP
EA/2006/0015 and 16

IN THE FIRST-TIER TRIBUNAL

Case No. EA/2011/0216

GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal in part and amends the Decision Notice FS50357370 dated 21st September 2011 as follows for the reasons set out in main body of the Decision and the 2 confidential schedules.

SUBSTITUTED DECISION NOTICE

Dated: 26th March 2012
Public authority: East Riding of Yorkshire Council
Address of Public Authority: County Hall, Beverley, HU17 9BA
Name of Complainant: Mr Peter Bolton

The Substituted Decision:

East Riding of Yorkshire Council breached s1(1) FOIA in that the items listed for disclosure in Confidential schedule 1 were wrongly withheld pursuant to s 40 FOIA as either they do not contain personal data or disclosure would not breach the first data protection principle.

Action Required:

Within 35 days, the Council are required to disclose the material listed for disclosure in Confidential Schedule 1.

Signed:

Fiona Henderson

(Judge)

REASONS FOR DECISION

The request for information

1. On 2nd June 2010 Mr Bolton requested information from East Riding of Yorkshire Council (ERYC) regarding the remuneration and appointment of their Chief Executive Officer which included the following:

"...all recorded information, E-mails, Council meeting minutes, research & reports held by you in whatsoever files concerning the appointment of Mr Pearson to his current position of Chief Executive Officer with the local authority"

2. ERYC replied on 16th December 2010 (substantially beyond the 20 working days set out in the Act). They supplied some information relating to CEO remuneration but refused to disclose information about his appointment relying upon s40 FOIA (disclosure would breach the data protection principles.)
3. Pursuant to an internal review in February 2011 ERYC disclosed the minutes of the Appointment Committee that resolved upon the appointment of Mr Pearson. This also named the 2 unsuccessful interviewees. They continued to rely on s40.
4. Mr Bolton complained to the Commissioner who held that the remainder of the information was properly withheld pursuant to s40 FOIA in his decision notice. He also held that there was a substantial breach of s10 FOIA in relation to the delay in responding to his initial request.
5. Mr Bolton has appealed on the grounds:
 - i) The Commissioner relied upon his decision FS50242593 as a precedent to determine this case, and this is wrong in law,
 - ii) The Commissioner erred in finding on the facts of this case that the information should be withheld pursuant to s40 FOIA;
 - iii) The Commissioner was wrong not to impose sanctions against ERYC in relation to the s10 FOIA breach,
 - iv) The Commissioner erred in construing the information request as being only for information directly relating to the named individual when the

request in fact encompassed information relating to the whole recruitment process.

6. The Tribunal joined ERYC as the second respondent, and the Appeal was determined on the papers with the consent of all parties. The Tribunal has considered all the material before it in reaching its decision. The Tribunal's reasons are set out in the open decision as far as is possible. Confidential schedule 1 refers directly to the disputed information that the Tribunal orders should be disclosed, it is to remain confidential until after the information so ordered has been disclosed by ERYC. Confidential Schedule 2 refers directly to the information that the Tribunal orders should remain withheld and is to remain confidential.

Preliminary Matters:

7. Pursuant to consideration of the case upon the papers the panel realized that a former senior officer of ERYC is a lay member of the Information Tribunal. This individual features in Mr Bolton's arguments particularly in relation to schedule 2 condition 6 DPA. The Tribunal therefore notified the parties that all the panel members have either attended Information Tribunal training events with this member and/or sat on Information Tribunal panels with him. The parties accepted that it was likely that this situation would be common to any composition of members of the information Tribunal and the panel did not recuse itself.

Ground iv Scope.

8. In his letter to the Commissioner of 11th September 2011 Mr Bolton stressed that he wanted information which would help him understand the following matters:
 - a) When and where was the position of CEO advertised?
 - b) How many applicants applied, and how many of these from ERYC?
 - c) What were the qualifications of these applicants?
 - d) How and by whom were the applicants short listed?
 - e) Was it ascertained how long the applicants would serve before early retirement?

9. The Commissioner has never accepted that these matters fall within the scope of the request when construed objectively. He maintains that the terms of the request are limited to information about Mr Pearson. ERYC provided some additional information (with personal data redacted) namely:

- The Advertisement
- Timetable
- Programme of Events and Action Required
- List of Applicants.

ERYC have not indicated whether they accept that this material was within scope or whether disclosure has been made on a voluntary basis outside the terms of the request.

10. ERYC have confirmed that:

“In accordance with Council Policy the application forms and interview notes in relation to the unsuccessful candidates were destroyed six months after the recruitment process”.

11. The Tribunal is satisfied that even on the ERYC and Commissioner’s interpretation of the request as relating to information directly concerning Mr Pearson, their approach was inconsistent. The Advertisement, the timetable, the programme of events and action required, all pertained directly to Mr Pearson. The Tribunal is satisfied additionally that the Commissioner’s interpretation when construed objectively is too narrow. Although it is accepted that the context of the request as a whole also included a direct request for details of Mr Pearson’s remuneration, the Tribunal notes that this request was for:

“...all recorded information... concerning the appointment of Mr Pearson...”¹

¹ Emphasis added

12. The reference to Mr Pearson identifies which appointment competition is being referred to. ERYC and the Commissioner have construed the request as meaning “directly related to” whereas the Tribunal is satisfied that “concerning” is less directed and wider in scope. “Appointment” has already been construed by ERYC and the Commissioner as the “appointment process” in that the information withheld concerns more than the appointment letter. The process encompasses the steps involved in making the decision that has been taken. Mr Pearson was appointed **by comparison to others:** the answers given by others in interview, and their application forms have all been compared to Mr Pearson’s and taken into account in the deliberations leading up to appointment. The Tribunal is satisfied therefore that this material and any notes made about the strength of their application concern the appointment of Mr Pearson and consequently would fall within scope.
13. ERYC have identified that they have considered the draft and final contract as within scope and but for the reliance upon s40 would have disclosed it. The Tribunal has therefore not been asked to decide whether it does in fact fall within scope but whether the contract should be withheld pursuant to s40 FOIA.
14. In light of its findings as set out above, the Tribunal adjourned the case in order to seek additional evidence from the Second Respondent. As a result of this:
 - The job specification and criteria for appointment have been disclosed and
 - a minute of Council has been disclosed confirming the appointment.

ERYC confirmed that

- i) The webpage information (if different from the editorial already disclosed)
 - ii) The selection matrix
 - iii) any longlisting or shortlisting comments
- have been searched for and are not held.
15. The Tribunal has not sought evidence as to when the information was destroyed as in light of the date of request being some 6 years after the appointment we are satisfied on a balance of probabilities that it would not have been held around the date of the request.

Ground i) Reliance upon FS50242593

16. Mr Bolton objects to the Commissioner's reference to decision FS50242593 in consideration of his case. He appears to have formed the view that the Commissioner may have fettered his discretion and failed to consider the circumstances of this case.
17. The Commissioner accepts that FS50242593 is not binding upon him or the Tribunal neither does he suggest that the case is on all fours with this case. He argues that it sets out general principles and is relied upon as setting out the arguments in relation to disclosure of personal data in the context of employment applications. In effect the case is being used to avoid repetition. The Tribunal notes that an appeal constitutes a complete rehearing on facts and law and considers that this ground is misconceived as it is in fact an argument under ground ii) namely that on the facts the Commissioner was wrong to conclude that the data protection principles would be breached by disclosure.

Ground ii) Section 40 FOIA

18. There is no dispute that the disputed information contains personal data and that as such s40 FOIA applies. Under s40(3) FOIA disclosure to the public otherwise than under this Act must not contravene any of the data protection principles. Pursuant to the first data protection principle:

Personal data shall be processed fairly and lawfully...

Guidance is given as to what is meant by "fairly" in paragraph 1(1) of Part II of Schedule I and "*regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed.*"

19. The Tribunal is satisfied that the applications were made in confidence. This is an undertaking given by the Council on the application form and the general practice in recruitment. Applicants would not expect that the fact that they had applied or the details of their application or the recruitment panel's views of the merits of their application would be disclosed unless it was required as part of the recruitment process. The Tribunal is satisfied that the expectation of privacy would not vary significantly between private or public positions. The Tribunal accepts that the

personal data in an application does not relate to the performance of the public role applied for. That is scrutinized separately.

20. The Tribunal notes that the assessment of fairness does not rest entirely upon the data subject's expectation but also includes striking a balance between the reasonable expectation of the data subject with general principles of accountability and transparency.² This overlaps with the considerations set out in Condition 6 of Schedule 2 DPA (which must also be met if disclosure is not to breach the first data protection principle). Condition 6 provides;

(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.

Necessary implies the existence of a "pressing social need" rather than something useful or desirable.³

21. The Commissioner and ERYC argue that disclosure could cause considerable damage or distress to job applicants if details about their applications are disclosed to the public as disclosure has the potential to damage an applicant's career prospects if their current employer did not know they were applying elsewhere. The Tribunal notes that in the case of Mr Pearson he was already employed by ERYC who consequently were aware of his application, however this is material in relation to other applicants.

22. The Tribunal also observes that disclosure has the potential to damage an applicant's career prospects in future applications as:

i) it sets out an applicant's pitch, the unique selling points that they hoped would persuade the panel to appoint them. Competitors would know how their rivals were likely to frame their application in future situations,

ii) prospective employers would know that an applicant had been unsuccessful in this competition.

² *The Corporate Officer of the House of Commons v IC and Norman Baker MP EA/2006/0015 and 16*

³ *Corporate Officer of the House of Commons [2008] EWHC 1084*

23. It might still be fair and warranted to disclose information where the public's legitimate interest is particularly compelling. Mr Bolton argues that there is considerable public interest in the scrutiny of the recruitment process of the chief executive because he was an internal candidate appointed in preference to 2 external candidates and the previous chief executive retired early and at some additional financial cost to the Council. He argues that disclosure should be made because:
- a) There has been a massive explosion in Public Sector pay particularly at senior levels,
 - b) This has led to high pension payouts coupled to early retirement packages aged 55,
 - c) Elected local authority Councillors have little control over these payments (especially under the "cabinet" system),
 - d) Cabinet members are not familiar with the full facts,
24. The Tribunal agrees with the Commissioner's assessment that there is no evidence of public concern about the recruitment of the Chief Executive or concern that the process improperly favoured an internal candidate, but some public concern relating to the previous Chief Executive's early retirement. The Tribunal considers that the arguments rehearsed above relate to the early retirement issue and are not directly material to the appointment of a new Chief Executive.
25. Mr Bolton argues that Mr Pearson compiled a report for Council advising upon the early retirement package of the Chief Executive, and that the retiring Chief Executive was involved in the administration of the recruitment process for his successor. Further Mr Bolton argues that elected members are being advised by Council officers with a vested interest in preserving the system (in this case favouring their colleague). Whilst Mr Bolton may have concerns about the process of appointment, the documents available to us suggest it was conducted in an open and transparent way with elected Councillors taking the decisions within a prescribed framework. The role of senior Officers and the Councillors who were involved in the process that was followed is apparent from the disclosure of redacted documents as set out in confidential schedule 1.

26. The Tribunal is satisfied that:

- a) there is a public interest in transparency of public sector organisations and in the public knowing that senior appointees are properly qualified to fulfil the posts requirements,
- b) there is a public interest in knowing that recruitment has been undertaken in an open and fair competition.
- c) There is a public interest in knowing how the appointment process was carried out.

But disclosure is only permissible where these interests outweigh the potential damage and distress caused by disclosure.

27. The Tribunal is satisfied that in relation to material that identifies other applicants disclosure would be unfair for the reasons set out above.

28. In relation to the successful applicant, Mr Bolton argues that Mr Pearson had held director status since 1995 with ERYC. Where a data subject holds a senior public position, they must expect that their public actions will be subject to greater scrutiny than their private lives⁴. The Tribunal accepts this principle but notes that the application for a job by the applicant is not the exercise of executive function on behalf of a local authority. Similarly whilst the interests of data subjects are not paramount where the data processed relates to their public lives⁵ the Tribunal draws a distinction between the application process leading to appointment and conduct once appointed.

29. Much of the information requested is not personal but general. Mr Bolton points to the large amount of biographical and career detail available about the Deputy Prime Minister and argues that senior appointed members of a Local Authority should not have greater privacy from disclosure than him.

30. The Tribunal accepts the Council's contention that a job application is in part a "life story" and that this is deeply personal. They do however, also accept that what is

⁴ *The Corporate Office of the House of Commons v IC and Norman Baker MP EA/2006/0015 and paragraph 78*

⁵ *The Corporate Office of the House of Commons v IC and Norman Baker MP EA/2006/0015 and 16paragraph 79*

termed personal data has been drawn with a broad brush by ERYC with whole documents being withheld because they contain some personal data. As set out in confidential schedule 1, the Tribunal finds that insufficient consideration has been given to the redaction of the disputed information so that the personal data is removed but the surrounding information which demonstrates responsibilities, processes, and expectations can be made public. When considering whether the first data protection principle is breached by disclosure, the Tribunal considers whether the legitimate public interests can be met without the disclosure of personal data. The Tribunal is satisfied that in some instances disclosure of redacted documents such as the blank application form adds to the transparency surrounding the application process.

31. Whilst much of the detail is career related it remains personal data and was provided in the expectation that it would not be disclosed. We note the level of seniority of the Deputy Prime Minister and that he is an elected individual. In that context the application process to be appointed to office is by seeking election which is entirely conducted in the public domain. He would have the expectation that this material would enter the public domain and may even have placed it there himself.

32. The 3 interview candidates had to give a presentation as part of the interview process. The presentation of Mr Pearson has been retained, but not of the other interviewees. The Tribunal is satisfied that this should not be disclosed because:
 - a) These are his personal thoughts on a professional situation, his private view may differ from his professional advice when in post.
 - b) It shows how he constructs an argument for the purposes of applying for a job,
 - c) It is a theoretical argument. The information is not necessary for scrutiny of his policies because were he to seek to implement his vision this would be through the democratic process which is subject to public scrutiny.

33. The withheld material includes the identity and role in the recruitment process of certain Officers and Councillors of ERYC. ERYC argue that Senior Officers are acting in an administrative and advisory capacity, and they are not the makers of the decision to

appoint and they would therefore have not expectation of disclosure. The Tribunal is satisfied that those in senior posts should be disclosed on the basis that it is part of their job, they are senior, forward facing and disclosure is in the interests of transparency in showing how decisions were made and by whom. There is a public interest in understanding how the process was carried out. The Tribunal is satisfied that this applies to team leaders or service heads, the Chief Executive⁶ and any Councillors. Others do not hold end of the line authority and disclosure in this context would put them in the spotlight unfairly when they are not ultimately accountable.

Ground iii s10 FOIA

34. The right to complain to the Commissioner is provided for in s50 FOIA:

(1) Any person (in this section referred to as “the complainant”) may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.

Consequently the Commissioner is empowered to make a decision as to whether s10 FOIA has been breached or not.

35. The power to require steps to be taken is provided for under s50(4)

Where the Commissioner decides that a public authority—

(a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or

(b) has failed to comply with any of the requirements of sections 11 and 17,

the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.

This limits the Commissioner to the power to require remedial steps to cases where information has not been provided, has been provided in the wrong format or has breached the refusal provisions. S10 is not listed as a section whereby the Commissioner

⁶ The retiring incumbent and not Mr Pearson who was the successful applicant

has the power to require remedial steps to be taken. As a matter of law the Commissioner had no power to impose sanctions as the appellant seeks him to do.

36. Whilst the Commissioner has the power to make a recommendation of good practice to a public authority pursuant to s48 FOIA, this does not fall within part I of the Act, consequently s50 FOIA⁷ is not applicable, and neither is s57 FOIA⁸. This Tribunal has no jurisdiction to determine how the Commissioner chooses to apply s 48 FOIA. For these reasons this ground of appeal must fail.

Other Matters

37. During the Commissioner's investigation (and in a submission to this Tribunal), ERYC relied upon s41FOIA⁹ in relation to Mr Pearson's presentation given during the interview, namely that this information was provided in confidence and disclosure would breach that duty of confidence owed by ERYC. Although the material was withheld pursuant to s40, the Commissioner made no reference to this in the Decision Notice and there is no evidence that Mr Bolton was even informed at the time that ERYC were relying upon this additional ground. The Tribunal considers this to be an error as it is depriving him of all the relevant information he needs when assessing whether to lodge an appeal.
38. When the case was appealed by Mr Bolton, ERYC failed to refer to s41 FOIA in their reply. The case was subject to a telephone directions hearing where the issues were clarified s41 FOIA was not raised then. Whilst the letter in which s41 FOIA was raised with the Commissioner was disclosed as part of the open bundle, it was not apparent that ERYC still wished to rely upon s41 until ERYC's written submissions.
39. The Tribunal has in fact determined this case with reference to s40 FOIA alone and so no issue relating to s41 arises, however, had that not been the case, the Tribunal indicates that it would have required argument as to whether ERYC were entitled to rely upon s 41 FOIA at the Appeal.

⁷ Application for a decision notice

⁸ the right to appeal to this Tribunal

⁹ Confidentiality

Conclusion

40. The Tribunal is satisfied that ERYC and the Commissioner's reading of the request was too narrow. The personal data of Mr Pearson and the other applicants should be withheld pursuant to s 40 FOIA as disclosure would breach the first data protection principle. The personal data relating to senior Council employees and Councillors should be disclosed, but that of junior employees should be withheld pursuant to s40 FOIA. Many of the withheld documents should be disclosed in redacted form with the personal data removed as set out in confidential schedule 1.
41. For the reasons set out above, the Tribunal allows Mr Bolton's appeal in part. The Tribunal's decision is unanimous.

Fiona Henderson

Judge

Dated this 26th day of March 2012