



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

Case No. EA/2012/0238

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50446099
Dated: 16 October 2012**

Appellant: JULIE WHITE

First Respondent: INFORMATION COMMISIONER

Second Respondent: CARMARTHEN COUNTY COUNCIL

On the papers at: FIELD HOUSE, HOLBORN, ON 28 MARCH 2013

Date of decision: 24 APRIL 2013

Before

ROBIN CALLENDER SMITH

Judge

and

PIETER DE WAAL and NARENDRA MAKANJI

Tribunal Members

REPRESENTATIONS:

For the Appellant: The Appellant presented her own written submissions.
For the First Respondent: Ms M Voznick, Solicitor for the Information Commissioner
For the Second Respondent: Mr R Edgecombe, Carmarthenshire County Council
Legal Services.

Subject matter:

FOIA 2000

Absolute exemptions

- Personal data s.40

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 16 October 2012.

SUBSTITUTED DECISION NOTICE

Dated: 24 April 2013

Public authority: Carmarthenshire County Council

Address of Public authority: County Hall
Carmarthen
SA31 1JP

Name of Complainant: Ms Julie White

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 16 October 2012.

Action Required: Within 31 days of the service of this Substituted Decision Notice the Second Respondent should supply the Appellant with the information requested.

Robin Callender Smith

Judge

24 April 2012

REASONS FOR DECISION

Introduction

1. The Appellant in this case made an information request for an up-to-date list of licensed dog breeders in Carmarthenshire.
2. The requirement to obtain a licence – and the conditions that a breeder should formally meet to obtain the licence – comes from the Breeding Dogs Act 1973 and the Breeding and Sale of Dogs Act 1999. There is a related statute, the Breeding Dogs Act 1991, which amends the 1973 Act to allow certain additional rights of entry for investigating officials. Local authorities have a statutory duty to apply the regulations.

The request for information

3. On 17 October 2011 the Appellant wrote to Carmarthenshire County Council as follows:

Please could you advise me which department is responsible for licensing puppy farming in Carmarthenshire? And would it be possible to send me a list of those premises which are licensed.

4. The Council's Animal Health Department replied on 27 October 2011 stating that it currently had 88 establishments licensed under the Breeding of Dogs Act 1973 in Carmarthenshire. At that stage the Appellant made an information request to the Council:

Please be kind enough to provide me with details under the Freedom of Information Act. I would like a current/up-to-date list of licensed dog breeders in the Carmarthenshire County. Or, those who have been licensed by Carmarthenshire LA.

5. The Council confirmed on 14 November 2011 that it did hold the requested information but considered that it was exempt under s. 40 (2) of FOIA. On 21 December 2011 the Appellant asked for an internal review and was told, on 23 January 2012, that the review had upheld the decision that the requested information was exempt under s. 40 (2) FOIA.

The complaint to the Information Commissioner

6. In the Decision Notice, the Information Commissioner's investigation focused on whether the Council was correct to rely on section 40 (2) to

withhold the names of the licensed dog breeders in the Carmarthenshire area. Living individuals could be identified from their name and address and, the Commissioner concluded, those clearly constituted “personal data”.

7. The Commissioner then considered whether disclosure of the names and addresses of the licensed dog breeders would contravene any of the Data Protection Act 1998 principles. He considered whether disclosure of the names and addresses would be “fair” taking into account the reasonable expectations of breeders and the potential consequences of disclosure.
8. He noted that:
 - a. Information about an individual’s private life deserved more protection than information relating to an official work capacity.
 - b. While the information related to the individuals’ business activities, that business was conducted from their private homes and touched on their private lives. There was no requirement for a public register of licensed dog breeders although dog breeders were required to display a copy of the license at their premises.
 - c. The local police had advised some licensed dog breeders not to display the licences too prominently because of previous incidents of threats, acts of criminal damage and violence to other dog breeding establishments in the area. Very few licensed dog breeders sold to the public.
 - d. Most of the breeders who were consulted by the Council objected to the disclosure of their names and addresses.
9. Although individuals might have a reasonable expectation about disclosure or any damage and distress caused to them by disclosure, the Commissioner accepted that it might still be fair to disclose the requested information if it could be argued that there was a more compelling public interest in disclosure. In relation to that he had noted:
 - a. The welfare of animals, particularly the welfare of dogs, was an emotive subject. The police had informed the Council that, in recent years, there had been incidents of targeting of dog breeders’ properties resulting in criminal damage and a risk to public safety.
 - b. Because of instances of animal extremist activity in Carmarthenshire, including criminal damage, threats of violence, and trespassing, the Council introduced a policy not to pro-actively publish names and addresses of the licensed dog breeders. That policy had been introduced in 2008 and was kept under review. Prior to that the Council did publish the details of licensed dog breeders.

- c. During the Commissioner's investigation that policy was specifically reviewed by the Council and retained.
- d. The Council had the highest number of licensed dog breeders in the UK. It believed there was evidence that the area was being singled out by animal welfare extremists including people travelling from other parts of the United Kingdom to make undercover visits to licensed dog breeders in the county.
- e. The Council held a consultation with the licensed dog breeders during the course of the Commissioner's investigation. Of those who responded, 90% stated they did not want the information released. Those responses referred to examples of previous incidents to support the concern of the breeders for their safety.
- f. There was a significant reference on animal welfare websites to "puppy farms in Carmarthenshire" and clear evidence that there was strong opposition to commercial dog breeding and concerns about the welfare of the animals.
- g. While it was difficult to determine whether the release of the information would result in an increase in activity by animal welfare extremists, there was sufficient evidence that disclosure could lead to increased activity and that it could cause unnecessary and unjustified distress and damage the individuals.
- h. There was great public concern about the standards of welfare of dog breeders and, specifically in Wales, there had been evidence of poor welfare in some breeding establishments resulting in new welfare regulations concerning dog breeding.
- i. While licensing was designed to ensure certain minimum standards, there was a concern that some public authorities might not be undertaking their responsibilities properly. Disclosure of the requested information would provide opportunities for public scrutiny.
- j. Other public authorities had either published or had disclosed the names and addresses of licensed dog breeders in their area.
- k. Both the Commissioner and the Council accepted there was a clear public interest in knowing that dog breeding was properly regulated. There was also a very strong public interest in ensuring that animals were treated and cared for properly.
- l. The Commissioner believed the case was finally balanced but held that the potential damage and distress that would be caused by the disclosure outweighed the legitimate interest of the public.

Although the Commissioner's Decision Notice does not explicitly make the finding in its conclusion, it is to be inferred from the analysis that the Commissioner considered that public disclosure of the requested information would not amount to fair processing and would therefore be in

breach of the first data protection principle in Schedule 1 to the Data Protection Act 1998.

The Second Respondent's Response

10. The Council, in its response, adopted the Commissioner's arguments. It believed that the absence of any recorded criminal convictions should not be taken as proof of the absence of criminal or other harmful actions by animal welfare activists.
11. Its response had been based on advice previously received from the police. Its position was strengthened by the response from licensed dog breeders to the survey it had conducted. The licensed dog breeders were fearful that, if the requested information was disclosed, they would be targeted by activists opposed to commercial dog breeding.
12. The Council believed that the high proportion of dog breeders in Carmarthenshire was a sign of the success of its policy in ensuring that local breeders were licensed and regulated. If the requested information was disclosed to the public at large – including those strongly opposed to commercial dog breeding – it would place licensed dog breeders at risk of harm and discourage them from engaging in the licensing process.
13. It was concerned that there was a significant risk that disclosure of the requested information would result in dog breeders choosing to trade illegally, making the monitoring of the welfare of breeding dogs infinitely more difficult.

The appeal to the Tribunal

14. The Appellant set out her position in her grounds of appeal dated 9 November 2012 and in a detailed and closely-argued reply to the Information Commissioner's points dated 31 December 2012. In summary:
 - a. The Council had made a number of claims about prejudice to licensed dog breeders which had no evidential basis.
 - b. The Appellant noted that while the Council had made a number of claims that actual harm such as criminal damage and threatening behaviour had occurred to licensed breeders as a result of "animal

welfare extremist” activity, those claims had not been substantiated. There was no evidence of any causal relationship between disclosure of the information and the existence of those harms.

- c. The Council had presented evidence that certain licensed breeders had concerns about potential harm to them if the details were to be disclosed. That was based on the responses of a sample of licensed dog breeders to a communication from the Council to all licensed breeders asking about their views on disclosure. 60% of the breeders who were approached replied to this enquiry and 93% did not want the details disclosed. Some cited fears of the consequences. There was, however, no evidence presented by the Council that disclosure of the information would take matters beyond individual breeders worrying to a degree that affected mental health or that the effects of such worrying were likely to be sustained or enduring.
- d. The Appellant summarised issues in relation to welfare problems with dog breeding and legitimate public interests in disclosure of licensed dog breeders’ details. In essence, disclosure of the details of licensed breeders by the Council would be consistent with the purposes of dog breeding regulations to assure a certain minimum welfare standard to meet public expectations, to assist purchasers of puppies where the current marketing environment provided opportunities for puppies to be sold with no information on provenance, to assist enforcement particularly in terms of public reporting to authorities who might not have the resources to seek out and investigate unlicensed breeders, to enable scrutiny of licensing standards being applied by the Council and facilitating redress by purchasers of puppies where later health problems arose.
- e. In relation to the Council’s “policy” – introduced in 2008 – there was no record available of any discussions within the Council about how the policy was arrived at.
- f. Mention had been made of the police informing the Council that there had been incidents of targeting properties of dog breeders resulting in criminal damage and threats to public safety. The Appellant had made enquiries which showed that, for the two-year period to which the request related, Dyfed-Powys Police held no records of any such discussions with the Council. There were no recorded convictions relating to violence, criminal damage or threatening behaviour occasioned to dog breeders that could be connected with “animal welfare extremists” in the last five years. There appeared to be no convictions from such activity in relation to Carmarthenshire.
- g. The Council had used inappropriately emotive descriptions to justify its position of non-disclosure by describing “animal welfare extremists” “targeting” the authority and “converging on it from all parts of the country” without giving any evidence to support those statements.
- h. The Appellant had provided the Commissioner with lists of licensed breeders which were provided - without hesitation - to her by a number of other local authorities in Wales. These had been provided without

any mention of reports of harm caused to licensed dog breeders due to the release of this information. The information included a full list of the 71 licensed breeders in Ceredigion County Council, a county directly adjacent to Carmarthenshire and – along with Carmarthenshire – the location of the highest concentration of both licensed and unlicensed dog breeders in Wales.

- i. The purpose of the dog breeding regulations that required licensing was to address public concerns about welfare standards in this sector. The information requested related to the adherence of such business to publicly expected and legally required minimum standards.
- j. Arguments supporting non-disclosure on the grounds of unfairness – as a result of intrusion into personal privacy – were weakened because of this professional business aspect at the root of the data requested.

Evidence

15. In addition to the open information disclosed to the Appellant in this appeal, the Tribunal considered closed information supplied by the Council.

16. In arriving at its decision, the Tribunal feels no need to refer to the detail of the closed information either in this decision or in any closed annexe to it.

Conclusion and remedy

17. The Tribunal reminds itself of the relevant legislation in respect of this request. Section 40 FOIA is a “gateway” provision in respect of issues relating to personal data as follows:

40 — Personal information

...

(2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

(3) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles,

...

The first data protection principle is set out in paragraph 1 of Schedule 1 to the DPA:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a) at least one of the conditions in Schedule 2 is met.

The relevant Schedule 2 condition is the sixth which provides, so far as relevant:

(1) 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.

18. 'Necessary' has been defined as meaning that there is a 'pressing social need' and that interference with a data subject's rights is "proportionate as to means and finely balanced as to ends": *Corporate Officer of the House of Commons v Information Commissioner* [2011] 1 Info LR 987 at [43].

19. The importance of the protection of an individual's right to privacy in respect of their personal data is summarised by Lord Hope in *Common Services Agency v Scottish Information Commissioner* [2008] 1 WLR 1550, referring to the parent directive and the Freedom of Information (Scotland) Act 2002 at [7]:

In my opinion there is no presumption in favour of the release of personal data under the general obligation that the 2002 Act lays down. The references which that Act makes to provisions of the 1998 Act must be understood in the light of the legislative purpose of that Act, which was to implement Council Directive 95/46/EC. 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: see recital 2 of the preamble to, and article 1(1) of, the Directive...

20. In *Morley v Information Commissioner & Surrey Heath Borough Council* [2012] 2 Info LR 155, the Tribunal observed at [17] & [22]:

...there is an inherent tension between the objective of freedom of information on the one hand, and the protection of personal data on

the other. Section 40(2) seeks to ensure that the interests of those requesting information from a public authority do not undermine, unnecessarily, the interest of those individuals whose personal data might find its way into the public domain as a result of the public authority complying with such a request. When section 40(2) is engaged, the Tribunal is required to undertake quite a different task from when it deals with other FOIA exemptions. FOIA promotes the right to information, but when section 40(2) is under consideration, the DPA determines the proper approach, and the interest of data subjects receives a high degree of protection.

...

21. Bearing all of the above in mind the Tribunal believes – on the facts of this case - that an important factor for any assessment in relation to the “fairness” of the disclosure of the personal data is best discovered from the context in which the personal data was provided to the Council in the first place.

22. The context, here, is to secure a commercial licence required by law to breed dogs. That license is necessary for the local authority to know who the licensed dog breeders in that area are, and so that the law can be enforced and welfare checks can be conducted as and when necessary in relation to the welfare of the dogs being bred commercially.

23. Licensing - in the ordinary course of things - is a public regulatory process. Indeed it was a public process in Carmarthenshire, in relation to the information that is at the core of this appeal, until the Council changed its policy in 2008.

24. The Tribunal is unimpressed with the Council’s survey of those currently on the licensed dog breeders’ register – conducted after the information was requested – that seeks to justify the policy of non-disclosure. The survey, and the suggestive language used in posing the questions, inevitably gives the impression of being self-serving and less than objective.

25. The survey would have had greater evidential value for the Tribunal to consider if it had been conducted as an objective attitude and information-gathering exercise prior to the Council considering its policy in this area in 2008. The Council could then have argued with greater force that individuals had come on to the Register because they had an expectation – in data

protection terms – that only the Council would be aware of their identities and home addresses.

26. An adjacent County Council, Ceredigion, revealed similar information. The fact that there were 71 licensed dog breeders on the register disclosed by that Council does not support this Council's argument that disclosure of information about breeders would cause breeders to operate their dog breeding in an unlicensed and illegal fashion for fear of disclosure of their identities.

27. The Tribunal accepts that the interplay of private and public interest issues in relation to disclosure of this information is complex but has concluded, unanimously, that in this case it is fair and in the public interest - in regulated commercial activity which is subject to a public licensing regime to protect the welfare of animals – to subordinate the privacy interests of those who register to engage in such activity so as to permit the personal data to be disclosed.

28. There is no order as to costs.

Robin Callender Smith

Judge

24 April 2013