



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

Case No. EA/2018/0225

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50743105
Dated: 4 October 2018**

Appellant: Ayman El-Tawil

Respondent: The Information Commissioner

Second Respondent: Devon County Council

Date and venue of hearing: 1 April 2019, Fleetbank House

Date of decision: 9 May 2019

Date of Promulgation: 10 May 2019

Before

Anisa Dhanji

Judge

and

**Michael Jones
Melanie Howard**

Panel Members

Subject matter

FOIA section 40(2) - whether the information requested is personal data, and if so, whether disclosure would breach the first data protection principle.

DECISION

The appeal is dismissed.

Signed

Anisa Dhanji

Judge

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REASONS FOR DECISION

Introduction

1. This is an appeal by Mr Ayman El-Tawil (the “Appellant”), against a Decision Notice (“DN”), issued by the Information Commissioner (the “Commissioner”), on 4 October 2018.
2. It concerns a request made by the Appellant to Devon County Council (the “Council”), under the Freedom of Information Act 2000 (“FOIA”).
3. The request was for information about a phone call to the Council in which the caller complained about a piece of land owned by the Appellant.

The Request

4. The Appellant’s request (the “Request”), was made on 1 March 2018 on the following terms:

I request all details of Devon Highways enquiry ENQ181076522

In particular but not restricted to:

- *How the request came in;*
 - *Date/time;*
 - *Exact transcript of the call from caller and operator;*
 - *Length of call;*
 - *Whether the caller was male / female;*
 - *If the caller left a name or number;*
 - *If the caller did not withhold their number and you hold that record to release that information;*
 - *As all calls are recorded to release that call recording.*
5. The Council disclosed the information under bullet points 1, 2, 4 and 6. It said that it did not hold information requested under bullet point 7.
 6. It disclosed part of the information requested in bullet point 3. This consisted of an extract of the transcript of the call. The Council withheld the remainder of the transcript on the basis that it was not within the scope of the Request.
 7. The Council also withheld the information requested under bullet points 5 and 8 citing the exemption in section 40(2) of FOIA (personal data).

8. Following an internal review requested by the Appellant, the Council maintained its position.

Complaint to the Commissioner

9. The Appellant complained to the Commissioner on 2 May 2018.
10. His only complaint was in relation to the Council's refusal to provide the recording of the phone call (bullet point 8), which took place between a member of the public and a staff member of the Council in relation to the caller's complaint about an area of a specific road. We will refer to this as the "disputed information".
11. The Commissioner issued a DN stating that the Council had correctly applied section 40(2) FOIA to the disputed information. She considered that disclosure would be unfair and would contravene the first data protection principle as it would not be in the reasonable expectation of the data subject that the disputed information would be disclosed to the public.
12. Subsequently, after the DN was issued, the Council disclosed a redacted copy of the full transcript requested in bullet point 3. The redactions were made in respect of personal data pursuant to section 40(2). The Appellant made a separate complaint to the Commissioner about those redactions, and the Commissioner has issued a separate DN in respect of that complaint. We do not consider that issues about the redactions to the transcript form part of this appeal.

Appeal to the Tribunal

13. The Appellant has appealed against the DN under section 50 of FOIA.
14. 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.
15. The burden of satisfying the Tribunal that the Commissioner's decision was wrong in law or that she should have exercised her discretion differently, rests with the Appellant.
16. 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.
17. The parties have lodged an agreed open bundle. In addition, we have been provided with a closed bundle which comprises the unredacted transcript of the call and unredacted submissions made by the Council corresponding with redacted submissions in the open bundle.

18. We have not considered it necessary to hear the recording that comprises the disputed information, and accordingly, have not requested that it be provided to us.
19. 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.

Disputed Information

20. In the usual case, and in line with the Supreme Court's decision in **Bank Mellat v Her Majesty's Treasury [2013] UKSC 38**, we would try to say as much as we reasonably could about the disputed information, without undermining the purpose of the appeal.
21. However, in the present case, the Appellant already knows the content of the disputed information because he has a transcript of the phone call, albeit with some redactions. The disputed information is simply an audio recording of that conversation.

Statutory Framework

22. 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.
23. 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.
24. "*Personal data*" is defined in section 1 of the Data Protection Act 1998 ("DPA"), which has since been replaced, but was in force at the time the Request was made. It provides that:

"personal data" means 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,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

25. The exemption from disclosure of personal data is contained in section 40(2) of FOIA. Essentially, personal data of third parties is exempt if disclosure would breach any of the data protection principles set out in Part 1 of Schedule 1 of DPA 1998. The exemption is absolute.

26. The first question is whether the disputed information amounts to personal data.
27. If so, would disclosure of the disputed information breach any of the data protection principles?
28. Only the first data protection principle is relevant here. It provides that personal data shall be processed fairly and lawfully, and in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met.
29. On the facts of this case, the only relevant condition in Schedule 2 is condition 6(1). The condition is that:

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.

The Parties' Position

The Commissioner's Position

30. The Commissioner's position is set out primarily in the DN, and in her Response to the Appellant's grounds of appeal.
31. The Commissioner says first, that the disputed information comprises personal data. Even though the caller did not leave his/her name or other details, the disputed information is not in fact anonymised. It is reasonably likely that a member of the public would recognise the voice and so be able to identify the caller. A member of the public may also be aware, e.g. from previous conversations, that that person may have complained in the past about the roads referred to in the call. Such information, too, could assist in identifying the caller.
32. Given the rural nature of the area in question, the Commissioner also says that the chance of the data subject being identified is potentially enhanced. Since fewer people tend to live in rural areas than in urban areas, the potential for the data subject to be identified would be greater.
33. The Commissioner, says, in short, that disclosing the sound of the caller's voice into the public domain, in combination with the transcript that has already been disclosed, could lead to the caller being identified. The disputed information is therefore personal data.
34. As to whether disclosure would breach the first data protection principle, the Commissioner says that disclosure would not be fair. She says that in assessing fairness, relevant considerations include (amongst other things):
 - the possible consequences of disclosure on the data subject;
 - the reasonable expectations of the data subject, taking into account their expectations both at the time the information was collected and at

the time of the request, the nature of the information itself, and the circumstances in which the information was obtained;

- any legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the individuals who are the data subjects.

35. The Commissioner says that by declining to give his/her name or contact details, the caller clearly did not wish to be identified.

36. Whilst acknowledging that a compelling public interest may nonetheless make it fair to disclose the disputed information, the Commissioner says that there is no such public interest in this case to justify disclosure.

37. The Commissioner also says that there are no Schedule 2 conditions present in this case.

The Council's Position

38. The Council has focused its submissions (dated 21 January 2019), on why the transcript of the call should not be disclosed in unredacted form. As already noted, we do not consider that that is a matter in issue in this appeal.

39. However, a number of submissions the Council has made apply equally to the disputed information. In particular, the Council says that disclosure would be contrary to the first principle of data protection because:

- it does not have the consent of the caller to release the information;
- disclosure of the information is not necessary to protect any person's vital interests;
- there is no evidence that disclosure will advance the administration of justice or would otherwise be in the public interest. In fact, the Council says that the opposite is true in that revealing personal data relating to calls that are made to its Highways Service might have the effect of reducing public confidence in the Council. This, in turn, may lead to fewer individuals reporting Highways concerns, damaging the Council's ability to effectively manage and maintain the highway network in Devon; and
- disclosure of information that might identify the caller is not necessary to enable the Appellant to understand the nature of the complaint made by the caller.

The Appellant's Position

40. As to whether the disputed information is personal data, the Appellant says that there are over 60 million people in the UK. The call could have come from anyone and that "the caller may have even put on a voice".

41. The Appellant says that the Commissioner erred in concluding that disclosure was unfair and would therefore contravene the first data protection principle. He says that disclosure would not be unfair because:

- The caller did not leave their name and was therefore anonymous;
- The Council does not tell callers that the recordings of their calls will not be given to a third party and there would have been no expectation, therefore, that the recording of the call would not be disclosed; and
- The caller did not explicitly request to remain anonymous.

Findings

42. The Commissioner's analysis, in terms of the steps she went through (as set out in her DN, and summarised above), are clearly correct, based on the statutory provisions, as well as the relevant case law.
43. The first question is whether the disputed information comprises personal data. This depends on whether, if the disputed information were to be disclosed, it would be reasonably likely that the caller could be identified from the recording and other information available.
44. The Commissioner has referred us to the Upper Tribunal's decision in **Information Commissioner v Magherafelt District Council [2013] AACR 14**, in which it was said that the proper approach to whether anonymised information is personal data within section 1(1)(b), for the purposes of a disclosure request, is to consider whether an individual or individuals could be identified from it and other information which is in the possession of, or likely to come into the possession of a person, other than the data controller, after disclosure.
45. In **R (Department of Health) v Information Commissioner [2011] EWHC 1430 (Admin)**, Cranston J said, at paragraph 66, that an assessment of the likelihood of identification should include:
- “assessing a range of every day factors, such as the likelihood that particular groups such as campaigners and the press will seek out information of identity and the types of other information, already in the public domain, which could inform the search”.*
46. On the facts of the present case, we agree with the Commissioner about the likelihood that a member of the public hearing the recording would recognise the caller's voice. A voice, imbued, as it is, with an accent and/or way of speaking, is often a distinctive characteristic. It is a common experience, for example, to turn on the radio, part way through a programme, and immediately recognise the speaker by his/her voice. Identification may also be possible or assisted by awareness from previous conversations or engagements, if, for instance, that caller is known to have previously made similar complaints. That would make identification of the caller even more likely. Just as with a radio programme, identification of the speaker would be assisted by the subject that she or he may be speaking about. In addition, we consider that the localised nature of the complaint may make identification more likely. In fact, since the Appellant owns land in the same area, the

Appellant may know the caller personally, and may easily recognise him/her from the voice.

47. We find, in short, that the audio recording here amounts to personal data. The next question then is whether disclosure of this personal data would breach any of the data protection principles.
48. Only the first data protection principle is relevant. The key issue is whether disclosure would be fair and lawful. If so, is disclosure necessary for the purposes of a legitimate interest that is being pursued, and is it unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects? The first and last of these considerations are closely related.
49. When assessing the fairness of disclosure, the interests of the data subject as well as the data user, and where relevant, the interests of the wider public, must be taken into account in a balancing exercise. This wide approach to fairness is endorsed by the observations of Arden LJ in **Johnson v Medical Defence Union [2007] EWCA Civ 262** at paragraph 141:

“Recital (28) [of Directive 95/46] states that “any processing of personal data must be lawful and fair to the individuals concerned”. I do not consider that this excludes from consideration the interests of the data user. Indeed the very word “fairness” suggests a balancing of interests. In this case the interests to be taken into account would be those of the data subject and the data user, and perhaps, in an appropriate case, any other data subject affected by the operation in question.”

Although that case concerned the provisions of the Freedom of Information (Scotland) Act 2002, the principles apply equally in relation to FOIA.

50. 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”.

51. The following passage in **Corporate Officer of the House of Commons v IC and Norman Baker MP [2011] 1 Info LR 935** at para 28, offers further guidance on the relationship between FOIA and the DPA:

“If A makes a request under FOIA for personal data about B, and the disclosure of that personal data would breach any of the data protection principles, then the information is exempt from disclosure

under the Act: this follows from section 40(2) read in conjunction with section 40(3)(a)(i), or (when applicable) section 40(3)(b) which does not apply in these appeals. This is an absolute exemption - section 2(3)(f)(ii) FOIA. Hence the Tribunal is not required to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure under section 2(2). However... the application of the data protection principles does involve striking a balance between competing interests, similar to (though not identical with) the balancing exercise that must be carried out in applying the public interest test where a qualified exemption is being considered”.

52. The Appellant says that it would not be unfair to release the recording because the caller did not leave his/her name, and therefore was anonymous. That argument is without merit. If, as we have found, the caller could be identified by a member of the public, the caller would not remain anonymous.
53. The Appellant also says that it would be fair to release the recording because the Council does not tell callers that the recordings will not be given to third parties, and also because the caller did not explicitly request to remain anonymous. There is no merit in this argument either. Just because the caller withheld his/her name, does not mean that it would be in his/her reasonable expectation that the audio recording of the call would be disclosed to the public. On the contrary, given that the caller chose not to give his/her name or contact details, it is more likely that he/she wished to remain anonymous. Additionally, as the Council has said, because the caller chose to withhold his/her name, it has been unable to approach the caller to seek his/her consent to disclose the withheld information.
54. The Appellant has asked how the police are able to release recordings of 999 calls. However, as the Commissioner has rightly said, each case must be determined on its own facts. It may well be fair and in the legitimate interests of policing to disclose recordings of 999 calls in certain circumstances. The question in this appeal is whether, on the facts of this case, it would be fair for the Council to disclose the audio recording to a member of the public.
55. The Appellant has also argued that the caller did not explicitly request to remain anonymous. However, the caller declined, when asked whether he/she would like to leave a name and email. We consider it to be clear from this that he/she did not wish to be identified.
56. On these facts, we consider that it would not be fair to the caller to disclose his/her personal data.
57. As already noted, fairness also requires a consideration of any legitimate interests of the Appellant and of the public in having access to the disputed information. There is very little, however, to support a finding that disclosure would advance any such private or public interest. As far as the Appellant's interests are concerned, he already has the transcript of the call. The audio recording adds nothing to that information, except to give him the opportunity

to identify the caller. The Appellant has not put forward any legitimate interest in knowing the identity of the caller.

58. As to the wider public interest, the Appellant argues that disclosing information such as the disputed information might discourage nuisance calls and hoax complaints. There is no evidence to suggest that the call in question, was anything other than a genuine complaint. We also agree with the Commissioner and the Council that disclosure may equally discourage members of the public from calling the Council to report issues if they thought that recordings of their calls would be disclosed.
59. For all these reasons we find that disclosure would not be fair. Having reached this finding, it is not necessary to go on to consider whether any schedule 2 condition is met.

Decision

60. We dismiss this appeal.
61. Our decision is unanimous.

Signed
Anisa Dhanji
Judge

Date: 9 May 2019