



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

Case No. EA/2012/0209

ON APPEAL FROM:

**Information Commissioner's
Decision Notice No: FS50424761
Dated: 4 September 2012**

Appellant: ANNE MICHELE KELLY

Respondent: THE INFORMATION COMMISSIONER

On the papers

Date of decision: 15 JANUARY 2013

**Before
CHRIS RYAN
(Judge)
and
HENRY FITZHUGH
ANDREW WHETNALL**

Subject matter: Inhibition of free and frank exchange of views for purposes of deliberation s.36(2)(b)(ii)

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

1. On 19 April 2011 the Appellant asked the Queen's University Belfast ("the University") for the following information:

"...all information pertaining to meetings, criteria and discussions surrounding the severance and early retirement offers given to staff in the School of Nursing last June. This includes minutes, emails, letters and any relevant documents."

This constituted a request for information under the Freedom of Information Act 2000 ("FOIA").

2. FOIA section 1 imposes on the public authorities to which it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA. Each exemption is categorised as either an absolute exemption or a qualified exemption. If an absolute exemption is found to be engaged then the information covered by it may not be disclosed. However, if a qualified exemption is found to be engaged then disclosure may still be required unless, pursuant to FOIA section 2(2)(b):

"in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

3. The University refused most of the request, although it provided the Appellant with some information that it considered she was entitled to, as it was her own personal data. The refusal was maintained, following an internal review requested by the Appellant, and was upheld by the Information Commissioner after the Appellant had complained to him. His decision was contained in a Decision Notice dated 4 September 2012. He concluded that the information requested was exempt from the obligation of disclosure because it fell within FOIA section

36(2)(b)(ii) and the public interest in maintaining that exemption outweighed the public interest in disclosure.

4. FOIA section 36(1) provides that it applies, among other things, to information which is held by a public authority other than a government department. It then reads as follows:

“(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –

(a)...

(b) would, or would be likely to, inhibit –

(i)...

(ii) the free and frank exchange of views for the purposes of deliberation...”

The exemption is a qualified one so that, if found to be engaged, it is necessary to then consider whether the information in question should still be disclosed, applying the public interest balance required by FOIA section 2(2)(b), mentioned above.

5. The Information Commissioner established that the opinion relied on by the University had been given by Mr James O’Kane, the Registrar and Chief Operating Officer of the University. The Information Commissioner was satisfied that this was the appropriate “qualified person” and no challenge has been made to that part of his decision.
6. The qualified person took the view that complying with the information request would result in the disclosure of discussions surrounding both the implementation of a Premature Retirement/Voluntary Severance scheme, which the University had introduced, and a process for restructuring the University’s School of Nursing and Midwifery (“the School”). He expressed the opinion (which the Information Commissioner largely accepted) that disclosure would be likely to prejudice the free and frank exchange of views in those contexts. On this basis the Information Commissioner was satisfied that the opinion of the qualified person was reasonable and that the exemption was therefore engaged in respect of the whole of the information that had been withheld.
7. Both the University and the Information Commissioner agreed that, when considering the public interest balance, weight had to be given to the public interest in increasing openness, transparency and accountability in the decision-making processes of public sector organisations, generally, and the University’s operation of its Premature Retirement/Voluntary Severance scheme, in particular. However, the Information Commissioner concluded that this interest was outweighed by the public interest in permitting those considering the review and re-structuring of the School, which was an on-going process, to carry out the process without their discussions being inhibited by premature disclosure.

8. On 29 September 2012 the Appellant lodged a Notice of Appeal. Her Grounds of Appeal were quite short, as follows:

"I am concerned about the reasons given by the university (and accepted by [the Information Commissioner] for non-disclosure of the requested information. Both them and yourselves attach great importance to the fact that the scheme is "ongoing". Significantly I based my timing of retirement on information given by senior staff to me indicating there would be no further offers. ...At that time had I know the process was "ongoing" I could have delayed my retirement and applied like others in my team for the very attractive packages offered the following year. My view is that information was withheld to me which hindered my ability to make a proper informed decision about one of the most important events in my career"

9. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.
10. As already mentioned, the Grounds of Appeal do not include any challenge as to the identity of the individual put forward as the "qualified person" for the purposes of FOIA section 36. Nor do they appear to argue that the opinion reached was other than reasonable. It could, however, be argued that they incorporate an argument that the public interest in maintaining the exemption does not outweigh the public interest in disclosure. We have treated it on that basis.
11. Although the Grounds of Appeal do not address, directly, a public interest in disclosure, it may be said that the purely personal interests expressed by the Appellant reflect a public interest in having redundancy or early retirement schemes operated by public authorities carried through in a way that provides those affected a fair opportunity of understanding how they operate and of satisfying themselves that they result in balanced treatment for all affected employees. To some extent this public interest reflection of the Appellant's personal disappointment as to the way the University treated her is identified in a written submission that she sent the Tribunal on 7 November 2012. However, those factors have already been accepted by the Information Commissioner's acknowledgement that openness and transparency are desirable in this context and we found nothing in the Appellant's case to justify giving greater weight to this factor than the Information Commissioner did.

12. The essence of the case for limiting transparency is that public authority employers may need to vary retirement deals from time to time to help match establishment costs to the needs and budget of an organisation, which may themselves also change under the influence of other factors. Complete transparency while variations are under consideration may not be possible, even though this may lead to inequalities between individuals retiring at different times and a wish, in retrospect, that they had better foreknowledge when they made the decision to accept the terms offered at the time. In these circumstances, we find it impossible to say that the Information Commissioner's assessment of the public interest balance was erroneous. Indeed, we consider it important that management has a degree of space when planning a restructuring exercise and we do not think the Information Commissioner may be faulted for concluding that it is a process that will take some time to complete and that disclosure at the time of the Appellant's request would have been premature.
13. In the circumstances it is our unanimous view that the Appellant has not succeeded in establishing that the exercise of the public interest balance by the Information Commissioner was wrong and that, accordingly, her appeal must fail.

Chris Ryan

Tribunal Judge
15 January 2013