IN THE UPPER TRIBUNAL **Case No.** GIA/3422/2016
ADMINISTRATIVE APPEALS CHAMBER

Before A Lloyd-Davies, Judge of the Upper Tribunal

DECISION

The decision of the tribunal dated 20 September 2016 did not involve the making of any material error of law. I accordingly dismiss Mr Lampert's appeal.

REASONS

1. Although the point of law involved in this case is a narrow one, I consider it would be helpful if I briefly outlined the background to the request for information made by Mr Lampert so that his current appeal may be set in its context.

2. Mr Lampert had guaranteed the indebtedness of a company to a clearing bank. That indebtedness was called in in the mid-1990s. The bank enforced its guarantee. Litigation ensued. That litigation ended adversely to Mr Lampert by the end of the 1990s (although there were also bankruptcy proceedings against Mr Lampert which continued). Mr Lampert was dissatisfied with the way in which the assets of the company had been realised on behalf of the bank and made a complaint to the Financial Services Authority (now the Financial Conduct Authority, but which I will refer to as "the FSA"). The FSA took no action.

3. Mr Lampert made numerous requests to the FSA for information relating to his complaint about the bank. The last of his requests to the FSA was made on 20 December 2012. It was refused on the grounds that it was vexatious and repeated within section 14 of FOIA. The Information Commissioner rejected a complaint by Mr Lampert and upheld the decision of the FSA. The Information Commissioner's decision notice was under the reference FS 50488531 and was dated 8 October 2013. I shall refer to that decision notice as "the 2013 decision notice".

4. The 2013 decision notice was <u>not</u> appealed. Mr Lampert then changed tack. In October 2013 he wrote to the Information Commissioner asking for the information that the Information Commissioner had obtained from the FSA in coming to its decision in the 2013 decision notice. On 25 November 2013 the Information Commissioner released all the information requested to Mr Lampert except personal data of third parties and a document supplied by the FSA to the Information Commissioner identified as "the briefing notes to Lord Turner [the then chairman of the FSA]" and which I shall refer to as "the briefing notes". The refusal by the Information Commissioner to disclose the briefing notes was based on section 44(1)(a) of FOIA in conjunction with section 59(1) of the Data Protection Act 1998 ("DPA"). Mr Lampert complained to the Information Commissioner about its failure to disclose the briefing notes. The Information Commissioner concluded in a decision notice (with reference number FS50527606 and dated 6 May 2014) that section 44(1)(a) of DPA had been correctly applied to the non-disclosure of the briefing notes. That decision was not appealed.

5. On 21 August 2015 Mr Lampert wrote arguing that there was now more public interest in the briefing notes being revealed and made a fresh request for them. Initially the Information Commissioner refused the request on the grounds that it was a repeated request within section 14(2) of FOIA. After an internal review, however, the Information Commissioner withdrew its reliance on section 14(2). It confirmed, however, that the briefing notes would still be withheld under section 44(1)(a) of FOIA by virtue of the provisions in section 59 of DPA. (The Information Commissioner also treated the request of 21 August 2015 as a subject access request under the DPA and, that to the extent that any of the information requested was personal data, it was exempt from the subject access provisions under section 31 of the DPA.)

6. It is the reliance by the Commissioner on section 44 of FOIA in conjunction with section 59 of DPA which is the subject of Mr Lampert's current challenge. That challenge was dismissed by the First-tier Tribunal on 20 September 2016. Before I turn to the proceedings in the Upper Tribunal I set out the relevant legislation.

7. Section 44 of FOIA provides that

> "(1) 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…"

8. The prohibitory enactment relied on by the Information Commissioner was section 59 of DPA which provides (as amended):

> "(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 –
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> (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,
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> unless the disclosure is made with lawful authority.
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> (2) For the purposes of subsection (1) a disclosure of information is made with lawful authority only if, and to the extent that –
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> (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 and the Freedom of Information Act 2000."

9. Section 70 of DPA 1998 provides, in subsection (1) that

"In this Act, unless the context otherwise requires –
"business" includes any trade or profession…"

It is to be noted that this definition uses the word "includes" and hence is not exhaustive.

10. The First-tier Tribunal decided that the FSA was a "business" for the purposes of section 59 of DPA. It further went on to decide that none of the provisions of section 59(2) of DPA (which provisions I shall refer to as "the gateways") enabled Mr Lampert to overcome the prohibition in section 59(1) of DPA 1998. The First-tier Tribunal refused Mr Lampert permission to appeal to the Upper Tribunal.

11. Mr Lampert renewed his application for permission to appeal to the Upper Tribunal. In his grounds of appeal he sought to argue, first, that the FSA was not a "business" for the purposes of section 59 of DPA because it was not engaged in commercial activity and, secondly, that if (contrary to his first submission) the FSA was a "business" then one or more of the gateways contained in section 59(2) should have been applied by the Information Commissioner.

12. On 7 March 2017 I granted Mr Lampert permission to appeal on the question of whether the FSA was a "business" for the purposes of section 59(1) of DPA 1998. In granting that permission I commented that I did not consider that Mr Lampert had a reasonable prospect of success in showing that the word "business" did <u>not</u> include the FSA but that I considered that it was a point which ought to be dealt with by a full Upper Tribunal decision rather than by a refusal of permission to appeal.

13. In respect of Mr Lampert's grounds of appeal relating to the application of the "gateways", I refused permission to appeal. In relation to this issue I commented

"Aside from the First-tier Tribunal's findings on the lawful authority "gateways" which in my judgment are unimpeachable, it is clear that the question of the "gateways" is a matter for the discretion of the ICO acting as a public authority and that the exercise of that discretion can only be challenged by judicial review proceedings – see <u>OFCOM v Morrissey</u> [2011] UKUT 116 (AAC) and not in this jurisdiction. Further, and in any event, to allow Mr Lampert access to material that he has already been denied access would not only undermine the confidential

> basis upon which the Commissioner received the material but would make the original unappealed denial of access of no effect: a nonsensical result." (My reference to the "original unappealed denial of access" is a reference to the 2013 decision notice, by which the Information Commissioner rejected Mr Lampert's complaint about the refusal of the FSA to give him the information he had requested.)

14. Mr Lampert was dissatisfied with my refusal of permission to appeal on his "gateways" grounds of appeal and applied for permission to apply for judicial review of that refusal in the Administrative Court. That application was refused by the Administrative Court on 19 May 2017 and Mr Lampert's application for permission to appeal the decision of the Administrative Court was refused by the Court of Appeal on 9 May 2018.

15. Accordingly, the sole issue which I now have to decide is that upon which I granted limited permission to appeal, namely, whether the FSA is a "business" for the purposes of section 59 of DPA.

16. I held an oral hearing of this appeal, at which Mr Lampert represented himself and Mr Metcalfe of Counsel represented the Information Commissioner. I am grateful to them both for their submissions.

17. Mr Lampert's oral submissions differed to some degree from those that he had made in writing in his grounds of appeal. I deal first with those written submissions.

18. Mr Lampert's written submission on the meaning of the word "business" was that it was limited to organisations of a commercial nature. It is certainly the case that the word "business" can have this restricted meaning. However, as Lord Diplock remarked in Town Investment Ltd. and Others v Department of the Environment [1978] A. C. 359 at 383C

> "The word "business" is an etymological chameleon; it suits its meaning to the context in which it is found. It is not a term of legal art and its dictionary meanings, as Lindley LJ pointed out in Rolls v Miller (1884) 27Ch.D. 71 at 88, embrace
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> 'almost anything which is an occupation, as distinguished from a pleasure – anything which is an occupation or duty which requires attention is a business.' "

I turn to the context. If the word "business" in section 59 (1) of DPA 1998 were to be given the limited interpretation for which Mr Lampert contended, it would mean that a very considerable number of the public authorities covered by schedule 1 of FOIA, namely, those which are governmental or not for profit organisations would not be caught be section 59(1). The requester would therefore be enabled to obtain by the back door (i.e. from the Information Commissioner) what he could not obtain by the front door (i.e. from the public authority directly). Such a result gives rise to a nonsense and cannot be what Parliament intended. Furthermore, as Mr Metcalfe pointed out, if this was the true construction of section 59, this would mean that public authorities would become reluctant to reveal to the Commissioner information, which could subsequently become disclosed by what I have described as "the back door". I am satisfied for the above reasons that the word "business" in section 59

cannot be limited to bodies which are engaged in commercial activity but encompasses anybody engaged in regular professional activities, including all those bodies listed or included in schedule 1 to FOIA which are not-for-profit organisations. (Mr Metcalfe also argued before me that the same conclusion would follow as a matter of EU law because of the obligation of confidentiality placed on the Information Commissioner and members of her staff by Article 28(7) of the Data Protection Directive 95/46/EC of 24 October 1995. I prefer not to express a view on this point since that Directive was addressed solely towards data protection issues and did not encompass questions arising under freedom of information: this distinction was not explored in argument before me).

19. I now turn to the submission that Mr Lampert made to me during the course of the oral hearing. He did not emphasise the commercial activity point with which I have dealt, but instead sought to argue that the Information Commissioner should have a discretion as to whether an organisation should, or should not, be treated as a business for the purposes of section 59 of DPA and that, in exercising this discretion, the Information Commissioner should have regard to all background circumstances. This argument has no merit. The word “business” is defined by section 70 of DPA and the Information Commissioner has absolutely no discretion whatsoever as to whether or not an organisation or body is a business for the purposes of the DPA. In his attempt to run this argument Mr Lampert was, in my judgment, seeking to re-introduce arguments based on the “gateways” which for the reasons already stated are not open to him in this appeal.

20. For the above reasons I dismiss Mr Lampert’s appeal.

(Signed on the original)

A Lloyd-Davies
Judge of the Upper Tribunal

Dated: 14 February 2019