Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2006/0064
Information Commissioner's Ref: FS50102714

Heard on the papers
On 13 March 2008

Decision Promulgated
23 June 2008

BEFORE

Deputy CHAIRMAN

Mr H FORREST

and

LAY MEMBERS
MR D WILKINSON
MS M SAUNDERS

Between

Mr ROB EVANS

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

MINISTRY OF DEFENCE

Additional Party

Representation:

For the Appellant: Mr A Hudson, barrister
For the Respondent: Mr J Cornwell, barrister
For the Additional Party: Mr A Maclean, barrister

Second Decision

The Tribunal upholds the decision notice in relation to the disclosure of the background note dated 25 July 2006 and dismisses the appeal.

Reasons for Decision

Background

1. The Tribunal promulgated its first decision in this appeal on 26th October 2007. That first decision sets out the factual background to the appeal. This decision deals with the remaining issues.

2. The Appeal concerned the information contained in three documents:

> (1) Manuscript notes of a meeting between Lord Drayson (Under Secretary of State for Defence and Minister for Defence Procurement) and a representative of a company, Whitehall Advisers, on 23rd June 2005 ("the Meeting Notes");
>
> (2) Manuscript notes of a follow-up telephone conversation on 28th June 2005 ("the Telephone Notes"); and
>
> (3) A brief background note for Lord Drayson about Whitehall Advisers ("the Background Note").

3. In the first decision, the Tribunal held that the exemption under s.36 (2)(b)(i) of the Act (prejudice to the effective conduct of public affairs) applied to the Meeting Notes and the Telephone Notes and that the public interest favoured maintenance of the exemption. The Tribunal concluded that in relation to the Background Note the public interest did not favour the maintenance of the exemption under s.36(2)(b)(i). However, disclosure of the background note was not ordered as other exemptions were claimed for it. Pursuant to the Directions issued by consent on 26 November 2007, these have been reduced to the question of whether the background note is exempt from disclosure under section 40 of FOIA, the exemption which applies to personal information. In the light of our earlier decision on section 36, the other exemptions claimed were not pursued.

4. In relation to section 40, the specific issues were set out as:

> Whether the Commissioner erred in the decision notice in concluding that:
>
> a) the Background Note consists of personal information about the representative of Whitehall Advisers;
>
> b) disclosure of the Background Note would be unfair to the representative of Whitehall Advisers;
>
> c) disclosure would constitute a breach of the First Data Protection principle, viz., that personal data are processed fairly and lawfully;
>
> d) the Background Note could not be redacted to allow its communication to the

Appellant without disclosing exempt information under s.40(2) and (3)(a)(i) of the Act.

Evidence

5. The Tribunal received witness statements for this second hearing from Mr Evans, the Guardian reporter who had lodged the appeal, Mr Inman, the Deputy Director Information (Exploitation) in the Ministry of Defence, and Mr Wood, who submitted an open and a closed statement. In his open statement Mr Wood described himself as the Managing Director of European Business Strategies Ltd, a company which trades as Whitehall Advisers, and disclosed that he was the representative from the company who attended the meeting with Lord Drayson, alongside Lord Hoyle, the company's other representative. In his closed statement he addressed the detailed contents of the Background Note. We were also provided with an exchange of correspondence between the parties from 24 January to 20 February 2008, including a letter from Mr Wood of 29 January 2008. We have also considered, so far as relevant, the witness statements, evidence and submissions from our first decision.

6. All parties provided written submissions for us; the Information Commissioner provided a closed submission addressing the detail of the background note as well as his open submission.

Consideration: Personal Data and Redaction

7. Two of the specific issues for our decision are relatively easily dealt with: personal data and redaction. All of the information in the Background Note related to Mr Wood, most of it in his capacity as a representative of Whitehall Advisers. Some of the information is biographical and some is purely personal, such as a reference to sporting interests. All the information in the Background Note is clearly personal data, within the definition of personal data in FOIA, which is the same as the definition in the Data Protection Act (DPA). Applying the two factors set out by Auld LJ in his judgement in Durant v FSA [2003] EWCA Civ 1746, Mr Wood is the focus of the information, and the information is biographically significant. That some of the information also relates to Mr Wood in his business life does not prevent it being personal data. As Mr Wood states in his open statement: "I am the most prominent "face" of the company in terms of commercial and professional relationships. My reputation and that of the company are inextricably linked."

8. Although many Background Notes contain other matters, (as described in paragraphs 42 to 46 of our earlier decision), such as the background to the issues to be discussed, and suggested lines that the parties might take, this Background Note does not. It is exclusively composed of information about Mr Wood. It follows that if the Note were to be redacted so as to remove the personal information, there would be nothing left to disclose. Redaction is not therefore a possibility.

Consideration: the section 40 exemption

9. The information in the Background Note was not requested by Mr Wood (the "data subject") but by a third party, Mr Evans. Section 40(2) of FOIA is therefore engaged. The provisions of section 40, so far as material are:

40(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 the second condition below is satisfied.

(3) The first condition is –

(b) …. That the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

10. The question therefore is whether disclosure to a member of the public, such as Mr Evans for this purpose, contravenes any of the data protection principles? If so, the information is exempt. The data protection principles are set out in Part I of the First Schedule to the Data Protection Act; and Part I must itself be interpreted in accordance with Part II. The Information Commissioner (IC) and the Ministry of Defence (MoD) argue that processing the data by releasing them to Mr Evans would contravene the first data protection principle.

11. The first data protection principle ("the first principle") is set out in Part I of Schedule 1 to the DPA:

> *"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, …"*

That first principle is to be interpreted according to paras.1-5 of Part II of Sch.1, which provide, so far as relevant, that:

"1 (1) In determining for the purposes of the first principle whether personal data are processed fairly, 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.

12. The information in this case, the Background Note "was prepared by a senior official from the then Defence Procurement Agency from his own knowledge of the company and the representative attending the meeting rather than any formal published sources." There is no evidence to suggest that that official was deceived or misled as to the purpose for which the information was to be processed. In this case, we are not assisted in deciding whether disclosure would constitute unfair processing by considering the method by which the data were obtained.

13. Part II of the first Schedule continues :

2 (1) Subject to paragraph 3, for the purposes of the first principle personal data are not to be treated as processed fairly unless—

(a) in the case of data obtained from the data subject, the data controller ensures so far as practicable that the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3), and

(b) in any other case, the data controller ensures so far as practicable that, before the relevant time or as soon as practicable after that time, the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3).

(2) In sub-paragraph (1)(b) "the relevant time" means—

(a) the time when the data controller first processes the data, or

(b) in a case where at that time disclosure to a third party within a reasonable period is envisaged—

(i) if the data are in fact disclosed to such a person within that period, the time when the data are first disclosed,

(ii) if within that period the data controller becomes, or ought to become, aware that the data are unlikely to be disclosed to such a person within that period, the time when the data controller does become, or ought to become, so aware, or

(iii) in any other case, the end of that period.

14. The data was not obtained directly from Mr Wood (the data subject) and therefore it is 2(1)(b) which applies. This condition was clearly not complied with at the time of the request. However, we cannot regard the apparent failure to disclose the information required to Mr Wood as providing a conclusive answer to the question of whether processing by disclosure to Mr Evans would be fair. If the fact that the data controller had not provided the data subject with the specified information could be used to block disclosure to a third party, then the data controller would always be able to defeat any third party request for disclosure simply by failing to inform the data subject.

15. This problem was considered by the Tribunal in the appeal of Corporate Officer of the House of Commons v the IC and Norman Baker MP EA/2006/0015, in paragraph 76 of their decision (though they were considering the similar provision in 2(1)(a) rather than 2(1)(b), as in this case). They relied on the inclusion in the condition of the words "so far as practicable" to decide that the condition was not an absolute one. We agree: where processing has been subsequently requested by a third party, and for a purpose which had not been foreseen at the time of collection, and which was resisted by the data controller, it is not practicable to deliver the information to the data subject, before the time of first processing. We note that the DPA was not directed at regulating third party requests for information (since at the time third parties had no right to request information), but primarily at regulating the processing of data as between data subjects and data controllers. In any event, 2(1)(b) allows for the information to be provided even after processing, in an appropriate case. Mr Wood has now been provided with a copy of the information required and we have the benefit of his comments on it in his evidence to us.

16. Interpreting the first principle in the light of Part II of the First Schedule, there is nothing in Part II to suggest that disclosure to Mr Evans would contravene the first principle.

17. We turn to consider the specific condition in the first principle that "at least one of the conditions in Schedule 2 is met". Schedule 2 to the DPA sets out the conditions that must be met if processing is to be fair for the purposes of the first principle. For present purposes the only relevant condition is:

"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."

18. Is the processing "necessary for the purposes of legitimate interests" of Mr Evans? Mr Evans is a reporter pursuing a story. His witness statement reminds us of the importance of a free and vigilant press; and of the importance of the particular issue he was interested in exploring, the relationship between Ministers, lobbyists and the arms trade. Without accepting all of his claims for the importance to the public of the issue, we accept that he has a legitimate interest in pursuing the information. Moreover, it seems to us necessary in order for him to pursue that legitimate interest that he has access to the information. Of course, he can, as the MoD argue, research and write stories about lobbyists and access to Ministers without seeing this particular Background Note; but his stories – and hopefully his readers - will be better informed, if he has access to raw data. That, after all, is the basis of all research.

19. The second part of paragraph 6(1) requires us to consider "any prejudice to the rights and freedoms or legitimate interests of the data subject". Mr Wood certainly has a legitimate interest in protecting his reputation and the interests of his business: we accept that they are in practice intertwined to such an extent that it is unrealistic to separate them in this case.

20. Paragraph 6(1) then requires us to balance Mr Evans' legitimate interests against the prejudice to Mr Wood, and to consider whether the processing is therefore "unwarranted" in the particular case. In our earlier decision we found (in paragraph 46) that there was " … a clear public interest in disclosure of the briefing note since it would throw light on the nature of the meeting between the Minister and lobbyists; and on how that relationship is viewed and developed. We accept it is in the public interest to increase transparency in this way. That public interest is present regardless of whether the meeting is viewed as routine and unremarkable, or as highly sensitive and exceptional. The public interest is served by disclosure of the information regardless of whether, in terms of what sells newspapers, it is interesting to the public." We recognise that legitimate interest is not the same as public interest: legitimate interest goes wider than then the narrower concept of public interest: someone may have a legitimate interest in pursuing particular information which is of very little public interest: someone researching family history for example. But in practice in this case, our summary of the public interest identifies the substance of Mr Evans' legitimate interests.

21. However, the other side of the balance, the prejudice to Mr Wood's legitimate interests, is very different to the balance we had to strike under section 36. There we were considering the inhibitory effect on public officials of disclosure; here we are considering prejudice to an individual. In his open statement, Mr Wood states: release would be "particularly damaging for both the company and me personally. Release would damage my reputation and that of the company as the statements contain information which is inaccurate and untrue". Mr Wood gives two instances: the first is that "Clauses in Whitehall Advisors contracts with commercial companies prevent the company, or me on its behalf, from revealing the company's client base". However, this appears irrelevant in our context. No one is suggesting that Mr Wood or his company have revealed their client base, or broken any contract. The information in the Background Note comes from "a senior official in the Defence Procurement Agency", not from Mr Wood or his company. Confidentiality clauses in a contract between Mr Wood and/or his company and their commercial clients cannot be invoked to prevent the disclosure by a third party (the MoD or one of its officials) of information which they have not received in confidence. In paragraph 46(3) of his submission to us the IC argues that the information was supplied to the Minister in confidence, referring to a statement from David Wray prepared for the previous hearing. However, Mr Wray appears to be referring to the confidentiality, within the Ministry, of statements made by civil servants to the Minister. That is an internal matter, and he does not suggest that the author of the note acquired the information in confidence. That has not been argued before us, and there is no evidence before us to that effect.

22. Mr Wood's second instance is that "some of the information contained in the note about the role undertaken by Whitehall Advisors is inaccurate". He sets out the inaccuracy in his closed statement. We have no reason to doubt Mr Wood's sworn statement. On the other hand, we have no reason to suppose that the author of the note, writing from his personal knowledge as Mr Inman tells us, was not writing what he understood to be true. Strictly, it is not the accuracy or otherwise of the information that concerns us, it is the degree of prejudice to Mr Wood's legitimate interests. Accepting that Mr Wood is correct and the particular statement referred to is inaccurate, we cannot see that any particular prejudice will accrue to Mr Wood from the disclosure of the understanding of the official, and he does not explain why it will have a prejudicial effect.

23. Mr Wood also agues that he would be personally prejudiced by disclosure because the note "contains personal information about me which is not in the public domain, some of which is also inaccurate". In his closed statement, he amplifies the points about inaccuracy. Mr Wood takes the strongest exception to an opinion relating to Mr Wood's work, arguing that to disclose it would seriously damage his business reputation and legitimate interests.

24. We are persuaded, on balance, that there would be significant prejudice to Mr Wood's legitimate interests (which include those of his business in this case) if the opinion were disclosed. While the opinions expressed about Mr Wood's work contain much that is positive, there is one aspect which is critical; and we accept that it might be portrayed, once disclosed, as an authoritative or representative view from the Ministry; and that that could have a damaging effect on his business reputation, particularly in the relatively small world of Westminster contacts in which

Mr Wood works. When we come to set that clear particular prejudice against Mr Evans' general legitimate interests, while we accept there is an interest in seeing the Note as an example of a generic category, we cannot see that there is much interest to anyone in seeing the information in this Note, which consists solely of information about Mr Wood, assembled for what this hearing has shown to be a "routine and unremarkable meeting". We therefore find that disclosure is not warranted given the significant prejudice disclosure would cause to the data subject. It follows that none of the conditions in Schedule 2 are met, and therefore the first data protection principle would be contravened if the data were to be disclosed. It follows that the information in the Background Note is exempt from disclosure within section 40(2) of FOIA

25. That finding is sufficient to dispose of the remaining issues in this appeal. Of the four issues identified in paragraph 4 above, we have decided that the decision note was correct in relation to (a) and (d) (personal data and redaction), and (c), that disclosure of the Note would breach the first Data Protection principle. Given our conclusion that disclosure would be unwarranted, applying condition 6 in Schedule 2, our decision on the broader question of whether the processing would be "fair" within the wording of the first principle itself (issue (b)), is strictly unnecessary. However, the issues raised are similar to those posed by Condition 6, considered in paragraphs 18 to 24 above. Our decision would be that disclosure would be unfair to Mr Woods.

Signed

Humphrey Forrest

Deputy Chairman Date: 23 June 2008