



IN THE FIRST-TIER TRIBUNAL

Appeal No: EA/2012/0261

**GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

LONDON BOROUGH OF BARNET

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

And

DEREK DISHMAN

Second Respondent

Subject: s40 FOIA: personal data; s43(2) commercial interests

Hearing: Held on 28 June 2013 at Field House.

Decision: The appeal is unanimously upheld in relation to s40 FOIA, but not s43(2) FOIA, for the reasons set out below. Accordingly, the Council is not required to make any further disclosures.

Date 12 September 2013

Reasons For The Decision

The Request

1. On 19 December 2011, the Second Respondent ('the requester') requested the London Borough of Barnet ('the Council') to provide:

"the job titles .. of the 40 officers who spent some or all of the week ended 16 December 2011 at the offices of Trowers & Hamlins evaluating the four proposals for the New Support & Customer Services Organisation proposals."

Background

2. The New Support and Customer Services Organisation (NSCSO) is a project within the 'One Barnet' programme. The Council's website indicates that this intends to reduce costs while delivering high quality services. In December 2012, a procurement exercise was run for the NSCSO project, and the preferred bidder was announced by the Council.
3. On 27 January 2012, the Council refused the request, claiming it was prejudicial to its commercial interests (s43(2) Freedom of Information Act 2000, "FOIA"), and then at a later stage that it was also exempt as personal data (s40(2) FOIA). The requester progressed the matter through the usual channels. When the Information Commissioner ('IC') came to investigate, he concluded that:
 - A. The Council wrongly applied the commercial interests exemption and partially misapplied the exemption for personal data .
 - B. The Council was required to disclose the job titles of the senior officials . Although these were personal data as they related to an individual post-holder, it was not unfair to disclose them.
 - C. The Council was also required to disclose the job titles of the junior officials identified by the request where more than one person held the job title, because:
 - a. Where only one individual held the job title, and they were a junior official, the title was personal data because disclosure would create a real risk of that junior official being identified and it would be unfair to make the disclosure because it would breach the official's reasonable expectations of privacy and cause them distress.
 - b. Titles held by more than one individual were not 'personal data', and so could not be exempt under s40(2) FOIA.
4. The Council provided the job titles for senior officials. This appeal focuses on whether it has to disclose those titles shared by more than one junior official as required by the IC.

Grounds of Appeal

5. The Council claims:

Ground 1: The job titles of junior officials relating to more than one individual are personal data, and so are exempt from disclosure under s40(2) FOIA; and

Ground 2: The IC was also wrong to find that the titles of junior officials relating to more than one individual were not exempt under s43(2) FOIA.

The Task of the Tribunal

6. The Tribunal's remit is governed by section 58 FOIA. This requires the Tribunal to consider whether the decision made by the IC is in accordance with the law or whether he should have exercised any discretion he had differently. The Tribunal may receive evidence that was not before the IC, and may make different findings of fact from the IC. This is the extent of the Tribunal's remit in this case, and therefore we do not consider any other issues raised, such as the proper use of public funds or Council email addresses.

7. The issues for this Tribunal are:

7.1 Whether junior employees who attended the meeting can be identified from the requested information alone or in combination with other available information. If so, the parties accept that it would be unfair to disclose their job titles because they accept that there are certain bloggers with hostile intentions, such that section 40(2) FOIA would exempt the information from disclosure. (We note that the IC accepted this argument, and the requester has stated that he supports the IC's submissions. We confirmed this position in further directions to all the parties.)

7.2 Whether s43(2) FOIA applies.

The Law

8. Under s.1(1) of FOIA, a person making an information request to a public authority is entitled to be informed in writing whether the public authority holds the requested information and to have it communicated to him, unless it is exempt from disclosure under the Act.

9. For these purposes, a public authority is exempt from providing information requested under FOIA where it is 'exempt information'.

10. Exempt information includes information that is (1) personal data (s40(2) FOIA) where its disclosure would contravene any of the data protection principles and (2) information which, if disclosed, would or would be likely to prejudice the commercial interests of any person, including the public authority holding it (s.43(2) FOIA) subject to what is commonly described as the public interest test set out in s.2(2)(b) FOIA.

Exemption for Personal Data:

A. Personal data is defined in s1(1) Data Protection Act 1998 ('DPA') as:

“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..”

Exemption for Commercial Interests:

B. The requested information would be exempt if disclosure would or would be likely to prejudice the commercial interests of the Council and in all the circumstances of the case the public interest in maintaining this exemption outweighs the public interest in disclosing the information. (See s43(2)FOIA and s2(2)(b) FOIA).

C. 'Commercial interests' is not defined in FOIA.

Evidence and Submissions

11. We were provided with open and closed bundles of documents, including the Notice and Grounds of Appeal, the Decision Notice, the IC's Response of 30 January 2013, the Council's open and closed replies of 13 February 2013, the requester's statement of 19 April 2013 and, in closed form, the requested information. We have considered all that has been submitted, even if not specifically referred to below. We have not issued any part of this decision in confidential or 'closed' form. In summarising the submissions, we have added our own headings to these summaries, for ease of reference.

Council's Evidence and Submissions

Ground 1

12. The Council's arguments under Ground 1 of its appeal include:

A. Disclosure of the job titles would create a real risk of the relevant individuals being identified and are thus personal data. S1 DPA defines "personal data" as: '*data which relate to a living individual who can be identified...*'

Standard of identifiability

B. The word "can" indicates the standard is not certainty. It is of 'reasonable likelihood' and more than a hypothetical possibility.

a. *Department of Health v ICO [2011] EWHC 1430 (Admin)* ('the DoH case') states:

“The DPA was enacted to implement European Council Directive 95/46/EC ... the DPA must be interpreted insofar as possible in a manner consistent with the directive... Recital 26 reads... :

*...whereas, to determine whether a person is identifiable, account should be taken of **all the means likely reasonably to be used either by the controller or by any other person to identify the said person;***

*whereas the principles of protection shall **not apply to data rendered anonymous** in such a way that the data subject is no longer identifiable...”*

... The concept of personal data in Directive 95/46/EC was considered at length by an advisory working party to the Commission, constituted under Article 29 of the directive... Its Opinion 4/2007 on the concept of personal data was adopted in June of 2007... It noted that the proposal of the European Commission for a directive had been amended to meet the wishes of the European Parliament, that the definition of personal data should be as general as possible so as to include all information concerning an identifiable individual. It also noted the objective of the rules in the directive as being to protect individuals. The working party stated ... National authorities should endorse a definition which was wide enough so that it would catch all "shadow zones" within its scope, while making legitimate uses of the flexibility contained in the directive...

*The working party report continued that, in general terms, information could be **considered to relate to an individual when it was about that individual.** ... The report concluded that **anonymous data** in the sense used when applying the directive could be defined as any **information relating to a natural person, where the person could not be identified, whether by the data controller or by any other person, taking account of all means likely reasonably to be used to identify that individual.**” (paras 17-22)*

- C. The Upper Tribunal in *Information Commissioner v Magherafelt District Council* [2012] UKUT 263 AAC stated:

“...The Act should, if possible, be interpreted in a manner that is consistent with the Directive... it is not appropriate to look for the precision in the use of language that is usually to be expected from the parliamentary draftsman. A purposive approach to making sense of the provisions is called for.” (Para 59)

- D. The term “motivated intruder” has been used to express this principle within the IC’s Code of Practice ‘Anonymisation: managing data protection risk’ (the ‘IC Code’). This states:

“ the Data Protection Act 1998 says that personal data means data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller. Determining what other information is ‘out there’, who it is available to and whether it is likely to be used in a re-identification process can clearly be extremely problematic.

...There are two main ways for re-identification to come about.

- An intruder takes personal data it already has and searches an anonymised dataset for a match.*
- An intruder takes a record from an anonymised dataset and seeks a match in publicly available information.*

... both risk scenarios are relevant and can carry with them different probabilities of re-identification. In either case though it can be difficult, even impossible, to assess risk with certainty.

Despite all the uncertainty, re-identification risk can certainly be mitigated by ensuring that only the anonymised data necessary for a particular purpose is released. The fact that data has been anonymised does not mean that data minimisation techniques are not still relevant.

...section 40..FOIA ... means that public authorities have to assess whether releasing apparently anonymised data to a member of the public would breach the data protection principles... The test in FOIA can be particularly difficult to apply in practice because different members of the public may have different degrees of access to the ‘other information’ needed for re-identification to take place. However, a motivated intruder test can go some way towards addressing this problem.

... organisations disclosing anonymised data should assess whether any organisation or member of the public could identify any individual from the data being released – either in itself or in combination with other available information. The risk involved will vary according to the local data environment and particularly who has access to information.

... There will clearly be borderline cases where, in reality, it will be difficult, or even impossible, to determine whether it is likely that re-identification will take place.

... In reality ... some types of data will be more attractive to a motivated intruder than others – and more consequential for individuals. In reality these factors should also inform an organisation’s approach to disclosure....”

(p.18-20)

- E. The IC Code emphasises that it is important to take great care and to carry out “*as thorough a risk analysis as possible*” and data controllers are urged to “*adopt a more rigorous form of risk analysis and anonymisation*”. The Council contends that there is evidence in this case of motivated intruders who are well equipped to and who intend to attempt to identify the individuals whose job titles have been withheld, and then subject them to unfair distress.
- F. There is a reasonable likelihood and high probability of living individuals being identified if the disputed information were to be disclosed. The IC has underestimated the risk of identification in suggesting that the risk is only akin to an “educated guess”.
- G. The Council has explained this in more detail in closed submission and to illustrate the point it provides a hypothetical example taken in a different context: If the Council had disclosed prima facie anonymised information about, say, victims of domestic abuse or recipients of certain types of benefits where only two living individuals satisfied the description, then the 50% probability of identification would, the Council submits, make this very obviously “too close for comfort”. The risk of identification would be unacceptably high in view of the very low number of underlying individuals who meet the description.
- H. Furthermore, and very importantly for the purposes of this appeal, there is already a great deal of information in the public domain linking Council employees (names and job titles) with the NSCSO programme; and (b) there is clear evidence of a motivated intruder who seeks and is able to access a great deal of Council information.
- I. More generally, it is clear that the requester is a blogger who is a motivated intruder and has access to a significant amount of internal Council information, including – it would appear – information from the Council’s intranet. Such information would assist him very substantially in any “motivated intrusion”.
- J. Disclosure of junior job titles would be likely to result in the intruder identifying living individuals and then subjecting them to the sort of treatment the Council is concerned to avoid.
- K. A sample of further blog posts, all containing internal information which this blogger has been able to access and place in the public domain, is below:
 - a. a blog post referencing a Director’s internal test results, which were not made public and were not widely available internally: <http://lbbspending.blogspot.co.uk/2012/12/why-contractors-dont-often-get-sacked.html>
 - b. a blog post referencing an internal email sent by the Council’s Chief Executive: <http://lbbspending.blogspot.co.uk/2012/11/the-friday-joke-redundant-we-have.html>;

- c. a blog post referencing information published on the Council's internal intranet: <http://lbbspending.blogspot.co.uk/2012/10/meet-chief-of-haringey-in-waiting.html>.
- L. This is only a selection based on research in preparation for this appeal; it is not an exhaustive account of the internal information which motivated intruders (the blogger and requester in this case) have made available. It reinforces that they have a desire to identify individuals who were involved in tender evaluation work of which they disapprove; the requester has asked for job title information to help him do that; disclosure of the disputed information would provide him with a very specific starting point from which he will (or at the very least, is reasonably likely to) obtain other information (using the means by which he has already accessed information referred to in his blog posts) with which his identification exercise could readily be completed. The unfair and distressing targeting of these individuals would then be highly likely to ensue.
- M. The Council acknowledges that the posts referenced above post-date the request. The test for the risk of identification is, however, forward-looking: "all the means likely reasonably to be used" (Recital 26 European Council Directive 95/46/EC). At the time of these requests, the matters explained above were likely to come to fruition.
- N. Whilst FOIA is normally approached "applicant-blind", in this case the factors relied upon by the Council relate largely to the work and conduct of the requester in this case. This does not undermine the Council's case: to whatever extent the "applicant-blind" principle is sound, Recital 26 is clear in its reference to "all the means likely reasonably to be used either by the controller or by any other person to identify the said person" (emphasis added). For these purposes, it makes no difference that the "other person" happens to be the requester; the requester is also a member of the public. It would be entirely artificial in the circumstances of this case to overlook the reality of this requester's intentions and the information he has already obtained and published about named Council employees involved in the NSCSO work to which he objects.
- O. The Council also argues - initially in closed submission, but then in open, that even if the motivated intruder were to 'identify' the wrong official in the Council from the job titles given, the reality remains that disclosure of the job title would be likely to result in the intruder identifying a living individual (albeit not the one he seeks) and then subjecting that individual to the sort of treatment the Council is concerned to avoid.

Ground 2

- 13. The Council's arguments for Ground 2 include:
 - A. Disclosure of the disputed information at or around the time of the request (December 2011) would have created a weighty risk of the Council's commercial interests being prejudiced in a way that was real, actual or of substance, such that it also relied on s43(2) FOIA. Even if the relevant individuals could not be accurately identified from the disputed information, disclosure of their job titles would nonetheless be likely to result in:

- a. approaches being made to the holders of these job titles by people seeking to influence the decisions they were taking or input they were providing with respect to the NSCSO procurement work.
 - b. inappropriate lobbying activity and undue and distressing criticism, thereby impeding their ability effectively to carry out their duties as regards this particular work.
- B. Given the size and value of the project, this represented a real risk of substantial prejudice to the commercial interests of the Council and those tendering for NSCSO work. That would be strongly against the public interest, whereas disclosure of the particular information in dispute would not serve the public interest in a meaningful way.

Respondent's Submissions

Ground 1:

14. The IC's arguments on Ground 1 include the following:

- A. Information that does not relate to and identify an individual is not personal data.
- B. The DPA must be interpreted insofar as possible in a manner consistent with the European Council Directive 95/46/EC including recital 26:

*"Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas **to determine whether a person is identifiable account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person: whereas the principles of protection should not apply to data rendered anonymous in such a way that the data subject is no longer identifiable...**"* (Emphasis added.)

- C. This was explicitly recognised by the High Court in the *DoH* case in which the Court found that anonymised data that do not lead to the identification of a living individual are not personal data and thus may be disclosed to the public.
- D. It is a question of fact, based on the circumstances of the case, whether, on a balance of probabilities, an individual or specific individuals may or may be reasonably likely to be identified by cross-referencing 'anonymised' data with other information reasonably available to them (See *Information Commissioner v Magherafelt District Council* ([2012] UKUT 263 instance, §79).
- E. The IC Code suggests that, if it is not clear whether individuals can be identified from the data, we should consider:
 - a. whether it is '*reasonably likely*' that an individual can be identified from those data (here, the disputed information) and from other data.

- b. whether a 'motivated intruder' would be able to achieve re-identification of an individual. The 'motivated intruder' starts without any prior knowledge but wishes to identify the individual from whose personal data the 'anonymised' data has been derived.
 - c. what other information would be available to a 'motivated intruder' from the internet, libraries, all public documents, making enquiries of people who may have additional knowledge of the identity of the data subject or advertising for anyone with information to come forward, etc.
 - d. whether the identification involves more than an educated guess that information is about or relates to a specific person. While the IC accepts that the possibility of making an educated guess (whether or not correct) about an individual's identity may present a privacy risk, it does not present a data protection risk because there has been no disclosure of personal data.
- F. The IC acknowledges that in some circumstances it can be difficult to establish accurately the risk of identification. In this case, the IC accepts that the numbers of persons in the relevant posts are in some cases quite low, and that the identification of junior members of staff might subject them to adverse comment from third parties, possibly bloggers or others who comment on the Council's activities, because of their attendance at the relevant meeting.
- G. The Council has failed to set out any plausible arguments as to how disclosure of the requested information (either on its own or in combination with other information which a third party or 'motivated intruder' would be reasonably likely to obtain) would or would be reasonably likely to enable identification of the specific post holders who attended the meeting.

Ground 2

15. The IC's arguments on Ground 2 include the following:
- A. 'Commercial interests' is not defined in FOIA. The IC's own guidance regards a commercial interest as relating to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services.
 - B. The IC accepts that the Council's activities in respect of the broader procurement procedure clearly relate to its ability to engage in a commercial exercise, namely the purchase of goods or services.
 - C. S43(2) FOIA consists of 2 limbs which clarify the test for probability of prejudice arising from disclosure. The IC considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not and certainly more than hypothetical or remote.

- D. The Council explained during the IC's investigation that the NSCSO procurement had experienced opposition from members of the public and pressure groups. The Decision Notice explains that the Council argued that someone opposed to the NSCSO procurement or partisan to a particular company to win the contract would be able to contact the officials directly and try to exert pressure on the decision-making process. It considered this to be an unacceptable risk as there was a need to ensure that evaluators were as independent and as objective as possible in reviewing bids and awarding scores. The Council pointed to the considerable length of the contract at stake and its potential monetary value as factors intensifying the need for protecting the process.
- E. The IC considered it entirely appropriate that members of the public should be able to lobby and question the Council about its decision-making, and given the acknowledged controversial nature of the NSCSO procurement and the broader public interest in the Council's One Barnet programme, there should be an expectation within the Council that its actions in this regard would be subject to scrutiny.
- F. The IC accepted the possibility that disclosure of the information might have an impact on the procurement process and result in correspondence which affected the council's administrative burden. However, he did not accept that it would be likely to prejudice or even affect the Council's commercial interests. Firstly, the withheld information did not reveal anything about the Council's approach in relation to the specific procurement exercise and, secondly, the Council officials were free to disregard and to remain otherwise uninfluenced by correspondence or approaches by members of the public or lobbyists.
- G. The IC concluded that the exemption was not engaged and did not provide arguments in relation to the public interest test.

Requester's Submissions and Evidence

- 16. The Requester stated that he supported the IC's arguments. He also made the following comments:
 - A. The procurement exercise was over such that the reason for withholding the information - potential for damage to commercial interests - had now passed.
 - B. He was not minded to lobby individual Council employees. Even if he had been, he would have needed to lobby at least 21 to be sure of getting a majority, assuming they each had equal influence in the process, and as the process was now over any danger would have passed.
 - C. He was hardly likely to lobby for either BT or Capita as he was not keen on either and would have preferred that the Council priced the final bids against in-house ones in order to clearly demonstrate what is to be gained by out-sourcing. Now the danger period had passed, the titles in question should be released.

- D. He was less bothered about junior employees doing the scoring than the very senior management as they actually carried out the tasks that were being outsourced and so would have a clearer idea of the skill set required.
- E. He was curious as to who was effectively taking the decisions about which contractor the Council would end up with and had no idea what he would do with the answer until he was in possession of it.
- F. FOI responses received by him were not automatically shared with others. In theory, the Council would make a decision but since they would be presented with a recommendation from officials of a clear win for Capita, and BT as a reserve several percentage points behind, it was extremely unlikely that they would do anything other than vote in favour of awarding the contract to Capita which they duly did on 6 December 2012.
- G. As regards the 'motivated intruder' arguments described above, he noted that until he saw the information he did not know what he would do with it and whether or not he would put any of it on his blog as he did not know what interest it might present to readers. As it was information relating to an event that took place some 19 months ago he considered it likely to present little interest. His blog entries of his earlier days (which this Tribunal presumes are those we were presented with) were of a 'job' type, but his blog had evolved and no longer featured this in 2013. He did not agree that a motivated intruder would be likely to result in the intruder identifying the wrong individual. The Council had not raised any examples of him, or any other party, doing so. If he were to make a factual error, he would correct it.
- H. He did not plan to try and identify any junior official from their job title following any release of information occasioned by this appeal.

Ground 2

- I. There was no prejudice to the commercial interests of the Council as the contract award decision had been taken before the Council's Council reply in these proceedings.

Our Findings

Ground 1

- 17. The parties have accepted that the issue for us to decide is whether the requested information is personal data. We are guided by the *DoH* case and the excerpts repeated in paragraph 12 above. Accordingly, we must consider whether a person is identifiable from the requested information, taking into account all means likely reasonably to be used by any person. The question is whether junior officials would be identifiable from the requested material and anything else in the possession of or likely to come into the possession of the requester or another person. From the blogs we have seen, it is clear that the requester is able to access a great deal of Council information. From the evidence we have seen, including the requested information, we consider there would be very little in the way of the requester identifying junior officials if the

requested information were to be disclosed. While an individual would not need to be particularly 'motivated' in order to find out those identities, the requester has shown some motivation and ability to do so. That the requester has blogged on this clearly shows that he has an interest in accessing such information, even if he then decides not to blog about it. He appears to be interested and motivated to find out the officials' identities, and if given the job titles there would be little in the way of him achieving that.

18. In short, we consider that in this case, officials are likely to become identifiable from their job title and other information that the requester is reasonably likely to have and to obtain. This is supported by the requester's involvement with blogs and apparent access to the Council's intranet, neither of which he has disputed.
19. It follows that the requested information is personal data for the purpose of S40 FOIA.
20. If the requester or any other motivated person were to identify the wrong official in the Council from the job titles given, we consider that it would still amount to the identification of a living individual (albeit not the one he seeks), and the information would again be personal data for the purpose of s40 FOIA.
21. We note that the requester argues that his blog has evolved such that he no longer tends to blog about job holder identities. He also states that if he were to make an error as to the jobholders' identities he would correct his blog if informed, and that he did not plan to identify the names of junior job holders. He also states that he does not know what he would do with the information until he has seen it. This does not alter our view. This is because our task is to determine whether officials would be identifiable from the requested material and the potential impact this may have on their legitimate interests.
22. The further question as to whether the personal data is exempt under s40 FOIA and, in particular, whether its disclosure would comply with the data protection principles in the DPA, has not been disputed by the parties, and on this basis they agree it is exempt.

Ground 2

23. We do not consider that s.43(2) FOIA applies to the requested information in this case, for the reasons advanced by the IC as set out in his Decision Notice and above. In particular, on the evidence presented by it, we do not think the Council has demonstrated that the requested information would or would be likely to prejudice any commercial interests of the Council or of another person. No parties presented any arguments in relation to the public interest test under this exemption, but they are not necessary for us to consider since we do not consider the exemption to be engaged.
24. Our decision is unanimous.

Judge Taylor

12 September 2013