



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

Case No. EA/2013/0161

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50481536
Dated: 11 July 2013**

Appellant: JANET GIGGINS
Respondent: INFORMATION COMMISIONER
On the papers at: FIELD HOUSE
Date of hearing: 13 OCTOBER 2013
Date of decision: 17 DECEMBER 2013

Before

ROBIN CALLENDER SMITH
Judge

and

DR HENRY FITZHUGH and DAVID WILKINSON
Tribunal Members

Representations:

For the Appellant: Ms Janet Giggins
For the Respondent: Ms Helen Davenport, Solicitor for the Information
Commissioner

Subject matter:

FOIA

Absolute exemptions

- Personal data s.40
- Prohibitions on disclosure s.44

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice dated 11 July 2013.

SUBSTITUTED DECISION NOTICE

Dated: 12 December 2013

Public authority: Information Commissioner's Office

Address of Public authority: Whycliffe House,
Water Lane
Wilmslow
Cheshire
SK9 5AF

Name of Complainant: Ms Janet Giggins

The Substituted Decision:

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice dated 11 July 2013.

At the time of issuing Decision Notice FS50481536 the Commissioner did not consider that any of the withheld information amounted to the Appellant's personal data and, as a consequence, did not consider the application of s. 40 (1). Instead the Commissioner found that s. 44 (1) (a) of the DPA was engaged in respect of the withheld information in its entirety. The Commissioner has reconsidered the Appellant's subject access rights and, as a consequence, also considered that s.40 (1) was engaged in relation to a very small amount of the withheld information and has disclosed that to the Appellant 5 September 2013.

Because of that delay the Commissioner was in breach of s.17 (1) for failing to cite s.40 (1) in relation to that information within 20 working days.

Action Required: None.

Robin Callender Smith
Judge
17 December 2013

REASONS FOR DECISION

Introduction

1. Since considering the issues in this Appeal the Tribunal has been informed that the Appellant has received the disputed information.
2. However both the Appellant and the Information Commissioner have confirmed that they wish the Tribunal to determine this appeal on its merits. The background chronology is set out in some detail to provide a context for this appeal.
3. The Information Commissioner's Office is the public body in this appeal.
4. The Appellant made a number of requests to West Berkshire Council ("the Council") in relation to a proposed development. The Council refused to comply with the requests relying on regulation 12(4) (b), namely, that it would be manifestly unreasonable to do so. The Appellant's subsequent complaint to the Commissioner was investigated under reference FS50421845.
5. Then, on 19 December 2011, the Appellant asked the Commissioner for all the correspondence between the Commissioner and the Council in connection with that investigation. The Commissioner disclosed all information which fell within the scope of the request.
6. On 17 May 2012, the Commissioner issued a decision notice in the case of FS50421845 in which he found that regulation 12(4) (b) was not engaged, ordering the Council to respond to the Appellant's requests.
7. In July 2012, the Appellant further complained to the Commissioner that the Council had not fully complied with the decision notice.

8. In September 2012, the Commissioner agreed to investigate this new complaint under reference FER0457411.¹

The request for information

9. Then, on 31 October 2012, the Appellant submitted a request to the Commissioner as follows:

I would also be grateful if under the provisions of the FOI Act/DPA Act/EIR Regulations you could supply the further representations (excluding those already supplied) made by the WBC [West Berkshire Council] to this complaint, including the correspondence/emails they supplied in support of their argument that the volume was excessive and the content in some way vexatious. Ideally I would like this information to be supplied in electronic format.

10. On 2 November 2012, the Commissioner wrote to the Appellant to acknowledge her request. The Commissioner advised that this request would be dealt with as a subject access request under the Data Protection Act 1998. However, in the same letter, the Commissioner also confirmed that it was possible that not all the information which fell within the scope of the request would constitute her own personal data and that any such additional information would be considered under the Act.

11. On 5 November 2012, the Appellant again contacted the Commissioner, revising the request as follows:

....In the light of further information I have just received I would be grateful if you could widen this request to include any correspondence and/or notes of telephone calls between [ICO employee] and any other senior officer of the ICO and West Berkshire Council officers or councillors or any other party in which I or my FOI complaints have been discussed.

12. On 27 November 2012 the Commissioner advised that, in light of the previous disclosure, he considered the scope of the request only to relate to any correspondence between 20 December 2011 and 31 October 2012. He disclosed the majority of that information under the provisions of the

¹ In February 2013 the Commissioner issued a decision notice in which he found that the West Berkshire Council did not hold any further information which fell within the scope of the Appellant's request other than that already disclosed to her.

Data Protection Act and in accordance with the Appellant's subject access rights.

13. The Commissioner decided, however, that two items of correspondence fell to be considered under section 44(1)(a) in reliance on section 59 of the Data Protection Act 1998 and that this correspondence should be withheld. The first letter was a letter from the Council to the Commissioner dated 12 June 2012 and the second was a letter from the Commissioner to the Council dated 8 August 2012.
14. On 29 November 2012, the Appellant expressed her dissatisfaction with the Commissioner's decision to withhold the two letters.
15. On 17 December 2012, the Commissioner provided the Appellant with the outcome of his internal review. The Commissioner maintained his decision in respect of section 44(1)(a).
16. On 10 January 2013, the Appellant complained to the Commissioner in his capacity as the regulator for the Act. The Appellant confirmed that her complaint solely related to the withholding of the two letters.
17. The Appellant also confirmed that she had made a request for the same information to the Council. The Council had refused to provide the two letters relying on section 36(2).²

The Decision Notice under Appeal

18. The Commissioner concluded that he was unable to disclose the two letters because none of the conditions set out in section 59 (2) of the DPA 1998 could be met because the Commissioner did not have lawful authority to disclose the two letters.

² The Appellant submitted a further complaint to the Commissioner regarding the Council's application of section 36 to the two letters. At the time the Tribunal considered this matter on the papers that complaint was being investigated by the Commissioner.

19. That was because the first letter came to the Commissioner in order to provide input and clarification in relation to his handling of an investigation into a complaint. The second letter was so inherently connected with the contents of the first letter that, too, could be disclosed without disclosing the contents of the first letter. The Commissioner concluded that section 44(1) (a) was engaged such that he was not obliged to disclose the disputed information.
20. Subsequently, in further submissions made on behalf of the Commissioner dated 14 October 2013, he conceded that he was also required to look for other correspondence or telephone note where the Appellant or any of her FOI complaints had been discussed by senior staff at the Commissioner's Office with the Council or any other party at any point. In failing to do that the Commissioner accepted that he had breached s.10. As a result of this, and at the Commissioner's invitation, the Tribunal has substituted the original Decision Notice and noted the s.10 breach in this respect.
21. For completeness, there is a further information request dated 29 November 2012 which is being dealt with as a new and separate request.

The Legal Framework

22. Section 44 FOIA provides:

Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- a. is prohibited by or under any enactment ...

23. The relevant enactment is the Data Protection Act 1998. The relevant extracts are:

59 Confidentiality of information.

(1) No person who is or has been the Commissioner, a member of the Commissioner's staff or an agent of the Commissioner shall disclose any information which—

- (a) has been obtained by, or furnished to, the Commissioner under or for the purposes of the Information Acts,
- (b) relates to an identified or identifiable individual or business, and

- (c) is not at the time of the disclosure, and has not previously been, available to the public from other sources, unless the disclosure is made with lawful authority.
- (2) For the purposes of subsection (1) a disclosure of information is made with lawful authority only if, and to the extent that—
 - (a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business,
 - (b) the information was provided for the purpose of its being made available to the public (in whatever manner) under any provision of the Information Acts,
 - (c) the disclosure is made for the purposes of, and is necessary for, the discharge of—
 - (i) any functions under the Information Acts, or
 - (ii) any EU obligation,
 - (d) the disclosure is made for the purposes of any proceedings, whether criminal or civil and whether arising under, or by virtue of, the Information Acts or otherwise, or
 - (e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest.
- (3) Any person who knowingly or recklessly discloses information in contravention of subsection (1) is guilty of an offence.
- (4) In this section “the Information Acts” means this Act [the Data Protection Act] and the Freedom of Information Act 2000.

Evidence

24. The Tribunal has seen and considered the withheld information in its entirety.

Conclusion and remedy

25. The issues in this appeal have altered with the passage of time. More information has been revealed to the Appellant and there is an ongoing, current complaint (FS50489084) being considered to the Commissioner which will result in a further decision notice being published shortly.

26. That new decision notice may itself be appealed and may come to the Information Rights Tribunal for determination and further appeals.

27. The Tribunal finds that the information which remains withheld in relation to these information requests is properly withheld. Section 44 FOIA is

engaged and the factual situation falls squarely within s.59 of the DPA relating to the confidentiality of the information.

28. The Commissioner has properly kept the matter under continuing review. If the withheld information was released now – and the Tribunal has no way of knowing what, when and how that has actually and subsequently been released to the Appellant - it could prejudice the Commissioner's current deliberations in respect of the new complaint. That would not be in the public interest.
29. On that basis the Tribunal makes a Ruling under Rule 14 (6) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 that the redacted information at [94] of the West Berkshire Council's email of 21 November 2012 remains withheld from the Appellant unless it has voluntarily been disclosed.
30. The remainder of the appeal in respect of the Commissioner's existing decision notice – apart from the Tribunal's Substituted Decision Notice – is dismissed.
31. Our decision is unanimous.
32. There is no order as to costs.

Robin Callender Smith

Judge

17 December 2013