



EA/2017/0156

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

Between:

LORENZO GARCIA

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Hearing at Field House, London on 14 November 2017.

Before:

Brian Kennedy QC

Mike Jones

Michael Hake

Representation:

The Appellant represented himself.

The Commissioner relied on her written submissions.

Decision:

The Tribunal Refuses the Appeal and the Decision Notice stands.

REASONS

Introduction:

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA") The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice ("DN") dated 29 June 2017 (reference FS50665162) which is a matter of public record.

Factual Background to this Appeal:

2. Full details of the background to this appeal, Mr Garcia's request for information and the Commissioner's decision are set out in the DN and not repeated here, other than to state that, in brief, the appeal concerns the question of whether the Royal Borough of Kensington and Chelsea ('RBKC') was correct to rely on s40(5) in this instance.

3. CHRONOLOGY:

25 July 2016	Appellant's request for information pertaining to visits by an environmental health officer to a specific property owned by a third party
22 Aug 2016	RBKC refuses request, citing s40(2) (personal information)
26 Aug 2016	Appellant requests RBKC to confirm that it holds the information
31 Aug 2016	RBKC refuses to confirm or deny, pursuant to s40(5)
18 Nov 2016	Appellant requests internal review
7 Dec 2016	RBKC review upholds refusal to confirm or deny
27 Jan 2017	Appellant complains to Commissioner
29 June 2017	Commissioner's Decision Notice FS50665162 rejecting Appellant's complaint

4. RELEVANT LEGISLATION:

s1 FOIA Information held or not held

- (1) Any person making a request for information to a public authority is entitled—
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.

s40 Personal Information

- (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 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
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).
- (5) The duty to confirm or deny—
 - (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
 - (b) does not arise in relation to other information if or to the extent that either—
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject’s right to be informed whether personal data being processed).

COMMISSIONER'S DECISION NOTICE:

5. The Appellant asserted that information relevant to the address in question had already been disclosed to him, and his request is borne out of a moral duty to complain due to his concerns for the wellbeing of the occupants of the address. He argued that in accepting a complaint from him, RBKC has accepted that there is a moral duty placed upon members of the public and accordingly it should disclose the requested information. Disclosure, the Appellant argues would not be contrary to the Data Protection principles as it is in the public interest to disclose this information to allow the Appellant to prepare a further complaint to safeguard the health of the individuals in question.

6. RBKC stated that visits by Environmental Health Officers to a particular property, the service of notices of intended entry under the Housing Act 2004 and correspondence with the occupiers – i.e. the information sought by this request - would constitute personal data as it would identify individuals. The Commissioner accepted this argument, as confirmation or denial of whether RBKC held this information would reveal that a specific address had been the focus of an investigation in respect of environmental health concerns, and what action, if any, had been taken in regards to them. The Commissioner accepted RBKC's argument that the individuals would have a reasonable expectation that information relating to them or any complaints made or actions taken in regards to them would not be made public. The Tribunal accepts and adopts the Commissioners detailed and comprehensive reasoning in the DN and in the Commissioner's response.

7. The Commissioner noted that FOIA is applicant- and motive-blind, and whilst the Appellant may have beneficent motives, it must be remembered that disclosure is to the world at large. Prior correspondence between the Appellant and RBKC does not create a gateway for disclosure. Accordingly, the Commissioner upheld RBKC's refusal to confirm or deny holding the information. Again, the Tribunal accept and adopt the detailed and comprehensive reasoning in the DN and in the Commissioner's response.

GROUNDS OF APPEAL:

The Appellant submitted two main grounds of appeal:

Ground I - Public Interest

8. The Appellant claimed that the public interest lay in disclosure to protect the health, safety and wellbeing of the inhabitants of the Borough. He raised particular concerns about certain characteristics of the property in question, and argued that by accepting complaints from members of the public unconnected to the subject properties, RBKC recognises that

members of the public have a moral duty to complain and therefore an inherent interest in the information in question. He was concerned that RBKC had been subject to undue influence that led to it not executing a Notice of Intended Entry and potentially overlooking the illegal insertion of windows without planning permission. The Tribunal heard at length from the Appellant and found no evidence or reason to support the suggestion that the public authority had been subject to “undue influence”.

Ground II - Consequences of Disclosure

9. Contrary to the Commissioner’s and RBKC’s assertions, the Appellant argued that the consequences of disclosure are “not important”, as much of the requested information was already disclosed to the Appellant in an email from RBKC with no confidentiality requirement. The Appellant was of the view that any distress caused to the individuals has already been occasioned, and releasing the rest of the information would have a negligible effect. The Tribunal find that the Appellant fails to understand or accept the purpose of FOIA or the consequence of disclosure through FOIA as being to the world at large rather than to a limited and select few individuals.

THE COMMISSIONER’S RESPONSE:

10. The Commissioner noted that the Appellant did not appear to dispute that the information constituted personal data. She maintained that it would be unfair to disclose this information, as there is a reasonable expectation of confidentiality between residents and the Council in matters of environmental health, and disclosure would be likely to cause distress to the data subjects. The Tribunal, having considered all the evidence before us are satisfied that the Commissioner is correct in her Response and accepts and adopts her reasoning.

Ground I - Public Interest

11. The stated objectives of the protection of the wellbeing, health and safety of the Borough’s residents is relevant, but confirmation or denial of whether the subject information is held would not materially advance these objectives. Public disclosure of this information would not assist the Appellant in advancing his complaint about the way his case was handled, and his concerns about the alleged contravention of planning regulations does not have a sufficient nexus to the Appellant’s environmental health complaint for this to be a relevant consideration. The Tribunal, having considered all the evidence before us are satisfied that the Commissioner is correct in her Response and accepts and adopts her detailed and comprehensive reasoning.

Ground II – Consequences of Disclosure

12. The Commissioner rejected the Appellant's assertion that there would be no harm in disclosing the information as the Appellant had already received information. She stated that it is not unusual for individuals to receive correspondence relating to complaints they have made, and this is substantially different to release to the world at large. If the Appellant were to publish the information he has received in his correspondence with RBKC that could potentially be subject to legal challenge through misuse of private information or a breach of confidence. As disclosure under FOIA cannot be made with constraints as to how that information is used, any disclosure would breach the first data protection principle. The Tribunal, having considered all the evidence before us are satisfied that the Commissioner is correct in her Response and accepts and adopts her reasoning.

APPELLANT'S REPLY:

13. The Appellant noted that it still had not been explained to him why RBKC had decided not to execute the Notice of Intended Entry. He argued that by redacting names and addresses the information would no longer be personal and could be disclosed. The Tribunal questioned the Appellant closely on this and we were not persuaded that redaction, even if appropriate would result in anonymity given the nature of the disputed information.

Ground I – Public Interest

14. The Appellant argued that his request concerned a pressing social need, especially in the wake of the Grenfell Tower tragedy, and for this reason the disclosure would be justified. He has particular concerns that certain aspects of the building in question could be damaging to the "physical and psychological health" of the inhabitants, and he was of the opinion that the information was necessary for him to progress his complaint and potentially expose any undue influence or shortcomings in RBKC's approach to environmental health issues. The Tribunal questioned the Appellant closely on this and we were not persuaded that there was any or sufficient evidence that any damage to the physical or psychological health of the inhabitants would be caused by the concerns he had raised and further we were satisfied on the evidence before us that the public authority had made sufficient inquiries to determine that there was no such risk as perceived by the Appellant and in fact no complaints had been received or recorded by the public authority on behalf or by inhabitants themselves.

15. On considering all the evidence before us, and in particular after close examination of the Appellant himself on his various submissions, the Tribunal share the Commissioner's view that the Appellant is well meaning but his concerns are misplaced and do amount to mere speculative concern, We make the following observations on hearing the Appellant at length in the oral hearing before us;

- a)** The Appellant failed to provide any or sufficient evidence of environmental risks to raise public concern as a result of his own observations or by way of complaints from tenants or residents or third parties or otherwise.
- b)** Even if there were established and recognised environmental risks (which we find no evidence of), it seems to us the Appellant fails to understand the DPA issues engaged in this matter. It further seems to us he mis-understands the effect of whether or not the public authority confirm or deny that it holds information, might be within the scope of his request. The public authority have, in our view properly recognised the concern for tenants who would be identified by disclosure. Even if redaction were used, such would be the extent of redaction, so as to render the information meaningless. Disclosure would fail to achieve the Appellant's aim of serving the public interest he seeks to satisfy
- c)** On close questioning by the Tribunal the Appellant has failed to undermine the reasoning in the DN.
- d)** On close questioning by the Tribunal the Appellant has failed to provide any evidence of wrongdoing on the part of the public authority. In fact to the contrary, his evidence demonstrated and confirmed that the public authority had co-operated with the Appellant and had made inquiries of the Landlord and tenants and found that there were no complaints from either. The Appellant could give us no reason why the public authority would "make up" their record of "no complaints".
- e)** The Appellant could provide no explanation why or how a Councillor had not followed up on any service concerns by way of the internal complaints procedure within the Council or pursued it further with his elected Councillor after he had made an initial complaint to his Councillor. The Appellant could give no reason why he had not pursued other legal remedies or action through correspondence or otherwise or why he had decided FOIA was a remedy.
- f)** On close questioning the Appellant failed to present any evidence of public interest in disclosure on the facts of this case beyond his personal concerns.

16. In conclusion we are of the view that the public authority and the Commissioner arrived at the correct balance between the rights of the relevant individual(s) and the legitimate interests that might be furthered by confirmation or denial of whether information within the

scope of the Appellant's request was held and on the facts before us section 40(5) has been correctly applied.

Brian Kennedy QC

20 November 2017.