



**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
(INFORMATION RIGHTS)**

Appeal No: EA/2011/0177

BETWEEN:

BRENDAN MONTAGUE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

Heard in Public by: Alison McKenna, Tribunal Judge
Nigel Watson, Tribunal Member
Alison Lowton, Tribunal Member

On: 27 January 2012

At: Field House, Breams Buildings
London

Date of Decision: 21 February 2012

Subject Matter: Section 40 (2) of the Freedom of Information Act 2000

Regulation 2 of the Environmental Information Regulations

DECISION

The Appeal is hereby dismissed.

REASONS

1. This is an appeal from the Information Commissioner's Decision Notice FS 50353245 dated 28 June 2011.
2. The Appellant was represented at the appeal hearing by Robin Hopkins of counsel, instructed by Messrs Harrison Grant. The Information Commissioner made written submissions but did not attend the hearing, with the agreement of the Tribunal. The Information Commissioner provided the Tribunal with written representations prepared by Eric Metcalfe of counsel, which were also provided to Mr Hopkins in advance of the hearing.

The Information Request

3. The Appellant made an information request to the Charity Commission for England and Wales on 2 August 2010, by asking for "a copy of all documents which would have to be released under the Freedom of Information Act relating to the Global Warming Policy Foundation" and specifically "the first and the successful application forms for the charity; any internal discussion about whether GWPF should be granted charity status; any information supplied as to donations and financial support for the new foundation".
4. On 18 August 2010 the Charity Commission supplied much of the information requested, but did not supply a copy of a bank statement which it held, confirming a donation to the prospective charity, as the statement concerned identified the donor. The Charity Commission considered that this document constituted personal data in relation to which the Appellant was not the data subject and that it was therefore exempt from disclosure under s. 40 (2) of the Freedom of Information Act ("FOIA"). The Appellant then asked for an internal review of the Charity Commission's decision. On 28 September 2010 the Charity Commission informed the Appellant that its original decision had been upheld on internal review.

The Complaint to the Information Commissioner

5. The Appellant complained to the Information Commissioner on 6 October 2010. He argued that there was a public interest in disclosure of the disputed information. Following the making of enquiries, the Information Commissioner issued the Decision Notice, in which he found that the Charity Commission was correct to have withheld the bank statement under s. 40 (2) of FOIA and required no steps to be taken. The Information Commissioner had considered the Appellant's arguments in the course of making his decision, but concluded that the disputed information was personal data, that the identification of an

individual donor to a charity might lead to unwarranted media attention for that individual so as to interfere with the right to a private life, and that the donation had been made anonymously with no expectation on the part of that donor that his or her name might be released. He also found that the Appellant's arguments relied upon his concern that the charity may have breached its own protocol (which states that it would not accept donations from donors connected with the oil industry) but that there was no evidence to suggest that this was the case, and further that the charity is not itself a public authority for the purposes of the Freedom of Information regime so as to require a level of public scrutiny of its affairs which might outweigh the rights of the data subject. (The Charity Commission had also raised arguments as to why the disputed information was exempt under s. 41(1) of the Act because it had been provided "in confidence" however as the Information Commissioner had found that the information was exempt under s. 40 (2) he did not specifically consider the application of s. 41 (1) of FOIA to the disputed information and that issue is consequently not before us).

The Application to the Tribunal

6. The Appellant applied to the Tribunal on 3 August 2011. He was given permission to proceed with the appeal notwithstanding that it was out of time. His Grounds of Appeal were that (i) s. 40 (2) of FOIA had been incorrectly relied upon; (ii) the release of the donor's name would not breach the Data Protection Act and (iii) that his request should have been considered under the Environmental Information Regulations 2004 ("the EIR") rather than under FOIA. Ground (iii) was not of course a matter that had previously been raised with the Charity Commission or with the Information Commissioner.
7. The Information Commissioner's Response to the Grounds of Appeal, dated 20 September 2011, asked the Tribunal to dismiss the appeal, argued that he had correctly applied the law in relation to the s. 40 exemption in the Decision Notice, and further that the information requested did not fall within the definition of "environmental information" contained in regulation 2 of the EIR simply because the charity concerned is involved in debate about environmental matters such as climate change.

Procedural Matters

8. The Appellant requested an oral hearing of his appeal. The Respondent submitted that the appeal could be dealt with by way of a paper hearing. The Tribunal's procedure is governed by The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules

2009¹ (“the Rules”). The Tribunal’s powers must be exercised in a way that gives effect to the Overriding Objective in rule 2.

9. The provision governing the mode of hearings is rule 32, which provides that the Tribunal must hold a hearing (by which it is meant an oral hearing) unless each party has consented to the matter being determined without a hearing and the Tribunal is satisfied that it can properly determine the issues without a hearing. It follows that the Tribunal had no discretion to order a paper hearing of this appeal unless the parties agreed to it and, conversely, that if only one party required an oral hearing then the Tribunal had no option but to arrange one². In the circumstances of this appeal, Judge McKenna directed an oral hearing of this matter on 2 November 2011.
10. The Respondent asked Judge McKenna to direct at a preliminary stage that he need not attend the oral hearing. Rule 15(1) of the Rules permits the Tribunal to make directions as to (c) the issues on which it requires evidence or submissions; (d) the nature of the evidence or submissions it requires; and (g) the manner in which evidence or directions are to be provided and whether orally or written. Rule 36 also makes clear that the Tribunal may proceed to determine an appeal without the attendance of a party if that party has had notice of the hearing and it is in the interests of justice to proceed in that party’s absence.
11. Taking into account the Overriding Objective, Judge McKenna ruled on 2 November 2011 that, as there no disputed evidence before the Tribunal but rather a dispute as to the application of certain legal principles only, it was fair and just to direct that the Respondent need not attend in person, but could in the alternative provide the Tribunal with written submissions.
12. Also on 2 November 2011, Judge McKenna directed that the public authority to which the information request had been made, namely the Charity Commission for England and Wales, should be invited to join as a party to this appeal. On 7 November the Charity Commission responded that it did not wish to be joined and it has consequently played no further part in this appeal.
13. The Judge’s directions of 2 November also provided that any witness evidence in this appeal was to take the form of written statements

¹ See

[http://www.informationtribunal.gov.uk/Documents/formsguidance/consolidated_FtT_GRC_Rules2009_060710\[1\].pdf](http://www.informationtribunal.gov.uk/Documents/formsguidance/consolidated_FtT_GRC_Rules2009_060710[1].pdf)

² The Upper Tribunal recently confirmed this interpretation of the rules (in the context of the analogous Social Entitlement Chamber Rules) in *AT v Secretary of State for Work and Pensions* (ESA) [2010] UKUT 430 (AAC).

which would stand as evidence in chief so that no witnesses would be called at the hearing unless the other party wished to cross examine them. In the event there was no live evidence required to be given at the hearing, which took the form of oral submissions by Mr Hopkins only.

The Evidence

14. The Respondent produced to the Tribunal an agreed "open bundle" of documents connected with this appeal and also "closed material" consisting solely of the disputed information. The closed material was not disclosed to the Appellant for obvious reasons. There was no other closed material before the Tribunal.
15. The Appellant produced to the Tribunal a number of witness statements from persons (including himself) expressing their opinions about the work of the charity, and also a bundle of supplementary materials containing (a) examples of documents produced by the charity and (b) materials from a number of sources concerning climate change scepticism.

The Role of the Tribunal

16. This appeal is brought under s.57 of FOIA. The powers of the Tribunal in determining an appeal under s.57 are set out in s.58 of FOIA, as follows:

"If on an appeal under section 57 the Tribunal considers -

- (a) that the notice against which the appeal is brought is not in accordance with the law, or*
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

The provisions relating to appeals also apply to decisions falling under the EIR by virtue of regulation 18 of the EIR.

The Issue for the Tribunal

17. Mr Hopkins accepted at the hearing of this appeal that if the disputed information was indeed personal data falling under s. 40 (2) of FOIA,

then the transposition of the decision making framework to that of the EIR would actually make no difference to the outcome of this appeal. This is because the relevant provisions (imported from the Data Protection Act 1998) apply equally to information requests falling under both FOIA and the EIR. Mr Hopkins had submitted in his skeleton argument that the reason the Appellant wished the Tribunal to rule that the Appellant's information request should have been dealt with under the EIR was so that the Charity Commission and the Information Commissioner would be bound to deal with any future requests about this charity under the EIR regime. However, as Mr Hopkins accepted at the hearing itself, this Tribunal's decision at first instance turns only on its own facts and does not establish a precedent which is binding on other Tribunals nor indeed on the Information Commissioner or the Charity Commission. Neither does the decision in this case have any formal influence in relation to future information requests, which can only be dealt with on their own merits and will each carry with them their own rights of appeal. Nevertheless, the Tribunal accepted that the Appellant is entitled to argue for the purposes of an appeal under ss. 57 and 58 of FOIA that the Information Commissioner's decision was wrong in law and so we deal below with the argument as to the applicability of the EIR in that context. As it is not an argument that is capable of influencing the outcome of this appeal (because, as we have explained, the data protection issue is equally applicable under the EIR), we deal with this Ground of Appeal shortly at paragraphs 38 – 42 below.

18. The principal issue before the Tribunal in this appeal, therefore, is the Appellant's argument that the Information Commissioner was wrong in law to uphold the exemption under s. 40 (2) of FOIA. As noted above, this issue must be resolved in favour of the Appellant for the appeal to be allowed, regardless of whether the information request should have dealt with under the EIR.

19. We therefore turn to examine the relevant law, which is as follows.

FOIA

20. Under s.1(1) of FOIA, a person making an information request of a public authority is entitled to be informed in writing whether the public authority holds the requested information and to have that information communicated to him, unless the information is exempt from disclosure as a matter of law. FOIA provides for a number of qualified and absolute exemptions to the duty of disclosure.

21. Qualified exemptions are subject to public interest considerations. This matter concerns section 40 of FOIA which, if engaged, provides an absolute exemption from the duty of disclosure so that public interest considerations do not apply.

22. Section 40 of FOIA reads as follows:

(1) Any information to which a request for information relates is exempt information 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 [of which the data requester is not the data subject], 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.....*

The Data Protection Act

23. Section 40 of FOIA cross-refers to the Data Protection Act 1998 (“DPA”). Section 1(1) of the DPA defines “personal data” as:

“...data which relates to a living individual who can be identified –

- 1. from those data, or*
- 2. from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller”.*

The Appellant accepted that the requested information was personal data for the purposes of the DPA and the Tribunal proceeded on the basis that it was personal data. The Tribunal needed therefore to consider whether the first condition in s. 40(3) FOIA was engaged, namely whether any of the data protection principles would be contravened by the disclosure of the personal data.

24. The first data protection principle³ provides inter alia that:

“1. 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.”*

³ See section 4 and part 1 of schedule 1 to the DPA 1998.

25. The first data protection principle is to be interpreted in accordance with part II of schedule 1 to the DPA 1998. For the purposes of this appeal, the relevant conditions in Schedule 2 are:

1. The data subject has given his consent to the processing.

also

6.(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or a 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 expectations of the data subject.

“At least one” of these conditions would have to be met in order to comply with the first data protection principle and so the Tribunal has considered both condition 1 and condition 6(1) in addition to the general question of whether the requested processing by disclosure would be fair and lawful.

The Appellant’s Submissions

26. The Appellant’s arguments on the data protection issue, drawn from his Grounds of Appeal taken together with the skeleton argument and the oral submissions of Mr Hopkins were as follows. The Tribunal was invited to find that the processing of the personal data with which we are concerned would be “fair” in the circumstances and also that a relevant condition from Schedule 2, namely condition 6(1), would be met. The Appellant’s argument was that the Tribunal must balance the privacy of the data subject against the public interest in disclosure in this case. He argued that the balance was in favour of disclosure because (i) the data subject’s expectation of privacy was not a particularly weighty factor on the evidence; (ii) that any interference with or damage to the interests of the data subject would be minimal and certainly not “unwarranted”; and (iii) that the public interest in knowing the identity of the data subject was extremely compelling in the particular circumstances of this case.

27. The evidence before the Tribunal was that the charity had adopted a policy of not disclosing the identity of its donors. This policy was referred to in its first annual report. However, it is not in fact clear to us whether that particular policy had been adopted prior to the making of the donation with which we are concerned, because that donation had pre-dated the charity’s registration as such. The documents before the Tribunal confirmed that the bank statement evidencing the donation had been provided to the Charity Commission by the would-be charity’s solicitors, in an un-redacted form, as part of the charity registration process, in order to confirm that it met the regulator’s minimum financial requirements. The redacted notes of the Charity Commission’s discussions with the

charity's Chairman suggested that the donor had expected anonymity, and that he or she would prefer to remain anonymous but that if disclosure were inevitable, he or she would prefer it to be voluntary, along with disclosure of the identity of other donors to the charity so as to minimise the impact of any press interest. Mr Hopkins' submission to the Tribunal was that this indicated that the data subject did not feel particularly strongly about disclosure of their identity so that their expectation of privacy did not carry much weight.

28. Mr Hopkins argued that on the other side of the scales was a high level of public interest in the activities of this particular charity, and in its funding arrangements. He argued that the factors in support of disclosure in the public interest were:

- (i) Parliamentary interest in the charity, in that members of the Science and Technology Select Committee had questioned Lord Lawson (the Charity's Chairman) about its funding arrangements on 1 March 2010.
- (ii) That the only identified detrimental consequence of disclosure was media interest, but the Appellant took the view that the individual concerned must have a high public profile and considerable financial means, so that this person would be well-placed to deal with any media scrutiny.
- (iii) That the charity is influential in the field of debate about global warming, and that as it both seeks to (and claims in its annual report to have success in) influencing the views of government and policy makers in this area, there is a legitimate public interest in knowing who has funded the charity's establishment. In this regard he relied on the fact that the charity trustees are all members of the House of Lords; evidenced correspondence between the charity's Chairman and the Government's Chief Scientific Advisor, and submitted that the donation with which we are concerned was not insignificant (£50,000) and that as this one donation allowed the charity to be established it can be assumed that the donor is influential within the charity.
- (iv) The charity has adopted a policy of not accepting donations from those with a "significant interest" in the energy sector. There is a public interest in knowing whether the charity has adhered to its own policy, especially in view of the background and publications of its Chairman. The Charity Commission has made clear that it will not be policing the policy as it views it as a matter for the charity trustees, so there is no other means of ensuring public scrutiny of the charity's probity on this issue.

29. Mr Hopkins reminded us that whilst there is no presumption in favour of disclosure in relation to personal data, there is no presumption against disclosure either. He emphasised that it is not the Appellant's case that all donations to charity should be in the public domain, but rather that the particular circumstances of this charity justify a departure from the normal approach because the charity operates as a "highly-connected lobbying machine". Mr Hopkins referred us to a number of first instance decisions made by differently constituted panels of this Tribunal, which he described as partially analogous with this case. However, as explained above, decisions of the First-tier Tribunal turn on their own facts and have no precedential value.

The Information Commissioner's Submissions

30. In relation to the Data Protection arguments, the Information Commissioner's written submissions were as follows. In support of the maintaining the exemption, he argued that

- (i) Having seen the disputed information, the Information Commissioner had reasonably concluded that the donor had not sought a career in the public eye, was a private individual making a donation in a private capacity and that he or she had a reasonable expectation of privacy in relation to the donation; and
- (ii) That the donor has a right to a private life under article 8 ECHR which should not lightly be interfered with. Other Convention rights might also be engaged by donations to charity, for example where they were religious in nature.

31. In relation to the schedule 2, paragraph 6(1) criteria:

- (i) That it is important that public curiosity is not confused with public interest in this case.
- (ii) That it is important to remember that the charity is not itself a public authority subject to the policy considerations arising under the Freedom of Information regime nor is it required to be publicly accountable for its policies. In any event the Charity Commission had said it had found nothing to suggest that the charity's policy of not accepting donations from those in the energy sector had been breached.
- (iii) That, in view of the media interest in the debate around global warming and perhaps especially in view of the media interest surrounding this appeal, it seemed likely that the disclosure of the donor's identity would result in media attention for that person.

The Tribunal's Conclusions

31. The Tribunal has considered the evidence and arguments most carefully. It notes that the burden of proof in relation to the appeal rests with the Appellant, so it is he who must satisfy the Tribunal that the Information Commissioner's decision was wrong in law or involved the inappropriate exercise of his discretion.
32. The Tribunal has no evidence that the data subject consented to the disclosure of his or her identity. The Tribunal concludes from the evidence of the redacted notes of the Charity Commission's conversation with the charity's chairman that the donor did have a legitimate expectation of privacy in relation to the donation. We do not accept that the reported suggestion of a "media management policy" in circumstances where disclosure was unavoidable detracts from this. This means we conclude that paragraph 1 of Schedule 2 to the DPA is not applicable here.
33. We are, as indicated above, unsure whether the charity had already adopted the policy of anonymity for its donors when the donation in question was made (the annual report refers to the policy having been adopted at the first meeting of the Board of Trustees). However, we find it puzzling that if such a policy was already in operation (or was anticipated) that the charity's solicitors would send to a third party an un-redacted bank statement disclosing the identity of a donor to whom anonymity had been promised. This is perhaps especially puzzling where the disclosure was to a public authority subject to the Freedom of Information Act. The Charity Commission's only interest at the registration stage would have been in the amount of the donation, and so we can see no reason why the identity of the donor could not have been redacted in the documents sent with the registration application.
34. We accept the Information Commissioner's argument that a donation to charity is ordinarily to be regarded as a private matter. We accept that the donor has a right to privacy which should not lightly be interfered with, and we have no evidence before us to cause us to doubt the Information Commissioner's conclusion that the donor has not sought a career in the public eye. It was, in our view, reasonable for the Information Commissioner to rely on the evidence provided by the Charity Commission in this regard. We accordingly conclude that the infringement of privacy rights and indeed the media attention which disclosure of that person's identity would be likely to attract would be unwarranted in these circumstances.
35. We do not accept the Appellant's argument that this donation was so significant in the affairs of the charity that the donor must himself or herself be influential in the charity's affairs. Firstly, the evidence shows that the charity's income in its first year of operation was over £500,000. We do not know whether, after the initial donation, the

remaining income was from one big donation of £450,000 or (as seems likely) was comprised of several smaller donations. The Appellant's argument that a single donation of £50,000 was significant in the life of the charity is somewhat conjectural. Furthermore, the Appellant has produced no evidence to support his assertion that a substantial donor thereby secures influence over the affairs of a charity. We reject that submission in noting that the administration of a charity is the legal responsibility of its trustees and not its donors.

36. We note that the charity claims, in its annual report, to have gained significant influence amongst policy makers in the field of global warming ("we are beginning to shape the climate and energy debates in the UK and abroad"). Whilst that is perhaps a rather surprising claim for an educational charity to make, that is a matter for the Charity Commission and not for us. It is in any event a claim unsupported by evidence of actual influence. Notwithstanding these claims, the charity is a private body which is not subject to the sort of accountability regime which the Appellant argues for. We are not satisfied that the charity is so influential as to make the disclosure of its financial affairs a matter of legitimate public interest outweighing the privacy rights of the data subject. Accordingly, we find that paragraph 6 (1) of schedule 2 to the DPA does not apply here.
37. We have also considered whether, in all the circumstances, the disclosure of the personal data would be fair and lawful for the purposes of the first data protection principle. There is no issue here as to lawfulness, however we conclude that in all the circumstances it would not be fair to process the data by disclosing it, for all the reasons we have given above.

The EIR

38. As noted above, it is immaterial for the purposes of this appeal whether the information request fell to be decided under the Freedom of Information Act or under the Environmental Information Regulations and it follows that our conclusions in relation to the Appellant's second argument are *obiter*. Nevertheless, we have given careful consideration to the Appellant's arguments in this regard. We have concluded that they are erroneous for the following reasons.
39. Regulation 2(1) of the EIR defines "environmental information" and where relevant reads as follows:
- "environmental information has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—*

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
- (c) Measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factor referred to at (a)...as well as measures or activities designed to protect those elements”.*

39. The Appellant’s argument, in summary, is that the charity operates in (and is influential in) the arena of debate about environmental factors such as global warming and that its work in influencing policy makers in relation to such issues therefore constitutes an activity or measure which affects or is likely to affect the elements of the environment.

40. The Information Commissioner’s submissions on this point were in essence that the reference to “measures” in the EIR was never intended to cover the private activities of non-Governmental bodies. Further, that as a matter of interpretation of the EIR there must be a direct causal relationship between the activities and the environment in order to form the required link between (a) and (c) of the definition in regulation 2 (1). The activities of the charity (and indeed the donation to the charity) do not have a sufficiently direct effect on the environment so as to make this link. The Information Commissioner speculated that virtually all human activity, including breathing, would be included if the definition were as wide as the Appellant suggests.

41. The Tribunal accepts that the European case law requires a broad interpretation to be given to the meaning of “environmental information”, however we were referred to no authority which supports the argument that a body educating the public about or even one publicly debating issues affecting the environment would fall within this definition. Mr Hopkins referred us to a first instance decision of this Tribunal in which the names of those attending a meeting between a campaign group and a Government Department about climate change⁴ were held to constitute environmental information, however, even putting to one side the absence of any precedent value in that decision, we see significant differences in relation to a meeting between a lobbying group and a policy maker and with the present case, which concerns the publication of educational material by a charity.

⁴ DBERR v IC and Friends of the Earth (EA/2007/0072)

42. In all the circumstances we are not satisfied that the activities of the charity, less still the activities of a donor to that charity, fall within the definition in regulation 2(1) of the EIR.

43. For all the reasons given above, we now dismiss the appeal.

Signed: Alison McKenna, Tribunal Judge

Dated: 21 February 2012