



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

Case No. EA/2013/0056

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50468486
Dated: 7 March 2013**

Appellant: DR ALI MERDAW

1st Respondent: INFORMATION COMMISSIONER

2nd Respondent: IMPERIAL COLLEGE LONDON

Heard on the papers: 30 October 2013

Date of decision: 6 November 2013

Before

ROBIN CALLENDER SMITH

Judge

and

ANDREW WHETNALL and MICHAEL HAKE

Tribunal Members

Written submissions:

For the Appellant: Dr Ali Merdaw

For the 1st Respondent: Ms Michele Voznick, solicitor for the Information
Commissioner

For the 2nd Respondent: Mr Robin Hopkins, Counsel instructed by Farrer & Co

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
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Subject matter:

FOIA

Absolute exemptions

- Personal data s.40

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 7 March 2013 and dismisses the appeal.

REASONS FOR DECISION

Background

1. Imperial College London (ICL) sought to recruit a research associate in its Department of Chemical Engineering. There were 20 applicants for the job. Dr Ali Merdaw was one of them.
2. Three of the 20 applicants were short-listed for interview. The Appellant was not one of them. When he heard he had not made the short-list, the Appellant asked for feedback on his application.
3. He wanted to know, specifically, which of the required criteria of his application was unsuccessful. He was informed that he had an interesting application, but other candidates had stronger CVs regarding relevant qualifications and experience for the specific post.
4. Following the explanation about the shortlisted candidates, the Appellant initially sought to make a subject access request. It was pointed out that he would only be entitled to his own personal data.

5. The Appellant then submitted an Equality Act Questionnaire in June 2012, to which ICL responded. Before September 2012 the Appellant made an application to the Employment Tribunal regarding his unsuccessful job application. On 4 September 2012 the Employment Tribunal refused his application concerning information about the other candidates which might allow them to be identified.

The request for information

6. On 10 September 2012, the Appellant wrote to ICL and requested information in the following terms:

- (1). Please provide copies of the application forms and particulars of the 3 candidates shortlisted for interview on an **anonymous** basis; please blot out all names and personal details, if necessary. The information should be edited to remove personally identifiable data without reducing the value of the information.

- (2). Please provide copies of any other document, official notes, if not submitted before, and emails exchanged between the members of the shortlisting panel and between them and the HR department, relevant to the short-listing process.

- (3). Alternative to (1), please provide a general comparative summary of the experience and qualifications of each candidate, identifying the successful candidates, on an anonymous basis. The summary should indicate the comparative information for the 8 selection criteria given in (1) advertised job description, and (2) Short Listing Record Form.

7. ICL responded on 5 October 2012. It provided a summary for each of the shortlisted candidates and stated that there were no further documents relating to the shortlisting process that the Appellant had not already received.

8. Following an internal review, ICL wrote to the Appellant on 11 October 2012. It maintained its original position and stated that the requested information was exempt under s.40 (2) of FOIA.

The complaint to the Information Commissioner

9. The Appellant contacted the Information Commissioner on 12 October 2012 to complain about the way his request for Information had been handled.
10. The Commissioner found that the disputed information was personal data, and that disclosure would breach the data protection principles set out at Schedule 1 to the Data Protection Act 1998 ("DPA").
11. He therefore found that ICL had correctly applied section 40(2) FOIA. He also found that there was no further information about the shortlisting process that had not already been provided to the Appellant.

The relevant law

12. The absolute exemption at s. 40(2) FOIA provides, insofar as is relevant here:
 - (a) Any information to which a request for information relates is also exempt information if it constitutes personal data which do not fall within subsection (1), 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, or...
13. The definition of "personal data" is found at s. 1(1) of the DPA. This provides:

"personal data" means data which relate to a living individual who can be identified -

 - a. from those data, or

b. from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, 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.

14. The data protection principles are set out at Part I of Schedule 1 to the DPA. The first data protection principle is that:

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...

15. The House of Lords has made clear, by reference to the equivalent Scottish regime, that "*there is no presumption in favour of the release of personal data under the general obligation*" of FOIA.¹

16. The relevant condition from Schedule 2 in this case is condition 6(1). which provides:

The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

The appeal to the Tribunal

17. The Appellant's grounds of appeal argued

1. The Commissioner had failed to consider his requests made to the ICL to disclose general information and not information of a personal nature. He wanted ICL to provide information under the FOIA how exactly the shortlisting and interviewing processes were carried out. That could be clarified through revealing correspondence between the

¹ *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47 [7] per Lord Hope

recruiting panel members and between them and HR, shortlisting grids, and interview dates and notes. All the information requested was sought in a redacted and anonymous basis; the Complainant indicated that in his original request in email sent to ICL in 10 Sep 2012. He wanted to know, for example, the timeline of the shortlisting and interviewing processes. That was not personal information and should not be withheld.

2. He had already received some of the information requested (e.g. redacted shortlisting grids - Short Listing Record Form) but that was outside FOIA.

3. There had been no discussion about ICL disclosing some general professional information about the shortlisted candidates under the FOIA that was not personal in nature. The Appellant believed that anonymised Short Listing Record Form (attached) could be expanded to include brief statements. That would clarify reasons for selecting or deselecting candidates, including the Appellant, and explain the scores given in respect to each of the 8 shortlisting criteria. For example, in criterion number 1, ICL could indicate if the candidate has a PhD degree or not and if it is relevant to membrane technology/polymer synthesis or not, and in criterion number 7 ICL could indicate the number of the candidate's published papers. ICL was asked to provide brief comparative summaries, which will not lead to the identification of individuals by cross-referencing the anonymised data. Thousands of people had PhDs relevant to such scientific fields and millions had not.

4. The Appellant had not received from ICL any information under the FOIA apart from the brief summaries given in an email dated 5 Oct 2012. They were insufficient and irrationally reduced and that they were selective rather than comparative.

5. The Appellant had requested further information related to the recruitment process, specifically emails between those involved and dates of interviews. That further request had not been considered.

The Second Respondent's Submissions

18. Following a Case Management Discussion before the Employment Tribunal on 16 October 2012, ICL had provided the Appellant with redacted versions of the applications and CVs of the three shortlisted candidates.
19. The Appellant was dissatisfied with the extent of the redactions. He sought a further disclosure order from the Employment Tribunal. On 5 December 2012, the Employment Tribunal Judge ordered ICL to disclose versions of the three shortlisted candidates' applications with fewer redactions which occurred.
20. In making that disclosure order the Second Respondent's position was that the Employment Tribunal Judge appreciated ICL's argument that some of the relevant information amounted to the personal data of the three shortlisted applicants. The Judge made the order because it appeared that this was "professional information that is relevant and necessary to be disclosed for the purposes of the fair trial of this claim". In other words, the Employment Tribunal Judge was ordering the disclosure of the shortlisted candidates' personal data for the purposes of those proceedings and not for disclosure to the world at large.
21. The Appellant's case before the Employment Tribunal was heard on 10 and 11 January 2013. By the time of the hearing before the Employment Tribunal, there was no suggestion that ICL had failed to disclose any information relevant to the shortlisting and appointment process. On 19 February 2013, the Employment Tribunal unanimously dismissed the Appellant's claim.

22. The Employment Tribunal's judgment resulted in ICL's appointment process being subjected to rigorous, impartial and public scrutiny. ICL conceded that the Employment Tribunal was critical of ICL's handling of the appointment process. It noted, however, that the Appellant had suggested only in a "half-hearted manner" that he should have been selected over the successful candidate. Dr Merdaw's race, religion and age played no part whatsoever in the process. The real reason Dr Merdaw was not shortlisted was because his experience was not comparable to that of the three shortlisted candidates.
23. Despite the decision notice in its favour, ICL voluntarily provided the Appellant with further explanations about the shortlisting process and another redacted copy of the shortlisting record form in order to assist him. ICL explained the timeline of the shortlisting and interview process. ICL notes that Dr Merdaw sought this information under FOIA but he has already been provided with it.
24. In preparing for this appeal, ICL discovered that there were two further emails (with attachments) of 15 and 16 May 2012 which it was content to release to the Appellant under FOIA. Those emails had already been disclosed to him during his Employment Tribunal proceedings (ICL had not withheld these documents from him and he had appended them to his reply to the Commissioner's response. Those documents were no longer in issue in the appeal.

The questions for the Tribunal

25. The Tribunal has to decide two questions. Firstly, whether the withheld information is personal data and, secondly, whether disclosure of that personal data would breach any of the data protection principles.

Evidence

26. The Tribunal had disclosed to it - as closed, confidential material - the withheld information.

27. It has been able, therefore, to consider the public interest balancing exercise involved in this appeal in the fullest possible context.

28. The Tribunal - when it sees such closed, confidential material in circumstances where it cannot immediately be made available to the Appellant - adopts a rigorous approach to considering the public interest arguments in revealing the information as against maintaining the exemption.

Conclusion and remedy

29. The Tribunal has no difficulty in finding that the withheld information is personal data – as defined in s.1 (1) of the DPA 1998 – and that there is a reasonable likelihood of a member of the public being able to identify the individuals who were the shortlisted candidates either from that information on its own or by combining that information with other information which is or is likely to be available to the member of the public.

30. The redacted parts of the shortlisting record form (i.e. the individuals' names) not only serve to identify them but also to link them with the personal information which is already in the public domain

31. The three shortlisted candidates' CVs, application forms and covering letters contain very detailed biographical information. They could not, as the Second Respondent successfully submits, realistically be redacted so as to remove any reasonable prospect of these individuals being identified.

32. Even if names and contact details were removed, the remaining information would be so detailed as to allow for ready identification in light of what is already in the public domain.

33. The Appellant has failed, practically, to counter this possibility in his grounds of appeal and other comments.

34. Disclosure of the personal data requested by the Appellant would breach the first data protection principle, which provides that:

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...

35. The only potentially applicable condition would be condition 6(1), which provides that:

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.

36. The Tribunal finds that Condition 6(1) would clearly not be met by disclosure of the personal data of the three short-listed applicants in this case.

37. The three short-listed candidates were private individuals who, in applying for the advertised position, were going about ordinary private business. Applying for a job is a fundamental aspect of personal privacy. The fact that they were seeking employment with a public authority did not affect the private nature of this information. They were not applying for senior or “public-facing” positions, but for the job of a University Research Associate. The three candidates could reasonably expect the fact of and details about their applying for a new job to remain confidential as between them and the prospective employer. Disclosure of such information would be a breach of that reasonable expectation of confidentiality.

38. The Tribunal is also satisfied that ICL holds nothing further in respect of the Appellant that it has not disclosed to him given the rigorous procedure that has resulted from this appeal and the Employment Tribunal Appeal.

39. For all the reasons above the appeal is dismissed.

40. The decision is unanimous.

41. There is no order as to costs.

Robin Callender Smith
Judge

5 November 2013