



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

Case No. EA/2019/0211

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50831430
Dated: 7 June 2019**

Appellant: George Greenwood
Respondent: The Information Commissioner
Date of hearing: 15 January 2020 at Field House, London
Date of decision: 31 January 2020

Before

**Anisa Dhanji
Judge**

and

**Alison Lowton
Stephen Shaw**

Panel Members

Subject matter

FOIA section 40(2) - whether disclosure of personal data would breach the first data protection principle.

DECISION

The appeal is dismissed.

Anisa Dhanji

Judge

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REASONS FOR DECISION

Introduction

1. This is an appeal by Mr George Greenwood (the “Appellant”), against a Decision Notice (“DN”), issued by the Information Commissioner (the “Commissioner”), on 7 June 2019.
2. It concerns a request made by the Appellant to the Department for Exiting the European Union (“DExEU”), under the Freedom of Information Act 2000 (“FOIA”).
3. The request was for information about complaints relating to expenses claimed by special advisers in DExEU.
4. DExEU refused part of the request, citing the exemption in section 40(2) of FOIA relating to personal data of third parties.
5. DExEU closes on 31 January 2020. That does not affect this appeal which is decided on the facts as they were as at the date of the refusal.

The Request

6. The Appellant’s request was made on 15 January 2019 on the following terms:
 1. *Please provide the total amount in expenses claimed by special advisors of your department in each of the last five financial years, and the current financial year to date.*
 2. *Please provide this broken down by named special advisor, and provide for each item, the amount claimed, the supplier, the reason for claim and the date of the expense, as well as any other information held centrally about these transactions in the accounting software used to record and process them.”*
7. DExEU responded on 12 February 2019. It provided the amounts requested paragraph 1.
8. In respect of paragraph 2, DExEU relied on section 40(2) and refused the request.
9. Following an internal review requested by the Appellant, DExEU wrote to the Appellant on 15 March 2019, maintaining its refusal.

Complaint to the Commissioner

10. On 21 March 2019, the Appellant complained to the Commissioner about the way in which DExEU had responded to paragraph 2 of his request. He considered that section 40(2) did not apply to the withheld information.
11. The Commissioner asked DExEU to reconsider its position. DExEU then disclosed some further information to the Appellant.
12. The scope of the Commissioner's investigation, therefore, focused on DExEU's application of section 40(2) to the remaining information, comprising:
 - names, employee numbers, and email addresses of the special advisors;
 - supervisor and approvers' names, and employee numbers; and
 - invoice numbers and dates of expenses.
13. We shall refer to this information as the "disputed information".
14. The Commissioner decided, in her DN, that DExEU had appropriately withheld the disputed information under section 40(2), and therefore did not require DExEU to take any steps to ensure compliance with FOIA.

Appeal to the Tribunal

15. The Appellant has appealed against the DN under section 50 of FOIA.
16. The scope of the Tribunal's jurisdiction in dealing with an appeal from a DN is set out in section 58(1) of FOIA. If the Tribunal considers that the DN is not in accordance with the law, or to the extent that it involved an exercise of discretion by the Commissioner, she 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.
17. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the Decision Notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, as in this case, the Tribunal will often receive evidence that was not before the Commissioner.
18. The parties have lodged an agreed open bundle. In addition, we have been supplied with a closed bundle which includes the withheld information.
19. DExEU has not been joined as a party, although we have considered its responses to the Commissioner's inquiries as contained in the open bundle.
20. The parties have requested that this 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, we are satisfied that the appeal can properly be determined without an oral hearing.

The Disputed Information

21. We will begin by describing the disputed information. In line with the Supreme Court's decision in **Bank Mellat v Her Majesty's Treasury [2013] UKSC 38**, we will try to say as much as we reasonably can about that information, without undermining the purpose of this appeal. We have also kept in mind the Court of Appeal's guidance in **Browning v Information Commissioner and the Department for Business, Innovation and Skills [2014] EWCA Civ 1050**, as regards closed material generally.
22. The Tribunal has received a closed bundle comprising some 14 pages. Redacted copies are in the open bundle, so the Appellant already knows the structure of the information and the nature of what has been withheld.
23. Briefly, the disputed information comprises a spreadsheet with a number of columns. The following information has been redacted
- Column A – the names of the special advisers
 - Column B – their employee numbers
 - Column D – entity (these are numerical entries)
 - Column F – home cost centre (these are also numerical entries)
 - Column G – work telephone numbers
 - Column H – e mail addresses
 - Column I – invoice numbers
 - Column M – expense template
 - Column O – supervisor name
 - Column P – supervisor employee number
24. To put this in context, the information provided includes:
- The number of special advisers, namely 8)
 - The part of DExEU to which the expense relates
 - The amounts (in £) claimed by each of the special advisers, namely
- 18.80
13.00
20.00
21.31
18.00
30.00
15.67

11.28
40.00

- What the expense was for in each case (they were primarily taxi fares).

Statutory Framework

25. 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 it.
26. The duty on a public authority to provide the information requested does not arise if the information is exempt under Part II of FOIA. Personal data is exempt subject to certain exceptions.
27. “*Personal data*” is defined in section 3(2) of the Data Protection Act 2018 (“DPA”) as meaning:
- “any information relating to an identified or identifiable living individual (subject to subsection (14)(c)).*
28. Under section 3(3):
- “Identifiable living individual” means a living individual who can be identified, directly or indirectly, in particular by reference to—*
- (a) *an identifier such as a name, an identification number, location data or an online identifier, or*
- (b) *one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.*
29. The exception which DExEU relies upon is set out in section 40 of FOIA, which provides that information is exempt from disclosure if it constitutes personal data of an individual other than the requester and where the first, second or third condition below is satisfied.
30. The only relevant condition here is the first condition contained in section 40(3)(A)(a) which provides as follows:
- (3A) *The first condition is that the disclosure of the information to a member of the public otherwise than under this Act-*
- (a) *would contravene any of the data protection principles, or*
- (b) *would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.*
31. Under section 40(7)

“...the data protection principles” means the principles set out in –

(a) Article 5(1) of the GDPR, and

(b) section 34(1) of the Data Protection Act 2018.

32. Section 40(8) provides that:

In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of the information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted.

33. GDPR is of course a reference to the General Data Protection Regulations.

34. The first question, therefore, is whether disclosure of the disputed information would breach any of the data protection principles. There are seven data protection principles. However, only the first data protection principle is relevant here. This is set out in Article 5(1)(a) of the GDPR. It provides that “*personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.*”

35. Processing, in the context of FOIA, occurs when the personal data is disclosed in response to a request. This means that the data can only be disclosed if it would be lawful, fair and transparent.

36. Processing is lawful if one of the conditions in Article 6(1) is satisfied. The relevant condition in the present case is set out in Article 6(1)(f) which provides as follows:

“Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.”

37. The key questions here, therefore, are whether disclosure is necessary, whether there is a legitimate interest in disclosure, and whether even if there is, the legitimate interests outweigh the interests and rights of the data subject.

The Commissioner’s Findings

38. The Commissioner considered the Appellant’s and DExEU’s arguments relating to each of the above questions.

39. In considering whether there was a legitimate interests in the disclosure of the disputed information, the Commissioner accepted that there is a clear public interest in the scrutiny of the spending of public money by politically appointed figures, in openness and transparency in government, and in the enhancement in public trust in the government that may result from disclosure.

40. As to whether disclosure was necessary, the Commissioner considered the definition of necessity, and noted that disclosure under FOIA must be the least restrictive means of achieving the legitimate aim in question. She considered, however, that there was no reasonable necessity in the present case. She considered that the legitimate interest in the spending of public money was not materially addressed by disclosure of the disputed information because the amounts involved were not excessive or warranting further scrutiny. The Commissioner did not consider that disclosure of the identity of the individual claiming the expense, for example of a taxi fare, added to transparency. She considered, therefore, that there was limited necessity in disclosure.
41. As regards the balancing test, the Commissioner considered that the data subjects were unlikely to expect their personal data would be disclosed under FOIA. They do not have public facing roles at DExEU, they do not have an executive function like civil servants at senior civil servant grade and above. Also, they cannot authorise expenditure, exercise management powers or statutory or prerogative powers.
42. For all these reasons, the Commissioner considered that there was an insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and found, accordingly, that the disclosure of the information therefore would not be lawful. It followed that she found DExEU was entitled to rely on section 40(2) to withhold the requested information.

Our Findings

51. It is clear that the disputed information comprises personal data. Indeed the Appellant does not argue otherwise. His arguments are focused on the nature and weight of the public interest in disclosure which he says is at stake. He says that there is an important public interest in knowing the expenses claimed by special advisers, and he seeks to draw parallels with the expenses of civil servants. In particular, he argues that:
 - there is a legitimate interest in the disclosure of the information;
 - Special advisers do not have a reasonable expectation of privacy due to their role; and
 - just knowing the amount of expenses claimed is not enough to properly hold these high profile government figures to account.
52. We consider the Appellant's position to be misconceived in his view that the issue here is whether there is a sufficiently strong public interest to justify disclosure of the identity of special advisers who claim expenses. It is not. We are not empowered to make generic findings. We are only able to make findings in relation to the specific information before us.
55. In other words, the assessment as regards legitimate interest is in relation only the particular information in issue, and the particular public interest factors that arise based on that information. It is not an exercise based simply on a generic categorization as the Appellant has positioned it. This does not

mean that generic factors are not relevant, but they must be borne out by the particular information in issue.

56. It is also important to clarify that although the assessment of the competing interests in the context of section 40(2), is referred to as a balancing exercise, in fact, one does not start with the scales evenly balanced. The continued primacy of the DPA, notwithstanding freedom of information legislation, and the high degree of protection it affords data subjects, has been strongly emphasised by Lord Hope in **Common Services Agency v Scottish Information Commissioner [2008] 1 WLR 1550** where he states (at para 7):

“In my opinion there is no presumption in favour of the release of personal data under the general obligation that [FOIA] lays down. The references which that Act makes to provisions of DPA 1998 must be understood in the light of the legislative purpose of that Act 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.”

57. In the present case, given the relatively small amounts in issue, and given also that the nature of each expense has been disclosed, and that the amounts are not such as to suggest any misuse of public funds, we consider that disclosure of the disputed information is not necessary for the purposes of a legitimate interest that is being pursued. We consider that it would do little to further the public interest referred to at paragraph 39. We also find that such legitimate interest as there is, does not outweigh the interests of the data subjects.
58. We make no observations about whether special advisers are in positions comparable to senior civil servants, or otherwise. Our finding is simply based on the disputed information in this case. Different information may of course, lead to different findings.

Decision

59. For all these reasons, we dismiss this appeal.

Anisa Dhanji
Judge

Date: 31 January 2020