



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2021/0031P

**Determined, by consent, on written evidence and submissions.
Considered on the papers on 19 April 2021**

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Ms Rosalind Tatam
Ms Emma Yates

Between

Kenneth Michael Haywood

Appellant

and

The Information Commissioner

Respondent

DECISION AND REASONS

DECISION

1. The appeal is dismissed.

MODE OF HEARING

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 36 and submissions from the Commissioner.

BACKGROUND

4. On 4 March 2020, the Appellant requested information about surveillance he says was carried out on him. The Department of Work and Pensions (DWP) confirmed that it held relevant information, but relied on section 40(1) FOIA to withhold it because the information would be his own personal data.
5. The Appellant's request to the DWP was for information in four parts (although part four had sixteen sub paragraphs). The requests made by the Appellant ranged across a number of different topics, but each request was based on the premise that the Appellant had been placed under surveillance by the DWP on a particular date. The requests covered whether the surveillance had taken place on that day, the training that officers would have had to carry out the surveillance on the Appellant on that day, the manner in which the surveillance was carried out which Appellant said caused him distress and anxiety, and whether a particular officer and vehicle were included in any surveillance, and whether training had been given to ensure that officers did not act towards others as the Appellant said the DWP had acted towards him.
6. The DWP responded on 17 March 2020 and confirmed that it held some information but that it considered the information to be the Appellant's own personal data. DWP therefore relied on section 40(1) FOIA to withhold the information. The DWP noted that any personal data it held would be caught by a Subject Access Request (SAR), although an exception to disclosure would likely be relied upon.
7. The Appellant sought an internal review on 23 March 2020, he argued that the information was not the personal data of him or anyone else and that the DWP was being obstructive in not providing the information. On 25 March 2020 the DWP

upheld its position. The Appellant complained to the Commissioner on 30 March 2020.

THE DECISION NOTICE AND APPEAL

8. The Commissioner's decision notice of 17 December 2020 stated that any information that the DWP held would be the Appellant's own personal data.

9. The Commissioner decided as follows:-

15. If surveillance of the complainant did indeed take place, that would be a decision taken about the complainant and with him as its focus. It would therefore be his personal data.

16. Whilst the complainant is seeking a variety of types of information, each individual question links back to the central premise that the DWP had put him under surveillance. For example, one part of the request asks: "Did those surveillance officers deployed by the DWP on the 22/7/19 to put me under surveillance receive additional training to undertake such surveillance?"

17. Whilst this particular question is (ostensibly) about training, it is actually about training given to particular officers who are alleged to have carried out surveillance on the complainant. If the surveillance of the complainant had not taken place, no officers would be identifiable and therefore no information would be held.

10. She also advised that because the information would have been personal data, the DWP should, in fact, have relied on section 40(5A) FOIA and should not have confirmed or denied holding information.

11. The Commissioner explained that:-

20. Whilst the Commissioner considers that the DWP was correct to withhold information from disclosure under the FOIA, she also considers that the DWP should never have confirmed holding information in the first place.

21. Responses provided under the FOIA are considered to be provided to the world at large. Because of the way the request was structured, the DWP has, in confirming it held information, confirmed the fact that the complainant was put under surveillance. That fact is itself the complainant's own personal data and should not have been disclosed under the FOIA.

12. The Commissioner also criticised the DWP for not treating the request as a subject access request (SAR) under the Data Protection Act 2018 and ‘strongly advised’ the DWP to do so. The Commissioner did not require any further steps under the FOIA to be taken as a result of this decision.
13. The Appellant’s appeal is dated 12 January 2021. The Appellant complains again about the way he was placed under surveillance by the DWP and states that there is an ongoing investigation into what happened. He says he will make an SAR request now that the DWP has accepted that it holds information.
14. The Commissioner responded to the appeal on 26 February 2021. The response first of all asks for the appeal to be struck out on the basis that there is no reasonable prospect of the appeal succeeding. In the alternative, the Commissioner says that any information which is responsive to the requests made by the Appellant would, by definition, be personal data and therefore exempt from disclosure.
15. The Appellant has not responded to the Commissioner’s submissions.

THE LAW

16. Under section 1(1)(a) and (b) FOIA a person who has made a request to a public authority for information is, subject to other provisions of FOIA and if it does, to have that information communicated to them.
17. The duty to provide the requested information imposed under section 1(1)(b) FOIA will not arise where the information is itself exempted under provisions contained in Part II FOIA.
18. Section 40(1) FOIA provides for an absolute exemption in respect of information if: “it constitutes personal data of which the applicant is the data subject”.
19. Section 40(5A)FOIA states that:-

The duty to confirm or deny 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).

20. Section 2(2) of the Data Protection Act 2018 defines personal data as “any information relating to an identified or identifiable living individual”.

DISCUSSION

21. Although the Commissioner’s response contains a request that the Appellant’s appeal is struck out by the Tribunal, this case has proceeded, and has been listed, as a consideration of the Appellant’s appeal on the papers, and the Tribunal prefers to deal with the matter on that basis.

22. The Tribunal agrees with the Commissioner’s conclusions on this matter. Any information held by the DWP which would be within the scope of the requests made and the questions asked would be, in fact, and as explained by the Commissioner in the decision notice, the Appellant’s personal information and therefore exempt from disclosure under FOIA

23. We also agree that the DWP should have dealt with this matter under s40(5A) FOIA and neither confirmed nor denied whether it held the information requested, as the fact that the DWP does hold information is in itself a disclosure of the Appellant’s personal information. However, as the Commissioner found, we have concluded that no further action is required.

24. On that basis, this appeal is dismissed.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 22 April 2021.

