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IN THE FIRST-TIER TRIBUNAL **Case No. EA/2013/0227**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50504859
Dated: 31 October 2013

Appellant: **Governing Body of Reading School**

First Respondent: **The Information Commissioner**

Second Respondent: **James Coombs**

On the papers

Date of decision: **15th April 2014**

Before
Chris Ryan
(Judge)
and
Malcolm Clarke
Jean Nelson

Subject matter:
Commercial interests/trade secrets s.43
Personal data s.40
Public interest test s.2

Cases:
Department of Health v Information Commissioner [2011] EWHC 1430 (Admin)
Information Commissioner v Magherafelt DC [2012] UKUT 263 (AAC),

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2013/0227**
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DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

Summary

1. We have decided that information held by the Appellant ("the School") regarding the results of its entrance tests had been sufficiently anonymised that it did not constitute the personal data of those who took the tests. The information is not therefore capable of falling within the exemption from disclosure provided by section 40(2) of the Freedom of Information Act 2000 ("FOIA") (third party personal data whose disclosure would breach data protection principles). We have also concluded that the information did not fall within the exemption provided by FOIA section 43 (prejudice to the School's commercial interests). We therefore reject the School's appeal.

The Request for Information

2. On 21 January 2013 the Second Respondent, Mr Coombs, wrote to the School requesting various elements of information regarding the School's entrance tests. The requests included the following:

> *"I would also like anonymised copies of the full test results (just the normalised scores for each test and the age weighting) for the last three years in electronic format".*

We will refer to this information as the Disputed Information.

3. The request constituted a request for information under FOIA section 1, which imposes on the public authorities to whom 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 absolute or qualified. 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"*

4. Although the School disclosed some information to Mr Coombs it claimed that the Disputed Information constituted the personal data of the individual children who had sat the relevant tests. The School therefore argued that complying with that part of the request would involve it in a breach of the Data Protection Act 1998 ("DPA"), with the result that the information should properly be treated as exempt information under FOIA section 40(2).

The law relied on by the School during the Information Commissioner's investigation

5. FOIA section 40(2) provides that information is exempt information if it constitutes personal data of a third party the disclosure of which would contravene any of the data protection principles set out in Schedule 1 of the DPA.

6. Personal data is itself defined in section 1 of the Data Protection Act 1998 ("DPA") which provides:

> *"'personal data' means 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"*

Complaint to the Information Commissioner and his Decision Notice

7. Mr Coombs complained to the Information Commissioner about the manner in which his request had been handled by the School and, following an investigation, the Information Commissioner issued a Decision Notice on 31 October 2013. The only part of the Decision Notice that we are concerned with is the Information Commissioner's decision that the School had not correctly applied FOIA section 40(2) and his direction that it disclose the Disputed Information to Mr Coombs within 35 days.

8. The basis of the Information Commissioner's decision was that the Disputed Information did not fall within the definition of personal data because, although it clearly related to living individuals, it was anonymised to a degree that meant that it was not reasonably likely that an individual could be identified from it. It was not therefore necessary to consider the application of the data protection principles.

9. The Information Commissioner reached his conclusion on anonymisation notwithstanding erroneously concluding that the Disputed Information included the dates of birth of each test candidate. In fact Mr Coombs had asked for the data to include the "age weighting", but not dates of birth. The "age weighting" is a number, based on the month of birth of each candidate (but not the day of the month). It is used in an attempt to balance the scores achieved by those who may be expected, by virtue of a birth date early in the academic year, to be more advanced than those born later in the academic year.

The Appeal to this Tribunal

10. The School lodged an appeal against the Decision Notice on 26 November 2013.

11. 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.

12. The Grounds of Appeal challenged the conclusion, recorded in the Decision Notice, that the Disputed Information had been sufficiently anonymised to prevent the individuals who sat the exam being identified from a combination of the Disputed Information and other available information. Two elements of additional information were relied on. First, that available on a public forum contributed to by certain parents of children who took the entrance tests or might be candidates in the future. Some parents published on the forum sufficient information about their child's performance on the test that the individual child could then be identified from the Disputed Information. The School annexed to its Grounds of Appeal copies of certain entries on the relevant forum, in which parents had set out information about a child, together with the results sheet for the 31 candidates who sat the Boarding Applications test for entry in 2013. The results sheet showed, underlined, two individuals who, it said, could be identified as a result.

13. The second element of information that the School said would enable individuals to be identified was information previously disclosed to Mr Coombs regarding the formula for age weighting. It was said that this would enable him to work out from the Disputed Information the months and years of birth of each child whose result was listed, which could lead to the identification of one or more individuals.

14. The School argued that disclosure of the Disputed Information in response to the information request would be unfair to the individuals who took the test and would therefore breach the data protection principles.

15. The Grounds of Appeal also included a complaint by the School that release of partial data would be confusing and misleading to the public and that Mr Coombs was likely to use the data out of context as part of a vendetta which it was said he was conducting against the School. Neither of those arguments has any relevance to the central question of whether the Disputed Information constitutes personal data, although they might come into play in the event that we were to decide that personal data should be disclosed and that the impact of the data protection principles therefore required to be considered.

16. Of greater relevance to the outcome of the appeal, the School also used the Grounds of Appeal to introduce a new ground for refusing disclosure. This was said to arise under FOIA section 43(2) (release of information likely to prejudice commercial interests). We have taken this ground of appeal into consideration notwithstanding the fact that it was not relied on during the Information Commissioner's investigation.

17. The parties were content for the appeal to be determined on the papers, without a hearing, and we agree that it is a suitable case to be resolved in that way.

18. We deal with each of the grounds of appeal in turn.

Does the Disputed Information constitute the personal data of those who sat the School's entrance tests and, if so, would its disclosure breach data protection principles?

19. The Information Commissioner's response to the arguments set out in the Grounds of Appeal was as follows. He correctly identified that the task facing this Tribunal, in deciding whether or not the Disputed Information constituted personal data, is to determine whether, on the facts, the Disputed Information is truly anonymised. He relied on the decision of the High Court in *Department of Health v Information Commissioner* [2011] EWHC 1430 (Admin) as interpreted and applied by the Upper Tribunal in *Information Commissioner v Magherafelt DC* [2012] UKUT 263 (AAC). He accepted that this required an assumption that some members would (be motivated to) try to get information they did not already have to combine with the anonymised data in order to identify individuals. He argued, however, that the steps taken by contributors to the online forum relied on by the Appellant to publicise information about some of those taking the tests did not undermine the anonymisation of the Disputed Information. First, he argued, it had been accepted by the Appellant that individuals who had not had details posted on the public forum would not be identified and, secondly, the Appellant's own evidence indicated that those who had

contributed information had used a pseudonym. It followed, he said, that whilst the parent who had created a post would be aware that it related to his or her child, another member of the public would not be able to combine the information with any part of the Disputed Information in order to identify him or her.

20. In the case of parents or teachers, who would have prior knowledge of the test performance of one or more individuals, the Information Commissioner invited us to conclude that this was sufficient, on its own and without being combined with the Disputed Information, to identify an individual and that it was not likely that they would disclose any part of the information to third parties seeking to penetrate the anonymised data.

21. Finally, the Information Commissioner argued that Mr Coombs' knowledge of the formula for age weighting did not lead to identification, although he conceded that it might enable anyone with that information to calculate a birth date and, by inference, to reduce the number of possibilities. Mr Coombs supported this part of the Information Commissioner's case, by reference to specific examples of information posted on the forum, although the greatest part of the written submissions filed by him, concentrated on a number of complaints about the School and its entrance test procedures, which are not relevant to the anonymisation issue.

22. In its Reply submission the School supplemented its Grounds of Appeal with a challenge to the argument that those with prior knowledge, enabling them to identify an individual, were limited to people with a close connection to that individual. It cited others who might know an individual's birth date (as a result, for example, of being a class-mate or having read an individual's social network publication) and who, it said, would be able to use that information to identify an individual from the Disputed Information. The School accordingly maintained its argument that it was not only the parent, close friend or teacher of an individual who would be able to identify a pupil but any other "motivated intruder", who had some prior knowledge of the individual.

23. Applying to the facts of this case the authorities to which we have been referred we believe that the rules we should apply are:

    (i) information which is sufficiently anonymised before disclosure will not amount to personal data at the moment of disclosure even though the data in its original format retained by the School continues to fall within the definition of personal data;

    (ii) the anonymisation will be sufficient if living individuals cannot be identified from the Disputed Information when considered with other information which is in the possession of, or is likely to come into the possession of, the intended recipient as a member of the public; and

(iii) in considering what additional information is likely to be available, account should be taken of all the means reasonably likely to be used in order to acquire that additional information.

24. The facts of the *Magherafelt* case, referred to above, were that the requested information (regarding disciplinary action taken against employees of a relatively small local authority) was likely to be of interest to investigating journalists and that there was likely to be a considerable body of circumstantial evidence for them to explore among fellow employees and inhabitants. In the present case, despite Mr Coombs' concerns about the overall operation of the School's entrance tests, it seems unlikely that individual test scores would attract the same degree of interest or that anyone carrying out an investigation would find an available source of additional information outside that dispersed among the family and friends of each of the large number of children who attempted the test. We take that assessment into account in proceeding to consider the likelihood of information coming into the possession of a recipient of the Disputed Information, which would enable an individual to be identified.

25. The examples of available sources of additional information suggested by the School do not lead, in our view, to a likelihood of the anonymisation being penetrated. We take each in turn:
    a. Parents and close family members will be aware of all the information in the original data, insofar as it relates to their particular child or family member. There will therefore be no information about their own family member for them to seek in the Disputed Information and no information in their possession to enable them to identify the child of any other family whose test results appears in the Disputed Information.
    b. Teachers may know how well individual applicants performed in a test. However, they will have come into possession of that knowledge as employees of either the School or another institution, which the applicant attended at the time of sitting the entrance test. In the first case it is not information additional to the Disputed Information but is the same information, in its pre-anonymisation form, which will continue to be treated as personal data in the possession of the employer. In the second case, the teacher of an individual applicant for a place at the School, will be in the same position as a parent, knowing both name, month of birth and test result.
    c. Those reading information posted on the forum will acquire no relevant information from messages uploaded under a pseudonym – even if date of birth and/or test results were to be published this will take the reader no closer to an individual's identity, beyond that the child's family member operates under a particular pseudonym. Even if the contributor gave his or her full name it would be that publication alone which identified the

individual and not the combination of published data and Disputed Information.

d. As to other individuals, whilst it is conceivable that some may have assembled information about an individual's month of birth and school tests being attempted, this could only be combined with the Disputed Information to identify that individual's score, if they knew the scores of all the other candidates in the same "month band" which on average was about 50 candidates for the normal test, to enable a process of elimination to take place. We regard the likelihood of that as far too remote to satisfy the test we have identified in paragraph 23 above.

26. Although the request was for 3 years data, only that pertaining to the 2012 test was provided to the Tribunal. We noted that in that year there were 6 candidates who took the test late (in January 2013). The test scores for these candidates were not included in the disputed information provided to the panel. In 4 of those cases they were the only candidate in their relevant age band. Therefore if the data for those candidates is presented separately it would be possible for those individual's scores to be identified but only by someone who knew from other sources both their month of the birth and the fact that they had taken the test late. Again, we consider that this combination of circumstances is too remote to satisfy the test of likelihood of availability test.

27. We conclude, therefore, that disclosure of the Disputed Information is not reasonably likely to result in a recipient being able to combine it with other information he or she holds and in that way to identify one or more of the individual's whose test results appear in the Disputed Information. The Disputed Information does not therefore consist of or contain personal data. It is not therefore necessary for us to proceed to the second part of the enquiry – disclosure possibly breaching data protection principles. The result is that the Disputed Information does not fall within the exemption provided by FOIA section 40(2).

<u>Disclosure likely to prejudice the School's commercial interests under FOIA section 43(2) and the public interest in maintaining the exemption outweighs the public interest in disclosure.</u>

28. FOIA section 43(2) reads, in relevant part:

> *"Information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).*

29. The exemption is a qualified exemption so that, if it is engaged, the public interest test falls to be taken into consideration in order to determine if it should be disclosed.

30. In its Grounds of Appeal the School asserted that release of the scores achieved on the test would have a prejudicial effect on the commercial value of the assessment and its value as a research tool for the School. In particular it suggested that members of the public, including tutors, could reverse engineer the data to calculate the number of questions under each assessment criteria and in that way provide an unfair advantage to certain candidates. It was said that for a selective school release of the data contained in the Disputed Information would severely prejudice the effective administration of the admissions process and undermine the validity and accuracy of the selection process.

31. The Information Commissioner argued in his Response first, that the School had not demonstrated that it had an interest in the Disputed Information which could properly be described as "commercial". In addition, he argued that the School had failed to demonstrate that any commercial interest which did exist would be prejudiced by disclosure.

32. The School sought to clarify its case in its written submission in reply. It asserted that:

    i. It had a commercial interest in the admissions procedure because it had been developed internally and disclosure would enable others to adapt and use it, thus benefitting from the School's expertise and experience and prejudicing the School's ability to sell the procedure, should it wish to do so in the future;

    ii. Tutors would be able to calculate the number of questions for each specific skill being tested and work out a "pass rate" which would unfairly advantage their clients and disadvantage others;

    iii. Reverse engineering of the data in this way would undermine the selection process, which was crucial to a selective school, and would force the School to outsource the entrance tests at considerable expense;

    iv. The Disputed Information had been seen by the Education Funding Agency, which governs Academies on behalf of the Department for Education and had found the School's admissions process to be compliant.

33. The School failed to make out its case under i.- iii. above. Regarding (i) the disputed information contains no information about the tests used and the age weighting formula has already been released. Regarding (ii) the number of questions was of course known by all candidates who sat the test and the "pass score" is in any case communicated to the parents of all applicants. It is unclear how the "pass rate" could be calculated, and, even if it could, how that could unfairly advantage the clients of tutors. Regarding (iii) there is no apparent reason why

release of the disputed information would require the school to outsource its tests. In summary, the School neither explained how the Disputed Information, on its own, would enable others to gain an unfair advantage nor supported with any credible evidence its assertions as to the way in which that was likely to cause it commercial harm. Its final point iv. has no relevance to the issue, although it might have been a relevant consideration if it had become necessary to carry out a public interest balancing test. However, the School has not made out its case that the exemption is engaged and it is accordingly not necessary for us to consider that test.

34. We should make it clear that, in theory, the disadvantages which the School said it would suffer are capable of constituting a commercial interest. However, for the reasons given, the School has simply failed to establish a case, on the facts, that those disadvantages are likely to accrue in the event that we order disclosure of the Disputed Information.

Conclusion

35. In light of our findings above we conclude that the School was not entitled to refuse disclosure of the Disputed Information, that the Information Commissioner was therefore right in the conclusion he reached in his Decision Notice and that the Appeal should therefore be refused both for the reasons given in the Decision Notice and, in respect of FOIA section 43, the reasons set out above.

36. We reiterate that the Disputed Information to be disclosed includes age weighting but not the dates of birth of those who took the School's tests (see paragraph 9 above).

37. Our decision is unanimous.

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Chris Ryan
Tribunal Judge
15th April 2014

Promulgated on 16th April 2014