



**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL  
(INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF  
INFORMATION ACT 2000**

**EA/2011/0042**

**B E T W E E N:-**

**MARY GRADWICK**

**Appellant**

**-and-**

**THE INFORMATION COMMISSIONER**

**Respondent**

**-and –**

**THE CABINET OFFICE**

**Second Respondent**

**DECISION**

**Determined on the Papers  
Promulgated on the 26<sup>th</sup> January 2012**

Before: Brian Kennedy QC  
Richard Enderby  
Narendra Makanji

**INTRODUCTION**

1. This decision follows the Tribunal's interim decision of 19 September 2011, in which it found that section 37(1)(b) FOIA was not applicable and it invited the parties to make submissions about the applicability of section 40 FOIA (personal data to the disputed information, and should be read in that context.

## **FACTUAL BACKGROUND**

2. The disputed information in this case comprises two citation documents and a meeting note, and includes a commentary on the particular individual's career.

## **LEGISLATIVE FRAMEWORK**

3. Section 40 FOIA provides, so far as is relevant:

*“(1) Any information to which a request for information relates is also exempt if it constitutes personal data of which the applicant is the data subject.*

*(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 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 tht Act (right to prevent processing likely to cause damage or distress), and*

b. *in any other case, 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.*

(4) *The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).*

(7) *In this section-*

*“the data protection principles” means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;*

*“data subject” has the same meaning as in section 1(1) of that Act;*

*“personal data” has the same meaning as in section (1) of that Act.”*

4. The Data Protection Act 1998 (“DPA”) provides by DPA section 7(1)(c):

*“(1) Subject to the following provisions of this section and to [sections 8, 9 and 9A], an individual is entitled...*

*(c) to have communicated to him in an intelligible form –*

*(i) the information constituting any personal data of which that individual is the data subject, and*

*(ii) any information available to the data controller as to the source of those data...”*

5. Section 27(1) DPA provides, as far as relevant:

*“In this Part “the subject information provisions” means –*

*a. the first data protection principle to the extent to which it requires compliance with paragraph 2 of Part II of Schedule 1, and*

*b. section 7.”*

6. Schedule 7, paragraph 3 of the DPA states:

*“Personal data processed for the purposes of-*

*a. Assessing any person's suitability for judicial office or the office of Queen's Counsel, or*

*b. The conferring by the Crown of any honour [or dignity],  
are exempt from the subject information provisions.”*

7. The first data protection principle is set out at paragraph 1 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 first conditions in Schedule 2 is met...”*

8. The relevant condition in Schedule 2 is paragraph 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.”*

## **APPLICATION OF THE LEGISLATIVE FRAMEWORK TO THE INFORMATION SOUGHT**

9. As the applicant for disclosure of the disputed information is not the ‘data subject’, s 40(1) FOIA does not apply.
10. The Tribunal finds that the disputed information in this case is ‘personal data’ for the purposes of s 1(1) of the DPA.

### **The ‘first condition’**

11. Under s 40(2) FOIA, the disputed information will be exempt if its disclosure would contravene any of the data protection principles or section 10 of the DPA.
12. The Cabinet Office argued that disclosure of the disputed information would contravene the first data protection principle. See paragraph 7 above. In particular, the Cabinet Office argued:
- a. It would not be fair, having regard to the interests of the data subject;
  - b. It is not necessary for the purposes of legitimate interests pursued by the Appellant; and
  - c. It would be unwarranted by reason of prejudice to the data subject’s legitimate rights and interests.

a. Fairness

13. The disputed information contains a summary of the named individual's background and achievements, including commentary and judgments about his work.
  
14. The Cabinet Office in its reply to the Notice of Appeal addressed the issue of fairness at paragraph 39. In particular, it argued that disclosure would be unfair for the following reasons:
  - (i) the data subject in the honours process is ordinarily a person about whom information has been collected without their knowledge;
  - (ii) the information may, in some cases, be partly prejudicial to the data subject;
  - (iii) the expectation of those involved in the honours process is that their participation will remain confidential;
  - (iv) the report of Sir Hayden Phillips stressed at paragraph 29 that the identity of candidates undergoing scrutiny and the identities of those nominating them must be kept confidential.
  
15. The Tribunal has read and considered the disputed information. It finds that disclosure would not result in any unfairness to the data subject in the circumstances of this case. In particular, it finds that at the time of the request:
  - (i) the disputed information is, without exception, of a positive nature with respect to the data subject;
  - (ii) in light of the positive nature of the disputed information, disclosure would be fair irrespective of whether the data subject had knowledge that the disputed information was being collected;
  - (iii) in the circumstances of this case, the disputed information is in no way prejudicial to the data subject;
  - (iv) the requirement of fairness requires 'fairness to the data subject', rather than fairness to those involved in the honours process; in any event, in the circumstances of this case, no unfairness to the participants in the honours process arises since none of the participants are identified and, even if they could be identified, given the fact that

the disputed information is without exception of a positive nature, the Tribunal does not see how any embarrassment or prejudice or unfairness would arise to those involved in the process;

- (v) in relation to paragraph 29 of Sir Hayden Phillips report, the Tribunal finds that it has no relevance to the circumstances of this case since the named individual is not undergoing scrutiny: he has already been awarded an honour; and the disputed information does not disclose the identities of those who nominated him;
- (vi) the data subject had no expectations as to the release of the disputed information as he was unaware of its existence at the time it was created.

b. Legitimate interests pursued by the Appellant

16. The Cabinet Office states:

- (i) there is a legitimate interest in knowing that the honours process functions free from outside interference;
- (ii) that interest is met by disclosure of information about the process whereby honours are awarded which is already in the public domain.
- (iii) the interest is in no way furthered by disclosure of details of one particular candidate's nomination. Insofar as there is a public interest in knowing why the data subject was nominated for an honour, it is met by the short citation published in the London Gazette.

17. The Appellant in her appeal stated that:

“knowing how the process works does not satisfy the requirements of transparency... or accountability...”.

18. The long citation is a product of a series of discussions and judgments, where the balance of the argument in favour or against a case is displayed for the consideration of the Committee. It aids discussion and deliberation. (para 47 WS AA).

19. The Cabinet Office argues that publication of the long citation does not serve any public interest, on the basis that the short citation explains why an honour has been awarded. The Cabinet Office is of the view that publication of the long citation does not reveal any more about the honours process itself. (para 48 WS AA).
20. The Tribunal finds that:
- (i) there is a legitimate interest in knowing that the honours process functions free from outside interference;
  - (ii) that interest is met by disclosure of information about the process whereby honours are awarded; and
  - (iii) disclosure of the disputed information, recorded as part of the process of awarding an honour, would further the transparency and accountability of the honours system.

c. Prejudice to the data subject's legitimate rights and interests

21. The Cabinet Office argued that disclosure would be unwarranted by reason of the prejudice it would cause to the rights and legitimate interests of the data subject. In its reply to the Notice of Appeal, it stated inter-alia, at paragraph 41:
- “ ----- The disclosure of details held by an authority on a candidate for an honour will contain personal information about their performance in the role for which they have been nominated. The fact that the information may be positive cannot prevent it being private.”
22. The Tribunal accepts that the fact that information *per se* is positive does not mean it is not private. For example, a person's medical records may be positive. Yet they remain private.
23. However, to the extent that the Cabinet Office suggest that information about the data subject's performance in his role is private, the Tribunal does not accept this. The data subject performs his duties as both a Crown Court Judge and as a senior public servant within the Ministry of Justice. His judgments are public. His judgments may be appealed. In terms of his work in the community, he is a

highly visible and senior public figure. His work is well known and presumably reasonably well documented. On that basis, the Tribunal has difficulty in accepting the Cabinet Office's contention that information about his performance in his role is private. It would be entirely different, for example, if the information about the data subject's performance concerned any information or allegations about misdemeanours or disciplinary hearings or so forth. But the disputed information is not concerned with any such disciplinary matter. It is purely to do with the performance of his professional duties and his role as a senior public figure in the community. It in no way relates to information that could be viewed as 'private'.

24. The Tribunal finds that the disputed information is not of a private nature. It further finds that the disputed information is of a positive nature. In light of these findings, the Tribunal concludes that disclosure would not cause any prejudice to the rights and legitimate interests of the data subject.

**Section 40(4) FOIA: the second condition**

25. The alternative condition for the application of the exemption in section 40(2) FOIA is that the information is exempt from section 7(1)(c) DPA (the data subject's right of access to his personal data) by virtue of provision of Part IV DPA.
26. In this case the information sought is exempt from s.7(1)(c) DPA by virtue of paragraph 3(b) of Schedule 7 DPA, which provides that personal data processed for the purposes of the conferring by the Crown of any honour or dignity are "*exempt from the subject information provisions*", including s.7(1)(c) DPA. The effect of paragraph 3(b) of Schedule 7 is that the data subject has no right to access the information sought by the Appellant in respect of his own candidature for the conferral of an honour. In this context, the Respondents argued that disclosure to any other member of the public would be unfair when the data subject himself is not entitled to disclosure.



27. Section 40(2) combined with s.40(4) FOIA does not give rise to an absolute exemption under FOIA. The exemption is subject to the public interest balancing test under s.2(2)(b) FOIA.
28. This Tribunal has already considered the public interest balancing test in relation to s.37(1)(b) FOIA. Its conclusion, at paragraph 33 of its interim decision herein, was that the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure. Its conclusion and reasoning as regards the public interest in relation to s.37(1)(b) apply equally to the public interest in relation to s.40(2) combined with s.40(4) FOIA.
29. With regard to any perceived unfairness to the data subject, the Tribunal is not convinced (a) that any such unfairness arises at all; and (b) if any such unfairness does arise, the Tribunal does not believe that it is sufficient to alter the balance of the public interest. In this context, the Tribunal is influenced that by the fact that in this case, once the disputed information is released, it will be equally accessible to the data subject as it is to the Appellant or any other member of the public. Further, the Tribunal distinguishes the present case from one where the disputed information may be 'private' information or prejudicial to the data subject. In such cases, there may very well be unfairness to the data subject if he were not entitled to the disputed information but members of the public were. However, for the reasons discussed above, the Tribunal finds that the disputed information is neither of a 'private' nature, nor is it prejudicial to the data subject in any way. Therefore, the Tribunal finds no unfairness to the data subject by disclosure of the disputed information to the Appellant.

## **CONCLUSION**

30. Unfortunately, once the Respondent concluded (erroneously in the Tribunal's opinion) that the first condition in s.40 was satisfied, they failed to go onto consider whether, in the event that the Tribunal disagreed (as has happened), the second condition under s.40 applied. However, the Tribunal was assisted in this regard by the submissions made by the Cabinet Office in its reply to the Notice of Appeal.

31. The Tribunal concludes the exemption in s.40(2) does not apply. The exemption in s.40(4) does apply. However, it is not an absolute exemption. It is subject to the public interest balancing test under s.2(2)(b) FOIA. In our view, in the circumstances of this case, the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

32. The Tribunal finds that the data subject's address should not be disclosed. Therefore, the disputed information should be disclosed subject to appropriate redaction.

33. For the above reasons, the appeal is allowed.

Brian Kennedy QC

Judge

26<sup>th</sup> January 2012