



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

EA/2012/0094

**ON APPEAL FROM
The Information Commissioner's Decision
No FS50427962 dated 2 April 2012**

Appellant: Philip Brown
Respondent: Information Commissioner
Date of hearing: On the papers
Date of decision: 31 October 2012

Before

**Anisa Dhanji
Judge**

and

**Jean Nelson and Dave Sivers
Panel Members**

Subject matter

FOIA section 40(2) – whether information is personal data; whether disclosure would breach the first data protection principle.

DPA section 35(2) – whether data is exempt from the non-disclosure provisions.

Case Law

Commons Services Agency v. Scottish Information Commissioner [2008] UKHL 47;
1 WLR 1550

Durant v Financial Services Authority [2003] EWCA Civ 1746

Johnson v Medical Defence Union (2007) EWCA Civ 262

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

EA/2012/0094

DECISION

This appeal is dismissed.

Signed

**Anisa Dhanji
Judge**

Date: 31 October 2012

REASONS FOR DECISION

Background

1. This is an appeal by Mr Philip Brown (the “Appellant”), against a Decision Notice issued by the Information Commissioner (the “Commissioner”), on 2 April 2012.
2. The appeal arises from a request for information made by the Appellant to the UK Border Agency (“UKBA”) on 21 August 2011, in relation to the immigration status of an individual whom we will refer to as Mr AF.
3. Although the Appellant’s request was directed to UKBA, that body is not itself a public authority, but rather it is an executive agency of the Home office. The Home Office is therefore the relevant public authority for the purposes of this appeal.

The Request for Information

4. The Appellant’s request was for:

“... official information showing whether or not [Mr AF] is a UK citizen, or whether he is a Nigerian citizen who is in the UK on some sort of temporary permission.”
5. UKBA refused the request, relying on the exemption in section 40(3) of the Freedom of Information Act 2000 (“FOIA”). Following an internal review, UKBA upheld that decision, stating that it would not disclose the information unless required to do so by a court order.

The Complaint to the Commissioner

6. The Appellant complained to the Commissioner under section 50 of FOIA. During the course of the Commissioner’s investigation, UKBA clarified that it was in fact relying on the exemption in section 40(2) of FOIA. It considered that the information requested (the “disputed information”) was exempt from disclosure by reason of the condition in section 40(3)(a)(i) i.e., that the disputed information is the personal data of a third party, and disclosure would contravene one of the data protection principles.
7. The Commissioner agreed with their decision, finding that the information requested was the personal data of Mr AF, and that in the circumstance of this case, disclosure would not be fair and so would breach the first data protection principle.

The Appeal to the Tribunal

8. The Appellant appealed to the Tribunal against the Decision Notice. The parties requested that the appeal be determined on the papers without an oral hearing. Having regard to the nature of the issues raised, and the nature of the evidence, the Tribunal was satisfied that the appeal could properly be determined without an oral hearing.
9. In determining the appeal, we have considered all the documents and written submissions received from the parties (even if not specifically referred to in this determination), including the supplementary submissions lodged by the parties on the Tribunal's directions. It has not been necessary, however, for the Tribunal to consider the disputed information since the issues in this appeal do not turn on what Mr AF's immigration status actually is.
10. No application was made by the Home Office, nor indeed by either of the parties, for the Home Office to be joined in this appeal. The Tribunal did not order joinder of its own motion because, taking into account the overriding objective in Rule 2 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, we considered that the appeal could properly be determined without the Home Office being joined.

The Tribunal's Jurisdiction

11. The scope of the Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the Decision Notice is not in accordance with the law, or to the extent that it involved an exercise of discretion by the Commissioner, he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
12. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, the Tribunal will often receive evidence that was not before the Commissioner.

The Legislative Framework

13. Under section 1 of FOIA, any person who makes a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information. The duty on a public authority to provide the information requested does not arise, however, if the information sought is exempt under Part II of FOIA.
14. The exemption relied upon by the Home Office in the present case is section 40(2) (personal data of third parties). If it is engaged, the exemption is absolute (ie., it is not subject to the public interest test). In order for this exemption to be engaged, it must be shown that the disclosure of the

disputed information would contravene one of the data protection principles set out in Schedule 1 of the Data Protection Act 1998 (“DPA”).

15. Under section 40(7) of FOIA, the data protection principles must be read subject to section 27(1) of the DPA which deals with exemptions set out in Part IV of the DPA, to the application of the data protection principles.
16. The exemption relied on by the Appellant in this case is contained in section 35(2) of the DPA. It exempts personal data from the non-disclosure provisions of the DPA where the *“disclosure is necessary for the purposes of, or in connection with, any legal proceedings”*. In effect, if the exemption is engaged, it has the effect of dis-applying the data protection principles in the circumstances covered by the exemption so that disclosure of personal data can be made by a data controller, even if it would otherwise contravene any of the data protection principles.
17. The Appellant contests the Decision Notice primarily on the grounds that the disputed information requested is not “personal data” as defined by the DPA. He says that even if it is personal data, by virtue of section 35(2) of the DPA, the data protection principles do not apply since disclosure is necessary for the purposes of or in connection with legal proceedings. He explains that Mr AF has brought legal proceedings against him in the Oxford County Court in relation to the title, ownership and possession of his home. He says that the costs of the case are considerable and that he is relying on winning the case in order to recover his costs. However, in practice, the costs will only be recoverable if Mr AF is a UK national. If he is a Nigerian national, he will return to Nigeria and put himself beyond the jurisdiction of the UK courts to escape enforcement of any costs order the Appellant obtains.

Issues

18. There are three issues before the Tribunal:
 - a) Is the disputed information personal data? If it is not personal data, then the information must be disclosed since no other exemption has been relied upon.
 - b) If it is personal data, are the data protection principles dis-applied in this particular case by reason of section 35(2) of the DPA? If not,
 - c) Would disclosure breach any of the data protection principles?

Issue 1: Is the disputed information personal data?

19. The legal definition of “personal data” as found in section 1(1) the DPA (and incorporated into FOIA by section 40(7)), is as follows:

“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, 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;*
20. The DPA gives effect to Directive 95/46/EC of 24 October 1995 on The Protection Of Individuals With Regard To The Processing Of Personal Data And On The Free Movement Of Such Data which defines “personal data” as follows:
- “... any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity”*
21. In the Court of Appeal’s decision in Durant v Financial Services Authority, “personal data” was defined by Auld LJ as follows:
- “...not all information retrieved from a computer search against an individual’s name or unique identifier is personal data within the Act. Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject’s involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person’s or body’s conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity.”*
22. The Appellant says that the disputed information simply concerns Mr AF’s official status in the UK. He argues that the request could be answered by UKBA simply stating either that Mr AF is a British citizen, or that Mr AF is a Nigerian citizen visiting the UK. Mr AF cannot be identified by his immigration status alone since that simply discloses whether he is one of 60 million people (if he is a UK national), or one of 120 million people (if he is a Nigerian national). He says that this is not itself information from which the data subject can be personally identified or which includes any official opinion or intention about him as an individual, and therefore, it is not “personal information”. Mr AF’s identity and his address are not part of the information requested because this information is already known to the Appellant.

23. We consider that the Appellant's argument is misconceived. What he is saying, in effect, is that if an individual is already known to the requester and can be identified by him through information already held, then any additional information such as his immigration status, cannot be personal data because that does not identify him. Taken to its logical conclusion, it would mean that the Appellant could ask a public authority to disclose a range of information about Mr AF (for example, whether he is gay or straight, a Christian or a Muslim, divorced or single), on the basis that such information would only disclose the category of people to which Mr AF belongs and would not itself identify him.
24. We do not think that this can be right in principle, nor indeed do we consider that such a conclusion can be sustained on the wordings of section 1(1) of the DPA, or on the **Durant** test. The disputed information clearly relates to Mr AF. Indeed, the request is for specific information about Mr AF. He could be identified from that information together with other information in the possession of the data controller, which would of course include Mr AF's name. The information would disclose a known individual's immigration status. The information is biographical in nature and Mr AF is the focus of the information. In our view, there can be no doubt that the disputed information is the personal data of Mr AF.

Issue 2: Are the data protection principles dis-applied in this particular case by reason of section 35(2) of the DPA?

25. As already noted, section 40(2) of FOIA taken together with section 40(7) means that the data protection principles must be read subject to the exemptions under the DPA. The Appellant relies on section 35(2). The question is whether section 35(2) applies in the present case.
26. Section 35 provides as follows:
 - (1) *Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by the order of a court.*
 - (2) *Personal data are exempt from the non-disclosure provisions where the disclosure is necessary—*
 - (a) *for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), or*
 - (b) *for the purpose of obtaining legal advice,**or is otherwise necessary for the purposes of establishing, exercising or defending legal rights.*
27. The Appellant points to section 35(2)(a). He says that disclosure is necessary for the purposes of, or in connection with, legal proceedings. He needs the disputed information in order to know if he meets the conditions required to make an application for an order for security for costs against Mr AF.
28. The Appellant refers the Tribunal to Rule 25.13 of the Civil Procedure Rules ("CPR"), the relevant part of which provides as follows:

(1) The court may make an order for security for costs under rule 25.12 if –

(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and

(b)

(i) one or more of the conditions in paragraph (2) applies, or

(ii) an enactment permits the court to require security for costs.

(2) The conditions are –

(a) the claimant is –

(i) resident out of the jurisdiction; but

(ii) not resident in a Brussels Contracting State, a State bound by the Lugano Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982 ;

29. The Appellant says that if Mr AF is a Nigerian national, present in the UK only as a visitor, he will fall within the non-resident condition of Rule 25.13(1)(b), and that he, the Appellant, can then make an application to the court for an order for security of costs against Mr AF.
30. The first point that the Appellant must satisfy us on is that the disclosure is necessary for the purpose of, or in connection with the legal proceedings in question. If it is not “necessary”, then the disclosure cannot come within the scope of section 35(2)(e) and the data protection principles are not applied.
31. The Commissioner’s Decision Notice does not address this issue, nor was it addressed in the Appellant’s submissions. The Tribunal, therefore, invited submissions on the point. The Commissioner’s submissions were notably brief. He says that “necessary” in this context must mean “relevant”, and that the “effort of producing the information must be proportionate to the decision”. In our view, this misses the point. Clearly, information cannot be said to be necessary for any purpose if it is not relevant, but necessary is not just about relevance, nor do we see the need to import notions of proportionality into the understanding of a simple everyday word. In our view, to give “necessary” its ordinary meaning, it is simply something that is needed, without which a specified outcome cannot be achieved. In this, we appear to be in agreement with the Appellant who refers us to dictionary definitions of necessary as meaning “indispensable, requisite, needful, that which cannot be done without”.
32. Applying those definitions, the question is whether the Appellant needs to have the disputed information in order to be able to satisfy the conditions in Rule 25.13 so that he can obtain an order for security for costs. The disputed information is about Mr AF’s nationality. However, the condition in Rule 25.13 which the Appellant is trying to satisfy, refers to the residence of the claimant.

Again, the Commissioner did not take this point and we therefore invited both parties to make submissions.

33. In response, the Commissioner says simply that the request was clearly for information as to Mr AF's nationality rather than residence. The Appellant, points out, correctly in our view, that "residence" is a term that has different legal meanings in different contexts. However, he goes on to say that it is generally equivalent to being "unavoidably subject to the jurisdiction", but cites no authority for this. He says further that nationality is not directly related to "being unavoidably subject to the jurisdiction", but that it is a good general indicator of it, because most people are resident in their own country and are only found living in other countries as temporary visitors.
34. We accept that it is likely that most people are resident in the country of their nationality. However, there is likely a significant minority who are resident in the UK without being UK nationals, and are nationals without being resident. Clearly the two terms refer to entirely different concepts. Indeed, while we expect that UKBA would have information about a person's nationality, we query whether they would hold information about whether a person is resident here.
35. To obtain an order for security for costs, the CPR requires an applicant to show that a particular claimant is resident out of the jurisdiction. The disputed information is about Mr AF's nationality. It does not go to the question of whether the condition in Rule 25.13(2) is satisfied. It follows therefore, that disclosure of the disputed information cannot be said to be "necessary" for the purposes of, or in connection with, any legal proceedings. This means that the data protection principles are not dis-applied in this case by reason of section 35(2).

Would disclosure breach any of the data protection principles?

36. Having found that the data protection principles are not dis-applied, we must go on to consider whether disclosure would breach any of the data protection principles. Personal data is only exempt from disclosure if disclosure would contravene any of the data protection principles. The data protection principles set out in the DPA regulate the way in which a "data controller" (in this case the Home Office), must "process" personal data. The word "process" is defined in section 1(1) of the DPA to include disclosure to a third party or to the public at large.
37. In the present case, only the first data protection principle is relevant. It has not been suggested that any of the others would be relevant. The first data protection principle provides that personal data shall be processed fairly and lawfully, and in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met. The test of fairness is a general one, and not confined to a consideration of whether any of the Schedule 2 conditions is met. Even where the Schedule 2 conditions are met, disclosure may still be unfair.

38. There is nothing to indicate that processing of the personal data in the present case would be unlawful. The issue is whether it would be fair. Fairness is a broad concept, capable of embracing a range of considerations. The wordings of the statute do not require fairness to be considered from the point of view of the data subject alone. Rather, it is entirely proper to have regard to the interests of the data user (here, the Appellant), and where relevant, the wider considerations of accountability and transparency implicit in FOIA.
39. This wide approach to fairness is endorsed by the observations of Arden LJ in **Johnson v Medical Defence Union** (at paragraph 141):
- “Recital (28) [of Directive 95/46] states that “any processing of personal data must be lawful and fair to the individuals concerned”. I do not consider that this excludes from consideration the interests of the data user. Indeed the very word “fairness” suggests a balancing of interests. In this case the interests to be taken into account would be those of the data subject and the data user, and perhaps, in an appropriate case, any other data subject affected by the operation in question.”*
40. This does not mean, however, that one starts with the scales evenly balanced. Although a consideration of fairness requires other interests to be taken into account, where section 40 is engaged, the data subject’s interests are clearly paramount. We note that the continued primacy of the DPA, notwithstanding freedom of information legislation, was strongly emphasised by Lords Hope and Rodger in **Commons Services Agency v Scottish Information Commissioner** (paragraph 7). Although that case concerned the provisions of the Freedom of Information (Scotland) Act 2002, the principles apply equally in relation to FOIA.
41. In the present case, there is no direct evidence before us as to the expectations of Mr AF about the potential disclosure of his nationality. However, it is reasonable to assume that the Appellant would not be asking UKBA for information about Mr AF’s nationality if he had been prepared to provide it to the Appellant himself. Indeed, the Appellant has said that Mr AF has refused to provide this information to him. We also consider that information as to one’s nationality would be regarded by many as being of a private nature, akin perhaps to information about a person’s marital status. While there may be an expectation that such information would be disclosed for official purposes (so for example, if requested by the police or the tax authorities), we consider that there would be an expectation that such information would not be disclosed by a public authority in response to a request by a private individual with no official standing to require that information.
42. The Appellant suggests that by embarking on civil proceedings, Mr AF should be deemed to have accepted and made himself subject to the various procedural rules including those that affect his privacy. However, we have not been referred to anything in the CPR or other rules requiring a claimant to disclose his nationality.

43. We also do not consider that fairness, looked at from the point of view of the data user (here, the Appellant), supports disclosure. As already noted, it does not appear to be the case that knowing Mr AF's nationality would assist the Appellant to meet the conditions in the CPR for an application for security for costs. Even if there can be said to be a general public interest in the proper enforcement of judgements, disclosure of the disputed information would not achieve that aim. There is no other interest on the part of the Appellant or the general public that has been put forward which would support a finding that disclosure would be fair.
44. We find, in short, that disclosure would not be fair. Having reached this finding, it is not necessary to go on to consider whether processing would also meet the conditions in Schedule 2.
45. For all these reasons, we dismiss the appeal.
46. However, we would like to record our appreciation to the Appellant for the efforts he has made in researching the law and in putting forward very careful and considered submissions to the Tribunal.

Other Issues

47. There are certain other issues which have arisen, which though not directly relevant to our findings, we will address briefly for completeness.
48. The Appellant says there are inherent contradictions in the Commissioner's role as initial adjudicator and then subsequently as litigant. We do not see that there is any inherent flaw in the Commissioner being a party to proceedings before the Tribunal where his Decision Notice is under appeal. The Commissioner's decision may be in favour of the public authority or against it. It is worth noting that the Tribunal is, of course, a creature of statute and the scheme the Appellant complains about is one prescribed by statute. The Appellant also suggests that the Commissioner withheld evidence from him. There is no suggestion that any evidence has been withheld from the Tribunal or any suggestion that the Appellant has been prejudiced in arguing his case before the Tribunal. If the Appellant believes there has been any impropriety on the Commissioner's part at any earlier stage, he can of course avail himself of the complaint procedures in place. Nothing in this determination prevents him from doing so.
49. Second, the Appellant says that even if the disputed information is personal data, its protection is derived from the right to privacy which is a qualified right and may be breached in the public interest, including in the interests of the administration of justice. Although section 40(2) is an absolute exemption, that is not to say that interests other than that of the data subject are not relevant. As already noted, fairness is embedded in the first data protection principle. It requires other interests to be taken into account, and we have taken into account the Appellant's interests.
50. The Commissioner has stressed that the disclosure in this case would be a disclosure under FOIA and therefore, it would be a disclosure to the world at large. He says that disclosure to the world at large cannot be said to be

“necessary”. He has drawn a distinction between disclosure to the world at large and what he describes as a “discretionary release”, which he says the data controller could make to a specific person for a specific purpose. That may be a theoretical possibility, but we would have thought it unlikely that UKBA would disclose information under section 35(2) about Mr AF’s nationality to the Appellant, whether on conditions of confidentiality or otherwise, given the very substantial risk it would run of being in breach of the first data protection principle.

51. Equally, we see no merit in the Appellant’s suggestion that in response to his request, UKBA should provide or should be ordered by the Tribunal to provide the disputed information directly to the Oxford Country Court which is dealing with the proceeding between the Appellant and Mr AF. Courts have the power themselves to order disclosure of personal data, whether subject to conditions or not. Under section 35(1) of the DPA, personal data is exempt from the non-disclosure provisions where the disclosure is required by the order of the court. For the same reason, we consider that if the Appellant believes he has a legitimate reason for seeking an order for security of costs, his proper avenue is the court that is dealing with the civil proceedings in question. It is that court which will be in possession of all the relevant facts and which will be best placed to decide on the merits of the Appellant’s concerns that Mr AF will flee the jurisdiction if he loses. We cannot of course speculate on how the court would deal with such a matter; we simply say that it seems to us that it would be the more appropriate forum for what may be perfectly legitimate concerns on the part of the Appellant.

Decision

52. We dismiss this appeal. Our decision is unanimous.

Signed

Date: 31 October 2012

**Anisa Dhanji
Judge**