



FIRST-TIER TRIBUNAL

GENERAL REGULATORY CHAMBER

Appeal No. EA/2011/0264

BETWEEN:

ANDREW OSBORNE

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

And

SWALE BOROUGH COUNCIL

Second Respondent

Held on the papers on: 23 March 2012

Before: C Taylor, J Blake, D Sivers

Subject Matter

Freedom of Information Act 2000: Absolute Exemption: Personal Data

DECISION

The Appeal is dismissed.

Reasons For The Decision

The Request for Information

1. On 24 January 2011, the Appellant requested of the Council:

“...the professional or other qualifications held by the holder of the post which I believe is designated Conservation Officer or Manager of conservation and design team.”

2. On 11 February 2011, he received a response that:

“... the post of Design and Conservation Manager requires the post-holder to hold an appropriate qualification at degree level (e.g. Architecture, Building Conservation or Urban Design) and membership of an appropriate

professional body (e.g. RIBA, RTPI or IHBC). I can also confirm that the current post-holder meets these requirements.”¹

3. The Appellant was not satisfied. On 17 March, the Council claimed that the actual qualifications were personal information and exempt from disclosure under section 40 of the Freedom of Information Act 2000 ('FOIA'). On 18 March 2011, the Appellant asked them to reconsider this.
4. On 29 May 2011, the Appellant lodged his complaint with the Commissioner. In a decision notice dated 31 October 2011, the Commissioner found in favour of the Council.

The Appeal

5. On 9 November 2011, the Appellant appealed to the Tribunal. He confirmed during a case management hearing that his grounds were:

GROUND A

The Commissioner erred in concluding that the requested information was personal data of the post-holder within the FOIA and Data Protection Act 1998 ('DPA'); and/or

GROUND B

The Commissioner erred in concluding that the Council correctly applied section 40(2) FOIA to the withheld information as disclosure would not be unfair and would not contravene the first data protection principle of the DPA.

The Task of the Tribunal

6. The Tribunal's remit is governed by section 58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or whether he should have exercised any discretion he had differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

Evidence

7. The Second Respondent informed the Tribunal that the post-holder's work involved giving professional heritage conservation advice to the Council and public. He had carried out the role over 25 years, and had been at the Council since 1998. On the two occasions he had appeared in court he had not been asked to provide his qualifications. However, he always provided his qualifications at planning inquiries and there was an expectation that he would. These happened on average twice a year and were held in public.

Ground A: Not Personal Data

The Law

8. Personal data is defined as:

"...data which relate to a living individual who can be identified

¹ RIBA: The Royal Institute of British Architects; RTPI: the Royal Town Planning Institute; IHBC: Institute of Historic Buildings Conservation.

- (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...*

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.” (S. 1(1) DPA)

9. What makes data ‘personal’ is where it relates to living individuals who can be identified from the data available. Whether it “relates to” the person identified depends on context and whether the information is sufficiently personal and focused on them:

“... In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity.”

Durant v Financial Services Authority [2003] EWCA Civ 1746, para.28

Submissions

10. From his submissions, it was clear that the Appellant already knows the identity of the post-holder. He argued that as information about a person’s degree is freely available on a university website, it is not therefore private or personal information. Information about being a member of a professional body was equally ascertainable by contacting the relevant body.
11. The Commissioner argued that the requested qualifications relate to a living individual and if disclosed would enable the officer (i.e. the ‘data subject’) to be identified from that information and other information in the public domain. This was because it would not be difficult for someone motivated as a recipient of the anonymous information to find out the identity of the officer in question from the disputed information and other information obtainable. He regarded as misconceived the Appellant’s arguments that the disputed information would not be personal data, because it would not be necessary to know the qualifications of the post-holder in order to identify the conservation officer, since the post-holder is regularly present at public meetings of the Council.
12. The Second Respondent argued that for the purposes of the definition of personal data, the officer was living and could be identified from his qualifications. They reasoned that it was irrelevant that the individual’s identity was already known, as it would be entirely unreasonable to suggest that personal information ceased to be personal if an individual could be identified without the data requested.

Our Findings

13. We consider the information being requested is personal data. It relates to a living individual identifiable from the data and other information available. The Appellant has not disputed that he knows the identity of the office holder and he would be the recipient of the information requested. It also seems, from what the Appellant has argued, that it would be relatively easy for others to find out his identity, for instance through attending relevant council meetings. For personal data to be sufficiently ‘personal’, it needs to relate to the individual in

some sufficiently biographical nature. We consider that a person's degree and professional qualifications such as membership of a professional body is sufficiently personal and biographical to fit within that description. We accept the Second Respondent's arguments and do not find the Appellant's arguments on this point compelling.

Conclusion

14. We do not accept ground A.

Ground B: Disclosure fair

The Law

15. Section 40(2) of FOIA states

“Any information to which a request for information relates is ... exempt information if ... it constitutes personal data ... and ... the disclosure of the information to ... the public otherwise than under this Act would contravene any of the data protection principles... ”

16. The Council has argued that the requested information is data, and disclosure breaches the first data protection principle ('DPP'). This states:

“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...”
Pt I of Sch.1 of DPA

17. In other words, to satisfy the first DPP, processing needs to (a) be fair, (b) be lawful and (c) meet at least one of the relevant conditions.

18. Since at least one of the conditions must be met in order for the disclosure of the requested information not to breach the first DPP, we consider this first. The parties did not approach their submissions in this order, but the Commissioner acknowledged the overlap in the substance of the arguments for fairness and condition 6. We have therefore considered all of the parties' arguments, (even if not specifically identified below), within this format.

19. The Appellant asserts two conditions are met. These are:

Condition 5(d): *“the processing is necessary... for the exercise of any functions of a public nature exercised in the public interest by any person.”*

Condition 6: *“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.”*

(Sch. 2 DPA. Emphasis added.)

20. In this context, the type of 'processing' we are concerned with is disclosure to the Appellant as a member of the public, and to be 'necessary' means that a pressing social need is involved and disclosure is proportionate to the legitimate aim pursued. (*House of Commons v IC and Brooke, Leapman,*

Ungoed-Thomas [2008] EWHC 1084 (Admin) (DC). The 'data subject' is the post-holder whose details may be disclosed.

Condition 5(d): Disclosure necessary to exercise a function of a public nature exercised in the public interest by any person.

Submissions

21. The Appellant argued that: *"the information requested about a post with a public facing role is legitimately required for the exercise of a function of a public nature exercised in the public interest."*
22. The Commissioner stated that the Appellant had not demonstrated how disclosure of the requested information would be 'necessary' for the exercise of a public function carried out by the relevant department of the Council, or even identified what public function the Appellant believed would be affected by disclosure. In so far as disclosure of this nature was necessary for the exercise of a public function, the Commissioner submitted that the Council met this by stating that the current post-holder met the requirements for the post.
23. The Council submitted that the obtaining of qualifications from an applicant is done so for the purpose of ascertaining whether or not they meet the criteria for the position applied for and that whilst the Council is a public authority the employment process is not in itself a public function.

Our findings

24. The Appellant has not provided sufficient compelling argument that condition 5(d) is met, and we cannot see how it does in this case.

Condition 6: Processing necessary for legitimate interests of third parties to whom the data is disclosed, except where it is unwarranted because of prejudice to the rights and freedoms or legitimate interests of the data subject.

Submissions

25. In assessing condition 6, the arguments submitted by the Appellant that might support to the contention that there are '*legitimate interests*' of the public that would make disclosure of the personal information '*necessary*' are below. To help organise the arguments, we have inserted headings. According to the Appellant:
 - (1) Competence and confidence
 - (a) It is important that the public should know the qualifications of the officer providing the advice because his/her duties included advising the planning officer when he determines planning applications and making quasi-judicial decisions that inform the Council's planning policies. These are important because, for instance, the buildings we design directly influence the way in which we live our lives, and engage with social values, educational, commercial, and spiritual needs. The control of

development is a major tool in determining the quality of the environment, architectural design and in promoting a good built environment. The control and restriction on works affecting listed buildings plays a major role in the conservation and preservation of the historic heritage. This involves developments worth many thousands of pounds and having a profound affect on the prosperity of the area and its inhabitants. The skills required are a trained imagination, knowledge of architectural design, building construction, building science, history of architecture and structures and it is impossible to determine from the information provided by the council in response to his request whether these requirements were met.

Members of the public have a keen interest in considering and making representations on planning and listed building applications and to enable for them to make an intelligent contribution to the development of their area it is important for them to know the quality of the advice that the Council is taking. For instance can statements by the Council about the design quality, historic importance or impact of the development be relied on if the officer's qualifications are limited and should those wishing to make representations seek their own professional advice?

The public need the information in order to satisfy themselves that the Council is acting in a responsible way in the best interests of the Community and if they are dissatisfied to enable them to lobby and at elections seek to remove the responsible councillors.

It had been the custom in earlier times for the Council to provide details about the qualifications of advisers.

- (b) The Council charged everybody with the exception of householders and charities fees of between £60 and £600 per hour for consultations with officers on planning applications and between £30 and £300 to give advice on an application by letter. It is only right and in the public interest that those paying these fees should know the qualifications of the officers attending meetings and writing letters.
- (c) The precise qualification is important as it demonstrates competence and is of general public interest. As an example, solicitors in this appeal have identified themselves as such to indicate they are qualified to respond to proceedings. This is helpful and the post-holder informing the public should be no different. If a member of the public considers that the Council are not adequately advised when taking a decision they should be in a position to say so.

A degree does not entitle a person to become a chartered member of RIBA or the RTPI. Both are examining bodies that set a standard for entry into these professions. The IHBC is not comparable with the royal institutes. It is a group of individuals, some with qualifications and some without, which forms an institute to promote conservation. It is not an examining body but describes itself as a professional body for building conservation practitioners and historic environment

experts and its membership as being a range of professional disciplines in the public, private and voluntary sectors including conservation officers, planners, architects, regeneration practitioners and academics. From the information given by the Council in response to the request, the public has no way to judge the value and suitability of the advice given by the post-holder.

- (2) Accountability: The post-holder is authorised to advise the Council or public and decide on its behalf professional matters, so confidence and trust in their professional judgement is paramount. This is different to council staff who do not hold accountability for forms of public advice.
- (3) Reduce Council disputes: It is more likely that council decisions will be disputed, if the qualifications of the advisers on the decision-making are unknown. (The respondents contested this, stating there was no evidence to support this.)
- (4) Transparency to increase public understanding of decisions: The Council are wrong to try and inhibit those who wish to challenge their decisions by withholding information that is germane to that dispute. Decisions of government should be open to challenge and the information to do so readily available, and the Council have a duty to be in a position to justify their decisions at inquiries etc.

26. According to the Commissioner:

- (1) Competence/Accountability: The public might reasonably want to know a particular official has the necessary qualifications required for the post, but it would not be necessary to know the exact qualifications of that official. He did not agree that there was a difference between the qualifications, and by implication the ability.
- (2) Reduce Council disputes: The Commissioner noted that the function of the Council officer is not to take decisions but to advise the Council when making decisions. The ability of a Council to deliver effective services to the Community would be hampered if members of the public disputed decisions made by the Council due to the qualifications of the individual who advised the Council prior to the Council reaching its decision. (The Appellant contested this stating there was no evidence to support this.)

27. The Council made additional arguments:

- (1) Competence/Accountability: It is the decisions of the Council that would be challenged not those of the post-holder, so that the precise qualification of the advising officer was irrelevant as to whether the decision was lawful or it is not, and was not germane to any dispute.
- (2) Transparency: The decision-making process of the Council was open to scrutiny by the public, especially in planning matters as files were open for public inspection and all committee meetings open to the public. Whilst there is an expectation of transparency for public bodies, in how decisions are made, it is the Council as a whole that is

to be held accountable to the public and not the individual employees.

Our findings

28. The Tribunal acknowledge that the public have a legitimate interest in having confidence in decisions taken by the Council. However, we did not consider it necessary to know the precise qualifications of its adviser, such as which degree they held and which professional body they belong to so as to meet this interest.
29. In some circumstances, it may be helpful to understand the vantage from which advice has been given, but equally or perhaps more important would be the length of relevant experience. Further, some qualifications may indeed be harder to achieve than others. However, disclosing such details neither meets a 'pressing social need' nor is proportionate to the legitimate interest. This is because the Council having chosen the relevant spectrum of suitable qualifications, and the post-holder having met the qualifications required for the post, seems to us sufficient to ensure confidence in the competence of the council's adviser. If anyone wishes to judge the quality of the decision and possibly challenge it, it would be most meaningfully done based on its own content and merit and not which professional body the Council's adviser belongs to.
30. We do not find it compelling that, where some pay fees for advice from the Council, they should know the precise qualifications of the officers attending meetings and writing letters. This is because those doing so choose to enter such a transaction and do so on the terms offered.
31. We do not accept the Appellant's arguments on accountability, (in paragraph 25(2) above). This is because the Council having vetted the adviser to ensure he/she holds the relevant qualification meets that need.
32. We find there to be no evidence to support that either disclosing or withholding the requested information would affect the number of disputes or impede the provision of services.
33. We accept a general interest in transparency and the freedom of information. However, we do not find the requested disclosure 'necessary' or proportionate action to meet this. The information is not germane in order to contest a dispute, given what the Council has disclosed in response to the request.

Conclusion

34. We accept a low level of interest in knowing the details of the post-holder's qualifications for the sake of transparency, the value of information, and confidence in the Council. However, we do not regard these as amounting to necessitating disclosure or a pressing social need in doing so.

Legitimate Interests of Post-holder

35. In view of our conclusion in relation to the first limb of condition 6, it is not strictly necessary for us to set out the strength of the arguments as to prejudice to the "*rights, freedoms and legitimate interests*" of the post-holder were the information to be disclosed. However, given the extent of submissions relating to this we touch on these briefly.

- (1) Legitimate Expectation of Privacy: The respondents argued that individual employees would not expect their personal data to be under public scrutiny whether or not they provide advice or make decisions in the name of the Council. This was in part because the adviser was not as senior as the chief officer who by law discloses certain information, and also because the information was provided in order to apply for the post and not for public disclosure. The Appellant argued that because professional bodies would be prepared to give details as to whether an individual was a member of the profession, the information was public and therefore the Council ought provide it.
Our Findings
In this case, where the post-holder expects to give his/her qualifications to public inquiries, we did not find the respondent's submissions compelling. (In relation to the Appellant's arguments, we note that information provided by a professional body is not the same as information provided by the Council as a public authority. His argument did not help support that either condition 5 or 6 applied.)
- (2) Protecting officials from personal/professional criticism/being undermined: The respondents argued that the officer had not given his consent to the disclosure. He had raised concerns because the Appellant had openly and publicly questioned his professional judgment in the past. Our Findings: We were not convinced. The information was about the post-holder's profession, not their private life. He/She is likely to be sufficiently senior, with considerable experience, not to be suffer significant damage or distress as a result of professional criticism.

Conclusion

36. We did not consider that there were strong arguments that the post-holder had legitimate or reasonable expectations for his data not to be disclosed. However, for disclosure to meet condition 6, there must be legitimate interests that make disclosure necessary, and we did not find that there were.
37. Accordingly, we do not accept ground B.

Other Matters:

38. We note that the Second Respondent did not comply with section 17 FOIA, in providing a refusal notice within 20 days stating which legislative exemption it relied on in refusing the request.
39. The Appellant gave arguments as to why Section 21 FOIA was not pertinent to the appeal. These were not considered because the Council had not claimed the exemption applied.

Signed:

Judge C Taylor

28 March 2012