IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0203**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50377314
Dated: 9 August 2011

Appellant: The Home Office

Respondent: The Information Commissioner

Heard at: Central London County Court

Date of hearing: 9 February 2012

Date of decision: 27 March 2012

Before
CHRIS RYAN
(Judge)
and
ALISON LOWTON
RICHARD ENDERBY

Attendances:

For the Appellant: Charles Banner
For the Respondent: Michael Lee

Subject matter: Personal data s.40

Cases: *Corporate Officer of the House of Commons v Information Commissioner* [2008] EWHC 1084 (Admin)

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0203**
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed and the direction in the Decision Notice dated 9 August 2011 that the Home Office should disclose the names of certain individuals is reversed.

REASONS FOR DECISION

Introduction and Background

1. On 18 October 2010 a member of the public sent the UK Border Agency a request for information about its policy and practice in respect of the requirement for any EEA national seeking a right to reside in the UK to hold comprehensive sickness insurance. Under section 1 of the Freedom of Information Act 2000 ("FOIA") a public authority is required to comply with such an information request unless the effect of other provisions of FOIA is that the information is exempt or need not be disclosed for another reason.

2. The UK Border Agency is not a public authority. It is an executive agency of the Home Office. The Home Office was therefore responsible for the way in which the information request was handled and is the Appellant in this appeal.

3. The Home Office disclosed some information, but withheld some more, relying principally on the exemption provided by FOIA section 35 (prejudice to formulation of government policy). Following an internal review of that partial refusal, and a complaint to the Information Commissioner about the manner in which the information request had been handled, the Information Commissioner issued a Decision Notice on 9 August 2011 ("the Decision Notice") in which he upheld the right of the Home Office to withhold information under that exemption. However the Information Commissioner concluded that the Home Office had been wrong to redact certain individual's names from documents which it had voluntarily disclosed. The redactions had been made on the basis that the names were exempt information under FOIA section 40 (personal information of an individual). The Information Commissioner disagreed that the exemption applied to staff holding a grade of Higher Executive Officer ("HEO") or above and directed the Home Office to release the names.

4. The Information Commissioner's decision applied to just three names. The first ("A") was the first name of an individual to whom an internal email had been sent by a colleague. The second ("B") was the first name and surname of that colleague, a Senior Executive Officer ("SEO"). The message itself operated as a short reminder of the effect of the rules regarding comprehensive sickness insurance and asked the recipient to circulate it to Senior Caseworkers so that they, in turn, could remind their teams.

5. The third name ("C") was the first name and surname of an individual who had signed a letter to a member of the public providing an explanation of the UK government's position on its implementation of the comprehensive sickness insurance requirements contained in a particular EU Directive. The letter was on the headed paper of the "European Operational Policy Team, North West Region" of the UK Border Agency and the writer recorded his or her position as "HEO Policy Officer".

The appeal to this Tribunal

6. The Home Office launched an appeal against the Decision Notice on 6 September 2011, in which it asserted that it should not have been directed to disclose the names of individuals holding the grade of either HEO or SEO.

7. The Tribunal's role on such an appeal is to consider whether or not the Information Commissioner's decision was "in accordance with the law" (FOIA section 58(1)). If it considers that it was not, it may issue such other notice as it considers appropriate, in substitution for the Decision Notice. The Tribunal may review any finding of fact on which the Decision Notice was based.

8. By the time that the appeal came on to be heard the Home Office had agreed to the release of the name of A and we therefore do not need to give further consideration to the personal data of that person.

Evidence

9. The Home Office submitted witness statements signed by Ms Rachael Etebar and Mr Jonathan Devereux. Both witnesses attended the hearing and were cross examined on their evidence. They both provided clear and helpful answers to the questions put to them by counsel for the Information Commissioner and by members of the Tribunal panel.

Ms Etebar

10. Ms Etebar is the HR Director for the UK Border Agency. She is therefore familiar with the levels of responsibilities of Home Office staff and explained the key functions of both an HEO and an SEO. She

also exhibited a document entitled "Job Evaluation and Grading Support", which provided grading guidance in respect of a number of Home Office grades, including the HEO and SEO grades. Her summary of the key functions for each grade, which was broadly consistent with the grading guidance, was as follows:

(a) HEO: The office-holder would be likely to have a good understanding in a specialist area and be responsible for policy support, including research and analysis for thosefulham at higher levels. He or she would make decisions in the area of specialisation and would draft correspondence and represent the Home Office at both internal and external meetings at their own level. The HEO grade is the lowest grade where a degree of line management would be expected. The exercise of judgment and discretion would be subject to definite limitations or clear practice and precedence to guide the individual's work.

(b) SEO: This is the lowest grade which may involve formal line management responsibilities and in which the exercise of discretion would be expected, with the office-holder being accountable for the achievement of objectives and targets within their responsibilities. Those at SEO grade would assume responsibility for specific areas of work and have substantial knowledge about that particular area of work. Their decision-making may be interpretive, but the options available would be likely to be limited.

(c) Both grades are therefore below the Senior Civil Service level where individuals may be expected to accept accountability for projects and policies (subject to ministerial oversight), or make public statements about them.

11. Ms Etebar also explained the relatively rigid hierarchy that exists in the Civil Service and, when answering questions during the hearing, explained that it would be quite unusual for an HEO to assume any of an SEO grade's functions, even on a temporary basis. She exhibited material on the job evaluation of senior civil service posts and drew attention to the fact that the evaluation of those in the Senior Civil Service grades "*specifically measures accountability, 'defined as the requirement to "carry the can" and "be answerable" for the use of resources, decisions, including the advice given as the last word in the area concerned, and for results against the achievement of goals."*

12. Part of Ms Etebar's evidence dealt with the practices adopted when considering whether the name of a member of staff, below the Senior Civil Service level, should be released into the public domain, as well as the reasons behind the Home Office's reluctance to do so. She exhibited guidance on the disclosure of information about colleagues. Although it was said that this gave rise to an expectation among individuals that their personal data was likely to be protected, we found

it significantly less helpful than the objective grading information. Guidance about disclosure should follow and reflect the decisions on the subject made by this Tribunal and the Information Commissioner; it carries little weight in influencing how those decisions should be made.

Mr Devereux

13. Mr Devereux is a Grade 7 Assistant Director and is responsible for operational policy within the UK Border Agency. He explained the hierarchical nature of the management structure, under which he would be involved in the formulation of policy but would need to escalate, to Director level, the finalisation of any new policy proposal he developed and proposed for adoption. Individual B (the SEO) and individual C (HEO), who worked with Mr Devereux on European Operational Policy, were similarly constrained from extending their activities beyond the role defined by their respective job descriptions. The job descriptions were exhibited to Mr Devereux's statement.

14. The job description for the SEO's role included providing policy advice on operational issues and support and guidance for casework teams, including the clarification and interpretation of existing policy. The description also covered contributing to the development of policy, including the preparation of briefings for Ministers, although Mr Devereux said in his witness statement that the role on policy development was limited in practice to undertaking research for, and making recommendations to, himself, which he would incorporate into an appropriate recommendation to higher levels of management. Finally, the job description included the preparation of responses to queries from the public within the SEO role.

15. The HEO job description listed the provision of policy information and advice to colleagues, other departments or the public as well as the preparation of policy notices and guidance. The HEO would also attend meetings as required and provide updates on policy development and legislative changes. Mr Devereux stated that this individual would attend meetings in a "recording and noting role".

16. Mr Devereux acknowledged that both B and C had, on occasions, responded to queries from the public in letters which disclosed their name and role. However, he said that he maintained close supervision over this function and would himself deal with policy queries of a complex nature, or those requiring opinions on aspects of policy which had not previously been addressed. He would also take personal responsibility for any meetings with members of the public, which might arise from a policy query.

17. Mr Devereux said that the communications involved in this Appeal, to which the two individuals had put their names, therefore covered quite specific topics and were written within the fairly tight constraints

imposed by their superior. He considered that the individuals would not expect their names to be disclosed in response to a freedom of information request and stated that, when asked, they had each said that they did not consent to disclosure.

18. The witness statement included a very fair acknowledgement that, due to a technical error, the names of individual's B and C had been included as contact points for queries arising from certain instructions to case worker teams, which had been released in response to another freedom of information request. However, he suggested that this should not undermine the reasonable expectation of the individuals that their names should not be released.

The relevant statutory provisions

19. The relevant parts of FOIA Section 40 read:

> *" (1) …*
>
> *(2) Any information to which a request for information relates is also exempt information if—*
>
> *(a) it constitutes personal data [of an individual, other than the requester], 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 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), and*
>
> *(b) … "*

20. The " data protection principles" are defined in sub-section (7) to mean the principles set out in Part I of Schedule 1 to the Data Protection Act 1998 ("the DPA"). The first data protection principle 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, and*
>
> *(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."*

21. The conditions in Schedule 2 read:

> *"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 –*
>
> *(c) for the administration of justice,*
>
> *i. (aa) for the exercise of any functions of either House of Parliament,*
>
> *(d) for the exercise of any functions conferred on any person by or under any enactment,*
>
> *(e) for the exercise of any functions of the Crown, a Minister of the Crown, or a government department, or*

(f) 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 interests of the data subject.

(2) …"

22. The condition that applies in this appeal is condition 6.

<u>The issues to be determined in this appeal</u>

23. The parties agreed that the name of each of the individuals in question constituted their personal data and that the two issues to be addressed were whether the disclosure of those names would be:

    (a) "fair"; and

    (b) in accordance with Condition 6(1).

    The parties also agreed as to the approach to adopt in relation to issue (b). This was to ask whether disclosure would be:

    (i) *"necessary for the purposes of legitimate interests"* and

    (ii) not *"unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject*".

24. We propose to deal, first, with the question of whether the disclosure of the names of the individuals would have been necessary for the purpose of any legitimate interest. We believe that it would not.

25. Both sides relied on the decision of the High Court in *Corporate Officer of the House of Commons v Information Commissioner* [2008] EWHC

1084 (Admin), in establishing that, in assessing what disclosure may be "necessary for the purposes of a legitimate interest", we should follow the approach of the European Court of Human Rights when considering any interference with a right provided under the European Convention on Human Rights. That approach is to consider whether there is a "pressing social need". The Information Commissioner submitted that there was a legitimate public interest in the names of B and C being disclosed and that disclosure was necessary to meet that interest. The public interest, he said, lay in achieving transparency in understanding how the UK Border Agency developed policies and instructions, and how they were communicated both internally and externally. Knowing the names of, not just the senior civil servants responsible for policy development, but also of those, like B and C, responsible merely for communicating policies and procedures served that interest.

26. We reject the argument of the Information Commissioner on this point. There may well be a pressing social need for the public to know the policy and its application (encapsulated, on the facts of this case, in the content of the communications to which B and C put their names). There may also be such a need for the public to know how policy is developed and who, in the higher levels of the civil service, takes responsibility for its development. However, we can see no such need for the public to know the identity of an individual who does no more than communicate basic policy detail or explain its effect at the level of detail appearing in the communications with which we are concerned in this Appeal.

27. The Home Office argued that, having reached that conclusion, it must follow, without further enquiry, that disclosure would not be fair and would constitute an unwarranted interference into the individual's privacy. We think that, too, is right. However, in case it is found on appeal that our conclusion is wrong, we go on to consider the issues of fairness and unwarranted interference.

28. The Information Commissioner argued that the intrusion into the individual's privacy would be very limited, just their names and their position in a public service, and that they must expect a degree of public scrutiny in those roles. He highlighted the level of responsibility each undertook and that their roles were to some degree public facing. He relied, in particular, on the fact that they both put their names to written communications with members of the public and suggested that, in those circumstances, they could have no objectively reasonable expectation of privacy.

29. The Home Office challenged each of those arguments and contended, in addition, that the interaction between the two individuals, on the one hand, and members of the public, on the other, was limited. It also suggested that, as the subject matter was relatively sensitive, disclosure would create a risk of unfair public criticism or ridicule. The Information Commissioner challenged that suggestion.

30. We believe that immigration issues do generate strong reactions among the public and that those handling the consequences of policies in that area, but not directly responsible for their formulation or adoption, are entitled to expect a degree of protection from mis-directed criticism. The individuals under consideration in this Appeal reiterate and explain policy. They may also assemble information and formulate arguments leading to the ultimate adoption of particular parties. But it is clear from their job descriptions that they operate at several levels below that at which policy is formulated or determined.

31. We were encouraged to take into account other factors, such as any assurances given to the individuals that their names would not be disclosed in response to a freedom of information request and any official guidance on the issue. We do not consider that either of those factors carries significant weight. Still less were we influenced by the suggestion that our decision should be influenced by the Information

Commissioner's own practice of disclosing names of all those in either the SEO or HEO level. Each individual's case must be determined on its own facts, taking into account the sorts of issues we have set out above. It would not be appropriate, in our view, to impose a blanket policy on the disclosure or withholding of individual's names based solely on an individual's grade: still less to base such a policy on the approach adopted by a different governmental department, possibly operating in a very dissimilar environment.

32. Our conclusions therefore are that:

    (a) the absence of a pressing social need to disclose the names in question is determinative of the Appeal; but that, if wrong on that,

    (b) the disclosure would, in any event, be unfair and an unwarranted intrusion into the individuals' privacy.

    It follows, in our view, that the Home Office was entitled to refuse to disclose the names and that the Information Commissioner fell into error in his Decision Notice when ordering their disclosure.

33. Our decision that the Appeal should be allowed is unanimous.

Chris Ryan
Tribunal Judge

Dated: 27 March 2012