



**IN THE FIRST-TIER TRIBUNAL
(GENERAL REGULATORY CHAMBER)
[INFORMATION RIGHTS]**

EA/2015/0035

ON APPEAL FROM:

Information Commissioner's Decision Notice: FS5056238

Dated: 5 January 2015

Appellant: MICHAEL WOOD

Respondent: THE INFORMATION COMMISSIONER

Heard at: Fox Court

Date of hearing: 13 May 2015

Date of Decision: 2 June 2015

Date of Promulgation: 10 June 2015

**Before
Henry Fitzhugh
Annabel Pilling (Judge)
Nigel Watson**

Subject matter:

FOIA – Absolute exemptions – Personal data s.40(2)

Representation:

For the Appellant: Michael Wood

For the Respondent: Rupert Paines

Decision

For the reasons given below, the Tribunal refuses the appeal and upholds the Decision Notice dated 5 January 2015.

Reasons for Decision

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 5 January 2015.
2. The Decision Notice relates to a request made by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to the Arnside Parish Council for timesheets for the clerk to the parish council.
3. The parish council refused the request on the basis that the information was exempt under FOIA on the ground that the timesheets were personal data of the clerk and applied section 40(2) (unfair disclosure of personal data).
4. The Commissioner found that the parish council correctly applied section 40(2) to the information.
5. The Appellant appealed to this Tribunal on 6 February 2015. The parties agreed that the matter could be decided without an oral hearing. The Tribunal was provided in advance of the hearing with an agreed bundle of material.

Legal framework

6. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.
7. The section 1(1)(b) duty of the public authority to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions. Where the information is subject to a qualified exemption,

it will only be exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b)).

8. The exemption provided for in section 40(2) FOIA is engaged if it is shown that disclosure of the personal data of third parties would contravene one of the data protection principles set out in Schedule 1 of the Data Protection Act 1998 (the "DPA"). This is an absolute exemption.

The issues for the Tribunal

9. The issues for the Tribunal are as follows:

- (i) Is the information requested (the timesheets) personal data?
- (ii) If it is personal data, would disclosure contravene one of the data protection principles and thus engage the exemption in section 40(2) FOIA?

Is the information personal data?

10. Personal data is defined in section 1(1) of the DPA:

"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..."

11. The Appellant submits that the timesheets of the clerk cannot be considered to be personal data; so much other information about the clerk is already in the public domain, such as the total monthly salary, pay scale, name, address and basic hours. The timesheets relate to time spent doing publicly funded work.

12. We agree with the Commissioner that this submission is ill-founded and based on a misconception of the definition of personal data. We are satisfied that the timesheets relate to a living individual, the clerk, and that she is identifiable from the data together with the fact that she is the subject of the request.

13. We are therefore satisfied that the information requested is the personal data of a third party.

Would disclosure contravene one of the data protection principles and thus engage the exemption in section 40(2) FOIA?

14. The data protection principles regulate the way in which a “data controller” (in this instance, the parish council) must process, which includes disclosing, personal data.

15. The first data protection principle provides:

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.

16. The conditions in Schedule 2 are:

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

(2) The processing is necessary –

(a) for the performance of a contract to which the data subject is a party, or

(b) for the taking of steps at the request of the data subject with a view to entering into a contract.

- (3) *The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.*
- (4) *The processing is necessary in order to protect the vital interests of the data subject.*
- (5) *The processing is necessary –*
- (a) *for the administration of justice,*
 - (b) *for the exercise of any functions conferred on any person by or under any enactment,*
 - (c) *for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or*
 - (d) *for the exercise of any other functions of a public nature exercised in the public interest by any person.*
- (6) – (1) *The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate expectations of the data subject.*
- (2) *The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.*

17. We consider that the only relevant condition here is paragraph 6(1).

18. There is an inherent tension between the objective of freedom of information and the objective of protecting personal data. It has been

observed that section 40(2) of FOIA is a “complex provision”¹. There is no presumption that openness and transparency of the activities of public authorities should take priority over personal privacy. In the words of Lord Hope of Craighead in *Common Services Agency v Scottish Information Commissioner*² (referring to the equivalent provisions in the Freedom of Information (Scotland) Act 2002 (the ‘FOISA’):

“In my opinion there is no presumption in favour of the release of personal data under the general obligation that FOISA lays down. The references which that Act makes to provisions of DPA 1998 must be understood in the light of the legislative purposes of that Act, which was to implement Council Directive 95/46/EC. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data....”

19. In reaching our decision we considered first whether a condition is met before going on to consider whether the processing would be fair and lawful³.

20. In *Corporate Officer of the House of Commons v Information Commissioner, Brooke and others*⁴ (EA/2007/0060) and [2008] EWHC 1084 (Admin), the High Court upheld useful guidance on applying paragraph 6 of Schedule 2⁵, which can be summarised as the following three part test:

(1) There must be a legitimate public interest in disclosure;

¹ *Blake v Information Commissioner and Wiltshire County Council* EA/2009/0026

² [2008] UKHL 47

³ Following *Common Services Agency v Scottish Information Commissioner*, paragraph 30.

⁴ (EA/2007/0060) and [2008] EWHC 1084 (Admin)

⁵ At paragraphs 60 and 61.

- (2) The disclosure must be necessary to meet that public interest;
and
- (3) The disclosure must not cause unwarranted harm to the interests of the individual.

21. We consider that this test requires a consideration of the balance between (i) the legitimate interests of those to whom the data would be disclosed (which in this context are members of the public, not just the Appellant) and (ii) prejudice to the rights, freedoms and legitimate interests of the data subject (which in this case is the clerk to the parish council). However because the processing must be “necessary”, for the legitimate interests of members of the public to apply, we find that only where (i) outweighs (ii) should the personal data be disclosed.

22. We agree with what a differently constituted Panel of this Tribunal said in *Roberts v Information Commissioner and Department for Business Innovation and Skills*⁶, at paragraph 32:

“We consider the legitimate interest [in disclosure] ... must be assessed by reference to its potential value to the public as a whole ... in order to overcome the statutory restriction on disclosure it must be such as to give rise to a pressing social need for the data in question to be made available ...”

23. It is not possible, or necessary, to set out in full all the points advanced by the Appellant. In summary, the Appellant asserts that disclosure is necessary and fair for a number of reasons, including;

- (i) there should be openness and transparency about a publicly funded position;
- (ii) he has a long standing concern that the clerk was not being monitored effectively;

⁶ (EA/2009/0035)

- (iii) as the clerk holds a public office funded by public money she could have no expectation that her timesheets would not be disclosed;
- (iv) that there is overspending of the budget by the parish council;
- (v) as the clerk works from home there might be an issue in respect of her speed of work and the possibility of her abusing that position.

24. The Appellant has provided examples of timesheets prepared by the clerk in support of his appeal.

25. We do not accept the Appellant's suggestion that the Commissioner or his solicitor has listened to "*one side of the story and drawn the conclusion that [the Appellant's] interest is in making trouble*". The Commissioner considered the fairness of disclosing personal data as the regulator for both the Freedom of Information Act and the Data Protection Act.

26. The Commissioner concedes that there is always some legitimate public interest in the disclosure of information concerning public officials because they are paid with public funds and, in principle, work on behalf of the public. However, in this particular case there is no evidence that the Appellant's concerns are borne out. Details of the clerk's salary and terms of appointment are matters which she would expect to be, and which are, in the public domain. Given the generic descriptions of work done, we cannot see how the information requested would assist in resolving the concerns raised by the Appellant, or assist in raising further or more specific concerns. It is not therefore "necessary for the purposes of a legitimate interest."

27. We agree with the Commissioner that this limited and general public interest in the disclosure of information concerning public officials is greatly outweighed by the expectations of the clerk in respect of

personal data which is not in the public domain, and which is information which she could reasonably expect to remain private, and the distress likely to be caused to her in respect of the Council's handing of a request for her personal data. Disclosure of the timesheets would enable any individual to build up a picture of what this individual was doing on her own home at any given time on a given day. The clerk would have a reasonable expectation of privacy in relation to such information and disclosure would be unfair.

Conclusion

28. We therefore agree with the Commissioner that the requested information is personal data and disclosure would breach the DPA and so the information is exempt under s40(2) FOIA. We unanimously refuse this appeal.

Judge Pilling

2 June 2015