IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2017/0142**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50659133
Dated: 22 June 2017

Appellant: **Alex Homer**

Respondent: **The Information Commissioner**

2nd Respondent: **Compliance Officer for the Independent Parliamentary Standards Authority**

Considered on the papers: 1 February 2018

Before

Chris Hughes

Judge

Suzanne Cosgrave & Rosalind Tatam

Tribunal Members

Date of Decision: **26 February 2018**

Subject matter:

Freedom of Information Act 2000

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 22 June 2017 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. Following the debacle of MP's expenses in 2009 the Parliamentary Standards Act 2009 and the Constitutional Reform and Governance Act 2010 created the current system of the Independent Parliamentary Standards Authority (IPSA) to administer the system of expenses at arms-length from MPs. The Compliance Officer is an independent office holder whose primary role is "to *conduct an investigation if he ..has reason to believe that an MP (the MP concerned) may have been paid an amount under the MPs' Scheme of Business Costs and Expenses Scheme that should not have been allowed*".

2. On 3 October 2016 the Appellant wrote to the Compliance Officer seeking Information:-

   "Could you please provide copies of all correspondence [between the MPs, the MPs' Offices, the Compliance Officer(s) and/or all IPSA employees] relating to the following complaints handled by the compliance officer for IPSA where remedial action was taken before the investigation was closed: C1415-008, C1415-011, C1415-023, C1415-028, C1415-029, C1415- 033, C1516-001, COM-1047 and COM-1048?"

3. The Compliance Officer refused on the basis that the information was exempt from disclosure by the personal information exemption contained in section 40 of FOIA:-

   "(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...."

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,

Schedule 2 condition 6 provides:-

"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 interests of the data subject."

4. Following an internal review, the Compliance Officer maintained this position; the Appellant complained to the Information Commissioner (the ICO).

The complaint to the Information Commissioner

5. In her decision notice the ICO explored the discretion that the Compliance Officer had with respect to investigations and the routine information about complaints and investigations which the Compliance Officer published.

6. The ICO noted that the correspondence related to MPs and their staff and as such was personal data. The ICO considered the application of s40(3) and (4) (paragraphs 20-33) and concluded those concerned would have a reasonable expectation that their personal data would not be disclosed. *"This is because they were subject to complaints that were assessed and were found to not require formal investigation (paragraph 33)".*

7. The ICO concluded that (paragraph 46) *"despite being public figures, the MPs in question would have the reasonable expectation that the information would not be disclosed. The complaints in this case were assessed, remedial action was taken and no formal investigation was found to be necessary.* She noted that where there was fresh compelling evidence justifying disclosure the Compliance Officer would consider it, but in this case there was no such evidence. Furthermore the ICO found

that the efficiency and effectiveness of the Compliance Officer's work would be hampered by disclosure which would impede information gathering and diminish the level of co-operation from MPs in the early stages of the work of assessing a complaint. The ICO concluded that disclosure would be unfair and so contrary to the first data protection principle, further it could cause damage or distress to the MPs concerned.

The appeal to the Tribunal

8. In his notice of appeal and subsequent documents the Appellant argued that the ICO was wrong to hold that MPs have a reasonable expectation that complaints handled where remedial action was taken against them before an investigation was closed will remain private. Where a public figure commits some wrongdoing or demonstrates incompetence in office, they have a diminished expectation of privacy. He distinguished these MPs, where there has been remedial action from other MPs against whom complaints have been made which were without merit

9. He further argues that there is a strong public interest in transparency to show that the rules are enforced. There is a strong public interest in the disclosure of the identity of politicians who abuse power by misappropriation of funds.

10. In resisting the appeal, the ICO distinguished between the public interest test applying to certain exemptions in FOIA and the exemption of personal information of third parties. She argued that there was no presumption that transparency in the activities of public authorities should take priority over personal privacy. While public interest could be relevant to determining whether disclosure was fair or warranted, if the section 40 exemption applied there was no public interest balancing exercise. The public interest in MPs expenses was satisfied by the role of the Compliance Officer, that role was subverted if information was disclosed which the Compliance Officer had decided not to publish. In responding to the Appellant's argument (paragraph 9 above) :-

"It is precisely the role of the Compliance Officer to collect and assess evidence, consider complaints and decide whether there is a case to answer in respect of any potential abuse of power. Where the decision is that there is ***no credible charge of abuse worthy of an investigation, there is a minimal public interest*** *[emphasis*

added] in disclosing those details, as against considerable prejudice and unfairness to the individual concerned."

Consideration

11. In considering this appeal the starting point is the framework under which the Compliance Officer operates which is set out in rules laid down by IPSA. The Third Edition (January 2015) of the Procedures for Investigations by the Compliance Officer for IPSA provides (so far as is relevant):

"3 Where the Compliance Officer exercises discretion under these Procedures, it shall be exercised lawfully, fairly and proportionately....

6. Where a complaint has been made to the Compliance Officer or he or she is requested to conduct an investigation, the complaint or request (as the case may be) shall:

a) be made in writing;...

7. For the purposes of these Procedures, the Compliance Officer may request information from any source that the Compliance Officer deems appropriate, including the MP concerned and IPSA. This information may be requested in writing or orally by way of a meeting.

8. The Compliance Officer shall consider the information received under paragraphs 6 and 7 and decide whether or not, in any exercise of his/her discretion, to initiate an investigation.

9. Where the Compliance Officer decides that a request or complaint is not valid or not to initiate an investigation, he or she shall notify the person making the complaint or request 3 of this decision. Unless there are exceptional reasons not to, the Compliance Officer shall include in this notification the reasons for the decision not to proceed. Where appropriate, the Compliance Officer shall send a copy of this notification to the MP concerned and IPSA.

10. Where the Compliance Officer decides to initiate an investigation, he or she shall notify the MP concerned, IPSA and the complainant (if any). The notification shall set out a summary of the scope of the matters to be investigated and be sent to all persons at the same time....

27. Subject to paragraph 28, the Compliance Officer shall publish, in such manner as he sees fit:

a) the notification sent out under paragraph 10;..."

12. The decision to launch a formal investigation therefore arises after some correspondence with the MP and is a matter where the Compliance Officer is required to exercise his discretion under rule 3. The MP and the complainant receive the Compliance Officer's account of his reasoning. Only if an investigation is launched is there a formal announcement that an investigation is under way. This practice is accepted as the norm adopted by many regulatory bodies. The announcement of an investigation will be, at the least, unwelcome publicity for the MP concerned.

13. The Appellant accepts that the information is personal data. He goes on to argue that s40(2) FOIA which makes provision for personal data within the disclosure regime of FOIA is a qualified exemption and therefore subject to the public interest test. This is a misapprehension. The effect of s40 is to require an analysis of the disclosure within the framework of the DPA, while this analysis contains elements to some extent analogous to issues relevant to the public interest in FOIA, they are distinct and the determination of whether a disclosure should be made needs to be pursued through a consideration of the data protection principles and their application.

14. The duty on the holder of personal data is to process it fairly and lawfully *"and in particular [personal data] shall not be processed unless... at least one of the conditions in Schedule 2 [DPA] are met."* The conditions are:-

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

2The 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.

3The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4The processing is necessary in order to protect the vital interests of the data subject.

5The processing is necessary—

(a)for the administration of justice,

(aa)for the exercise of any functions of either House of Parliament,

(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 interests 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.

15. The MPs have not given their consent and it is clear that the only condition potentially relevant to the disclosure of the information is contained in 6(1). In order to meet the requirements of this test the Appellant must prove that the disclosure is necessary for a legitimate interest and the prejudice to "*rights and freedoms or legitimate interests of*" the individuals concerned is not unwarranted.

16. The tribunal is not satisfied that the Appellant has passed either limb of this test. The Appellant as a journalist has the interest of producing a news story. The Appellant, we assume, is interested in producing a news story about MPs who took remedial action to rectify an expense claimed contrary to the expenses legislation. These facts are in the public domain due to the publications which IPSA produces as part of its accountability. The Compliance Officer has, as he is entitled to, exercised a discretion and the Appellant has not argued that the Compliance Officer has not exercised it fairly lawfully and proportionately and that he was not entitled to conclude that a formal investigation (and the consequent disclosure of the name of an MP) is not justified. While the Appellant argues that "*where MPs have repaid expenses, some misconduct, incompetence or other malfeasance must have taken place*" that is an over-simplification and exaggeration. Innocent inadvertent human error, misunderstanding and miscommunication are also valid explanations. The system of oversight has worked in accordance with the legislative framework. For the purpose of accountability and the proper use of public funds the information is already available; the names of the MPs involved are not *necessary* for the legitimate purpose of journalism, given the framework of control and oversight in place.

17. Nor has the Appellant satisfied the second half of the test; the legitimate interests of the data subjects concerned. These MPs have a responded to the Compliance Officer in the knowledge that unless there is an investigation the issues raised by the

Compliance Officer will remain confidential. MPs have legitimate interest in their reputations and in the confidentiality of their communications with the Compliance Officer. The Compliance Officer has not considered an investigation justified. In these circumstances the interference with the legitimate interests of the data subjects is unwarranted.

18. The Compliance Officer made it clear that he was not applying a blanket refusal to disclosure of the names if MPs in relation to complaints other than those that had led to a formal investigation and the ICO made reference to this in the Decision Notice that if a person could demonstrate a "*particular public interest in further information being published about a complaint, including the identity of the particular MP, then the Compliance Officer would consider the merit, or otherwise, of those reasons*".(DN para 44)

Conclusion

19. The tribunal is satisfied that the reasoning of the ICO is correct in law and there are no grounds for disturbing her conclusions. The appeal is dismissed.

Judge Hughes

Date of Decision: 26 February 2018
Date Promulgated: 28 February 2018