



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No.EA/2011/0271

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50413676
Dated: 7 November 2011**

Appellant: MR BILL BAILEY

Respondent: INFORMATION COMMISSIONER

Second Respondent: NOTTINGHAM COUNTY COUNCIL

On the papers on: 2 March 2012

Date of decision: 27 March 2012

Before

ROBIN CALLENDER SMITH
Judge

and

JOHN RANDALL and MARION SAUNDERS
Tribunal Members

Representation:

For the Appellant: in person

For the Respondent: Anneliese Blackwood, Counsel for the Information
Commissioner

For the Second Respondent: Sue Bearman, Senior Solicitor, Nottingham County
Council

Subject matter:

FOIA

Absolute Exemptions

- Personal data s.40

Cases:

Blake v Information Commissioner and Wiltshire County Council (EA/2009/0026)
and *Waugh v Information Commissioner and Doncaster College (EA/2008/0038)*.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 7 November 2011 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The Appellant wanted information about investigations and disciplinary hearings involving employees in Nottinghamshire County Council's Building Cleaning Service.

The request for information

2. On 21 June 2011 he wrote to the Council asking for a copy of the Nottinghamshire County Council's staff disciplinary procedure. Additionally for staff employed during a specific period within the Council's Building Cleaning Services – including schools – he requested:

- (1) How many staff have been subject to management and/or audit investigations as regards potential disciplinary proceedings;
- (2) Copies of any management and/or audit investigations, suitably redacted;
- (3) How many formal disciplinary hearings have been held and the reasons why e.g. theft, unauthorised use of council vehicles etc.
- (4) The result of those formal disciplinary proceedings e.g. written warning, dismissal etc.

Can you please supply information requested at 2 the staff employed within the Ashfield area and, separately, the staff employed within the Bassetlaw area?

3. The Council replied on 4 July 2011. It disclosed the number of disciplinary cases in the requested timeframe together with the reason and result of those cases. It refused to provide any copies of management/audit investigation relating to those cases relying on s.40 FOIA (personal information).

4. The Appellant wrote back on the same day stating:

I asked for how many investigations not how many disciplinary procedures had been held. I would therefore ask if there have been any management/audit investigations that may not have resulted in disciplinary procedures, the thrust/reason for the investigation and the reason why a disciplinary hearing was not held.

5. The Council responded to this new request on 6 July 2011 relying on s.40 FOIA as its reason for refusing to provide the requested information. The Appellant then told the Council that similar information had already been given where the investigation resulted in disciplinary action and maintained that he was only asking for the same level of information.
6. There was an internal review and the Council wrote to the Appellant on 25 July 2011 upholding his appeal in part – releasing the fact that there had been one audit investigation in the time period specified and disclosing that information insofar as it related to operational matters – but told the Appellant it would neither confirm nor deny whether that investigation had led to any disciplinary proceedings. It withheld any further information in response to his request under s. 40 FOIA.

The complaint to the Information Commissioner

7. The Appellant clarified to the IC that his complaint related to the Council's failure to say if a disciplinary hearing had been held in respect of the audit investigation; its refusal to provide the results of the hearing if a disciplinary hearing had been held; and its refusal to provide the reason(s) why no hearing was held if no disciplinary hearing took place.
8. The Council told the IC it was relying on s.40 (2) on the basis that whether or not anyone in its employment had been subject to disciplinary procedures was personal information.
9. The IC was satisfied that all the withheld information fell within the definition of personal data because it 'related to' information about one or more identifiable living individuals who might have been the subject of an

audit investigation. The withheld information would have related to an audit investigation and whether disciplinary proceedings followed. The IC was satisfied that the data subject(s) would have had a reasonable expectation that their personal information will be kept confidential and not passed on to third parties without their consent. The Council indicated that consent had not been sought on the basis that it would not be given. The IC considered that, although it would be good practice to seek consent, there was no obligation to do this.

10. The IC accepted the Council's position that – if the withheld information was released into the public domain – it would be possible for someone with local knowledge to determine who was involved in the investigation even if the information was redacted.
11. Because the information at issue related to a specific audit investigation the IC considered the disclosure of any information about the investigation and its outcome was likely to lead to the identification of the individual(s) concerned. That would have an unjustified adverse effect on the individual(s) concerned.
12. In the light of the nature of the information and the reasonable expectations of the individuals concerned, the IC was satisfied that to release the withheld information would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the data subjects. Those arguments were persuasive and outweighed any legitimate interest in disclosure. He concluded that it would be unfair to disclose the withheld information because it would breach the first data protection principle.
13. The Appellant appealed against the IC's decision on the grounds that there could not be any difficulty in disclosing the disputed information as it was similar to information that had already been disclosed to him in response to previous requests.

14. In addition, the Appellant argued that it was wrong for the IC to take into account the fact that a person could have additional information which would enable the inquirer to identify the individuals referred to in the disputed information. Adopting that approach would mean that all requests for personal information would have to be refused.
15. The Appellant believed the IC had accepted the Council's argument that the disclosure of the disputed information "could result in harassment causing unnecessary and unjustified distress or damage" without giving any reasons.

Evidence

16. The Tribunal considered both open and closed submissions in relation to the disputed information.

Conclusion and remedy

17. The Tribunal has been able to consider the nature of the disputed information. It notes that it relates to an internal audit investigation and whether or not disciplinary proceedings were conducted. It is clear that there would be a reasonable expectation of any data subjects that the disputed information would not be disclosed because it would be unfair and would breach the first data protection principle.
18. The Tribunal reminds itself of the formulation in *Waugh v IC and Doncaster College* where it stated (Paragraph 40):

...there is a recognised expectation that the internal disciplinary matters of an individual will be private. Even amongst senior members of staff would still be a high expectation of privacy between an employee and his employer in respect of disciplinary matters. The majority of the information sought consists of material not normally available to the public.

19. There is nothing in the circumstances of this request that persuades the Tribunal to depart from the principle set out above. Disclosure of the disputed information would not be fair.
20. Multiple audit investigations fell within the scope of the Appellant's previous information requests because they were set in the context of a wider timeframe. This meant that it was harder for a recipient of the information to identify who were the data subjects of the audit investigations and what disciplinary consequences had occurred (if any).
21. In this appeal the disputed information concerned only one audit investigation and whether disciplinary proceedings followed. It is clear that it would be significantly easier for the data subject(s) of the disputed information to be identified. The IC was quite correct to differentiate these two situations.
22. The Tribunal is also satisfied that the IC gave reasons for arriving at his conclusion in Paragraph 32 of the Decision Notice. The function of the Tribunal is not to provide a critique on whether fuller reasons should have been contained in the decision notice if the decision notice itself is in accordance with the law and the IC exercise his discretion correctly.
23. The Tribunal has been able to inform itself fully on this point by considering the closed information and has no hesitation in finding to the required standard – the balance of probabilities – that the IC's decision (as well as Nottinghamshire County Council's initial stance on this issue) was correct.
24. Our decision is unanimous.
25. There is no order as to costs.

Robin Callender Smith
Tribunal Judge
27 March 2012