



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

Case No. EA/2012/0199

ON APPEAL FROM:

**Information Commissioner's
Decision Notice No: FS50451414
Dated: 29 August 2012**

Appellant: John Evans

Respondent: The Information Commissioner

On the papers. 7 February 2013

Date of decision: 27 February 2013

**Before
CHRIS RYAN
(Judge)
RICHARD FOX
GARETH JONES**

Subject matter: Personal data s.40

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

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DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is refused.

REASONS FOR DECISION

The appellant's information request and the Information Commissioner's
Decision Notice

1. The Appellant's appeal is based on his belief that Caerphilly County Borough Council ("the Council") should have disclosed to him:
 - a. what payments an individual ("X") had made in respect of the repairs of a property held by him under a 125 year lease from the Council; and, if paid by someone other than X
 - b. who made the payments; and, if that was the case
 - c. the agreement under which the payments had been made.
2. The Appellant's original request for that information was made under the Freedom of Information Act 2000 ("FOIA"). FOIA section 1 imposes on the public authorities to whom it applies an obligation to disclose requested information unless certain conditions apply, or the information falls within one of a number of exemptions set out in FOIA. Each exemption is categorised as either an absolute exemption or a qualified exemption. If an absolute exemption is found to be engaged then the information covered by it may not be disclosed. However, if a qualified exemption is found to be engaged then disclosure may still be required unless, pursuant to FOIA section 2(2)(b):

"in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information"
3. The Council refused to disclose the information on the basis that it was covered by the absolute exemption set out in FOIA section 40(2). That sub-section provides that information is exempt information if it constitutes personal data of a third party the disclosure of which would contravene any of the data protection principles.
4. The refusal was upheld by the Council, following an internal review which the Appellant asked it to conduct. The Appellant complained to the Information Commissioner who, in the Decision Notice that has given rise

to this appeal, decided that the Council had been entitled to refuse disclosure because payments made under an individual's residential lease fell squarely within the sphere of his private life. Accordingly disclosure would be unfair in view of X's reasonable expectation that privacy would be maintained (reaffirmed by his refusal to consent to the disclosure requested) and the fact that, in the view of the Information Commissioner, there was no legitimate public interest in disclosure to justify the interference with his privacy.

The appeal to this Tribunal

5. On 13 September 2012 this Tribunal received an appeal against the Information Commissioner's Decision Notice. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.
6. Although the Appellant originally asked for his appeal to be determined at a hearing he subsequently opted for a paper determination. The Information Commissioner consented to that mode of determination and we are satisfied that it is appropriate, given the nature of the arguments on each side. Directions were therefore given for the effective disposal of the appeal.
7. The Appellant's Grounds of Appeal to this Tribunal are quite short and may be set out in full:

"I was told by a leaseholder [X], who lives under the same leasehold contract as myself, that Council bills received by him for repairs to his flat, and his block, which leaseholder have to pay a percentage of the cost of repairs done to Council tenanted flats, as well as his own, were given to Local Councillor [Y] and were paid. That he never paid a repair bill for years because [Y] sorted it out for him. He said to me, if I was a fully paid up member of the Labour Party, to give my bill to [Y]. I said I was not a Labour Party member or a member of any political party, but, if becoming a member of the Labour Party paid my bills, I would consider it. I asked him does this mean you have a different contract to everyone else. He said he does not bother with anything like that as [Y] sorts all that out.

"I asked the [Council], how does [Y] operate, to pay [X's] repair bills. I received several fob offs from the Council, and 3 different appeals, and asked to invoke my rights under [FOIA] to divulge how [X] and [Y] did it.

“Sometimes leaseholder repair bills can be many hundreds, indeed, thousands of pounds. So you can see my point. If [X] has a different contract to allow Councillor [Y], to somehow get his bills paid, while other leaseholders struggle to pay theirs, we should all benefit from this system. I think people should be made aware of what is going on, and not be covered up by the Council. I am not concerned about the Council Contract, but the way [X] pays his repair bills, with help from Councillor [Y], whom he is very close to, through the local Labour Party activities.”

On that basis he argued that he should be allowed to:

“find out how [X] has his repair bills paid, with the help of Councillor [Y], ...to whom he gives his bills...”

8. Before coming to our interpretation of the Grounds of Appeal we will set out a summary of the relevant law.

The law that applies to the appeal

9. The effect of FOIA section 40(2), in the circumstances of this appeal, is that any information to which a request for information relates will be exempt information if it constitutes the personal data of a third party and its disclosure to a member of the public, otherwise than under the FOIA, would contravene any of the data protection principles.
10. For the purposes of FOIA section 40, personal data is defined in section 1 of the Data Protection Act 1998 (“DPA”), which provides:

“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”

11. The data protection principles are set out in Part 1 of Schedule 1 to the DPA. The only one having application to the facts of this Appeal is the first data protection principle. It 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 ...”

Schedule 2 then sets out a number of conditions, but only one is relevant to the facts of this case. It is found in paragraph 6(1) and reads:

“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.”

The term “processing” has a wide meaning (DPA section 1(1)) and includes disclosure.

12. A broad concept of protecting, from unfair or unjustified disclosure, the individuals whose personal data has been requested is a thread that runs through the data protection principles, including the determination of what is “necessary” for the purpose of identifying a legitimate interest. In order to qualify as being “necessary” there must be a pressing social need for it - *Corporate Officer of the House of Commons v Information Commissioner and others* [2008] EWHC 1084 (Admin).

13. In determining whether or not disclosure of the requested information would be contrary to the data protection principles we have to consider:

- i. whether disclosure at the time of the information request would have been necessary for a relevant legitimate purpose; without resulting in
- ii. an unwarranted interference with the rights and freedoms or legitimate interests of each of X.

And if we are satisfied on those points we have also to consider:

- iii. whether disclosure would have been unfair or unlawful for any other reason.

14. In respect to the issue of fair and lawful processing under (iii) above we have to bear in mind guidance provided in paragraph 1(1) of Part II of Schedule 1 to the DPA, which provides:

“In determining for the purposes of the [first data protection 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.”

15. We interpret the Grounds of Appeal as meaning that the Appellant does not challenge the Information Commissioner’s conclusion that the information requested did constitute the personal data of X and that his appeal is based on the argument that the Decision Notice was not in accordance with the law because the Information Commissioner made an error in concluding that the data protection principles would have been breached if the Council had complied with the request.

Our decision

16. The Information Commissioner’s approach was to decide, first, whether disclosure would have been “fair”. He took into account:

- a. whether disclosure would have been within the data subject's reasonable expectations;
- b. the nature of those expectations; and
- c. what, if any, consequences would flow from disclosure of the requested information.

However, because he considered that disclosure might still have been "fair" if there had been a more compelling public interest in disclosure, he considered if there were any legitimate public interest in disclosure.

17. On the facts of the case before him the Information Commissioner decided that the general public interest in transparency and accountability of the Council, combined with the public interest in understanding how the Council managed its leasing arrangements, did not give rise to a legitimate public interest in disclosure. On the other hand he concluded that disclosure of payments under a private individual's lease agreement would constitute an intrusion into that person's privacy (particularly as the Council did not publicise information on the subject) and might well cause an unnecessary and unjustified degree of distress to the individual. The Information Commissioner also recorded that the Council had sought consent from X, who had refused to give it.
18. The Information Commissioner's balancing exercise led him to the conclusion that disclosure would not have been fair under the first data protection principle and that it was not therefore necessary for him to go on to consider whether any of the conditions in Schedule 2 of the DPA would have been met.
19. As we have indicated in our summary of the law, as we understand it, we prefer to approach the issue of disclosure by first examining whether a Schedule 2 condition leads to the conclusion that disclosure should be made and, if it does, then consider whether there are any other factors that would nevertheless make such disclosure unfair. In this case the Information Commissioner, while taking the opposite approach and purporting to make his decision on the basis of the general criterion of fairness, has in fact applied the balancing exercise required for the specific criterion set out in paragraph 6 of Schedule 2.
20. We also think that the Information Commissioner was in error in concluding (in paragraph 21 of the Decision Notice) that he "*did not find in this particular case there was legitimate public interest in disclosure of the requested information*". We believe that there is a legitimate interest in exploring whether a local authority councillor had operated a system under which the political affiliations of a tenant of that authority might lead to repair bills being reduced or eradicated. However, the weight that this public interest should bear is affected by the strength of the evidence suggesting that such a system did exist. On the facts of this case it appears, from the Appellant's correspondence with the Council, that the evidence is his own uncorroborated recollection of a casual conversation with X, while they were exercising their respective dogs. Although, therefore, we think that the Information Commissioner should not have

concluded that there was no legitimate interest in disclosure, we regard the weight that should have been attributed to it as very slight.

21. With regard to the factors to be taken into account on the other side of the scales, we regard those considered by the Information Commissioner in his assessment of fairness to have been appropriate for consideration under paragraph 6 of Schedule 2 and that the weight he applied to them was entirely justified. We are satisfied that disclosure would constitute an unwarranted intrusion into X's rights and freedoms and that this factor comfortably outweighs the public interest in disclosure which we have identified.
22. In those circumstances we find ourselves reaching the same conclusion as the Information Commissioner, although by a slightly different route, and have accordingly reached the unanimous decision that there was no error in his conclusion that the Council had been entitled to refuse disclosure of the requested information.
23. For those reasons the appeal is dismissed.

Postscript

24. The Information Commissioner disclosed to us, in a Closed Bundle, an unredacted copy of a letter he had received from the Council during the course of his investigation. We are satisfied that the redactions were justified as they concealed information that was the personal data of X, the disclosure of which would not have been justified. However, they provided us with additional information which reaffirms our decision both as to the quality of the evidence in support of the asserted public interest in disclosure and the degree of intrusion into X's privacy that would result from disclosure. We stress, however, that we would have reached the decision we have even without that information. The additional, closed, information simply provides us with further comfort that our decision is correct. For completeness the facts we derived from the closed information are summarised in a confidential annex to this decision, which should not be disclosed other than under an order from the Upper Tribunal or a Court disposing of an appeal from it.

Chris Ryan
Judge

27 February 2013