



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

Case No. EA/2014/0033

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50512587
Dated: 16 January 2014**

Appellant: Mr Gordon McIntosh

First Respondent: The Information Commissioner

Second Respondent: British Broadcasting Corporation

Date of hearing: 16 September 2014 at Field House

Date of decision: 23 October 2014

Date of Promulgation: 24 October 2014

Before

**Ms Anisa Dhanji
Judge**

and

**Mr Michael Jones
Mr Nigel Watson
Panel Members**

Representation

For the Appellant: in person
For the First Respondent: Mr Eric Metcalfe, Counsel
For the Second Respondent: Mr Jonathan Scherbel - Ball, Counsel

Subject matter

FOIA section 40(2) - whether disclosure of personal data would breach the first data protection principle

Case Law

Benford v Information Commissioner & DEFRA (EA/2007/0009)

Common Services Agency v Scottish Information Commissioner [2008] 1 WLR 1550

Corporate Officer of the House of Commons v IC and Norman Baker MP [2011] 1 Info LR 935

Corporate Officer of the House of Commons v IC & Others [2008] EWHC 1084

Dundas v Information Commissioner & City of Bradford (EA/2007/0084)

Edem v Information Commissioner [2014] EWCA Civ 92

Farrand v Information Commissioner and London Fire and Emergency Planning Authority [2014] UKUT 0310 (AAC)

England v London Borough of Bexley and Information Commissioner (EA/2006/0060 & 0066)

Johnson v Medical Defence Union [2007] EWCA Civ 262

Jonathan Browning v Information Commissioner and Department for Business, Innovation and Skills [2014] EWCA Civ 105

DECISION

The Tribunal dismisses the appeal and upholds the Decision Notice dated 16 January 2014.

Signed

**Anisa Dhanji
Judge**

REASONS FOR DECISION

Introduction

1. This is an appeal by Mr Gordon McIntosh (the “Appellant”), against a Decision Notice issued by the Information Commissioner (the “Commissioner”), on 16 January 2014.
2. It concerns requests for information made by the Appellant, a journalist, under the Freedom of Information Act 2000 (“FOIA”), to the British Broadcasting Corporation (“BBC”) for information as to whether royal palaces had licences for all their television sets, and whether the BBC scrutinises and checks this, in the same way as for other premises. The BBC refused the request on the basis that the information requested was personal data and was exempt under FOIA.
3. The Appellant complained to the Commissioner who upheld the BBC’s refusal. The Appellant has now appealed to the First-tier Tribunal challenging the Commissioner’s decision. The BBC was joined as the Second Respondent in the appeal.

The Request for Information and the Refusal

4. The Appellant’s request made on 3 December 2012 was in the following terms:

“I would like to know if the Royal Palaces, including Westminster have licences for all of their Televisions, and if you scrutinise and check in the same way as for residential or commercial premises”

5. The BBC replied on 3 January 2013. It asked the Appellant to clarify the meaning of “Royal Palaces” and “Westminster”, and to provide a list of post codes for the addresses relevant to the request. It provided extracts from the BBC TV Licensing Crown Immunity Policy (which it stated it was doing pursuant to its duty under section 16 FOIA to offer advice and assistance).

The Appellant wrote to the BBC on 5 January 2013. He listed 18 specific post codes. At the same time, the Appellant asked the BBC how many exemption requests it had received in the past two years from these premises. He also clarified his request in the following terms:

“Are you proactively making, and then following up on licensing requests to these premises and how many requests were made in the last 2 years to how many “properties” within the palaces/government residences?”

6. On 1 February 2013, the BBC replied as follows:

“It is TV Licensing’s duty to ensure that everyone in the United Kingdom who needs a TV licence has one. Further to our obligations under the Communications Act, TV Licensing will contact any address where we believe a TV Licence is needed. We will continue to investigate further until we are able to determine the licensable status of the address”.

The BBC also stated that there had been no requests for exemptions.

7. On 4 February 2013, the Appellant complained about the handling of his request. He sent a spread sheet to the BBC showing the number of apartments there are in Kensington Palace as an example of how his request should have been answered. He also requested details of the number of licences that had been purchased in the past two years by reference to each of the post codes provided.
8. In its reply dated 22 February 2013, the BBC stated that the request for the number of licences purchased over the past two years was effectively a new request and this information would be exempt under section 40(2) of FOIA. It further said that it considered the Appellant’s spread sheet as to the number of units of accommodation at Kensington Palace to have been an illustrative example rather than request for information as Kensington Palace had not been included in the original list of post codes.
9. On 26 February 2013, the Appellant wrote to the BBC stating the he wished to refer the matter to a senior manager. He also said that the list of post codes he had provided should also include the postcode for Kensington Palace, namely W8 4PX. In addition, he asked for statistical information as to the proportion of properties at particular post codes which hold a TV licence.
10. At first, the BBC treated this as a new request, but later confirmed that it would be treated as a request for an internal review. On 22 May 2013, following the internal review, the BBC upheld its position that the information relating to the number of TV licences (expressed as a nominal value or as a proportion of licensable places), within each of the post code areas requested was exempt under section 40(2) of FOIA. The information was personal data and its disclosure would contravene the data protection principles. In relation to Request 4, the BBC also relied on section 31 FOIA (likely to prejudice the prevention or detection of crime).

The Commissioner’s Findings

11. The Appellant complained to the Commissioner. The Commissioner decided that the information requested constituted personal data because:
 - There was a risk that individuals could be identified from a full post code;
 - Along with information already publically available, the information in issue would enable a third party to identify individual addresses, and therefore individuals themselves. The number of addresses were sufficiently few in each post code area to enable individuals to be identified by a straightforward process of elimination; and

- Some of the post codes related to a single address and even if the information was provided in a statistical form (namely a percentage of properties holding TV licences within a post code), it would identify whether the occupier of that residence does or does not hold a TV licence. Further, where a post code relates to multiple addresses, the data could be used to derive personal information about the occupants of those post codes.
12. As to whether disclosure of the information would breach the first data protection principle, the Commissioner considered that disclosure would not be fair because:
- TV licence holders would have a expectation that the details about their licence held by the BBC would not be disclosed; The Commissioner drew attention in the Decision Notice to the BBC's submissions in relation to the TV Licensing Privacy Policy and the BBC's Privacy Policy. The Commissioner considered that disclosure of the information would reveal something about the residents of the particular properties; and
 - Beyond the generic public interest in public authorities being transparent, it was difficult to see how disclosure would meet any specific public interest.
13. For these reasons, the Commissioner decided that the BBC had correctly applied section 40(2) of FOIA, and issued a Decision Notice to that effect.
14. Having decided that the information was exempt under section 40(2), the Commissioner did not go on to consider whether it was also exempt under section 31 FOIA (prejudice to law enforcement).

The Appeal to the Tribunal

15. The Appellant has appealed to the Tribunal against the Decision Notice. The scope of the Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the Decision Notice is not in accordance with the law, or to the extent that it involved an exercise of discretion by the Commissioner, he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other Notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
16. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the Notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, as in this case, the Tribunal will often receive evidence that was not before the Commissioner
17. An oral hearing took place. Bearing in mind that the appellant was unrepresented, we explained the procedure of the hearing to him and invited him to ask us questions at any time if there was anything he needed explained or clarified. In the event, no issues or difficulties arose.

18. Some parts of the hearing took place in closed sessions which were limited to evidence and submissions about the information in dispute. The closed sessions were conducted in keeping with the Court of Appeal's decision in **Browning**. We do not consider it necessary, in order to properly explain our reasons, to refer to the information or evidence about it in detail in this determination.
19. During the course of the hearing, we heard oral evidence from Mrs Pipa Doubtfire, the Head of Revenue Management at the BBC with responsibility for overseeing the BBC's Licence Fee Unit. She adopted her open witness statement and was cross-examined. She also gave evidence in a closed session when she adopted her closed witness statement and was questioned by the panel. Much of her evidence was by way of providing a background and context to the issues in this appeal. While that has been helpful, it has not been necessary to refer to it, specifically, in this determination. We will refer, however, to her evidence as it relates more directly to the issues in this appeal, although we note that her evidence in this regard relates more to the exemption in section 31 rather than section 40(2).
20. Since the Appellant's request has evolved over time, we asked the Appellant, at the start of the hearing, to confirm if the effect of his various communications is that the information he is now seeking is:
 - a) The number of television licences held at Royal Palaces and/or government buildings at 19 specified post codes, expressed as either an absolute value of licences or as a proportion of licensable premises per post code; and
 - b) To the extent that those Royal Palaces or government buildings are unlicensed, full details of the investigation and enforcement activity undertaken by Television Licensing for each unlicensed address, including the number of licensing requests made to those unlicensed addresses.
21. He said that he is seeking the information in (a), but that (b) has been answered by the BBC's assurance, in its submissions, that it does not in fact distinguish in its approach and enforcement methodology, between the post codes which are the subject of the Appellant's request and other post codes on the basis that the former have a connection with the royal family or the government. While the Appellant acknowledged that he could not test the veracity of that assurance, he confirmed that in effect, this appeal is about the information in (a). We will refer to that information as the "Disputed Information".
22. In his Notice of Appeal, the Appellant requested that he wished to extend the scope of his request to cover the last three years "*so as to evidence that a reactive measure has not been put in place following the raising of this FOI request.*" However, as already noted, the Tribunal's jurisdiction under section 58(1) of FOIA is to decide whether the Commissioner's Decision Notice is "in accordance with the law", or whether he "ought to have exercised his discretion differently". The Commissioner's powers under

section 50(1) of FOIA is to decide “*whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I [of FOIA].*” In effect, the Tribunal can only consider whether the provisions of FOIA have been applied correctly to a request for information received by the public authority. We do not have jurisdiction to consider whether other information, beyond the scope of the original request, should be disclosed.

23. The parties have lodged open and closed bundles, in addition to written submissions and a bundle of authorities. We have also been provided with the Disputed Information. We have considered all the material before us, and will refer to it as needed, but will not attempt to refer to all of it, nor to every turn of argument.

Issues

24. The issues to be addressed in this appeal are as follows:
- Is the Disputed Information “personal data”?
 - If so, would its disclosure breach any of the data protection principles?
 - Is the exemption in section 31 FOIA engaged?
 - If so, does the public interest favour disclosure?
25. The BBC had previously sought to rely also on section 43 FOIA (commercial prejudice), but no longer does so.

Findings and Reasons

Statutory Framework

26. Under section 1 of FOIA, any person who makes a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information.
27. The duty on a public authority to provide the information requested does not arise if the information sought is exempt under Part II of FOIA. The exemptions under Part II are either qualified exemptions or absolute exemptions. Information that is subject to a qualified exemption is only exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Where, however, the information requested is subject to an absolute exemption, then, as the term suggests, it is exempt regardless of the public interest considerations.
28. In the present case, the public authority says that the Disputed Information is exempt under sections 40(2) and 43(2) of FOIA. We will consider each in turn.

Is the Disputed Information personal data?

29. Under section 40(2) of FOIA personal data of third parties is exempt if disclosure would breach any of the data protection principles set out in Part 1 of Schedule 1 of the Data Protection Act 1998 (“DPA”). The exemption is absolute. The data protection principles regulate the way in which a “data controller” (in this case the BBC), must “process” personal data. The word “process” is defined in section 1(1) of the DPA to include disclosure to a third party or to the public at large.

30. The first question is whether the Disputed Information is personal data. If not, it is not exempt under section 40(2), and must be disclosed unless another exemption applies.

31. The legal definition of “personal data” as found in section 1(1) of the DPA (and as incorporated into FOIA by section 40(7)), is as follows:

“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, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

32. The DPA gives effect to Directive 95/46/EC of 24 October 1995 on The Protection Of Individuals With Regard To The Processing Of Personal Data And On The Free Movement Of Such Data which defines “personal data” as follows:

“... any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity”

33. In the Court of Appeal’s decision in Durant v Financial Services Authority “personal data” was defined by Auld LJ as follows:

“...not all information retrieved from a computer search against an individual’s name or unique identifier is personal data within the Act. Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject’s involvement in a matter or an

event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity.”

34. More recently, in **Edem v Information Commissioner**, the Court of Appeal clarified that personal data is data which relates to a living individual “who can be identified”. This is a different concept from whether the person can be contacted or traced. If a person might be identified by a combination of the data disclosed and the context in which it is used, it is not relevant that it may be difficult to contact them. The Court cited with approval the following passage from the Commissioner’s Technical Guidance document on “What is personal data”:

“It is important to remember that it is not always necessary to consider ‘biographical significance’ to determine whether data is personal data. In many cases data may be personal data simply because its content is such that it is ‘obviously about’ an individual. Alternatively, data may be personal data because it is clearly ‘linked to’ an individual because it is about his activities and is processed for the purpose of determining or influencing the way in which that person is treated. You need to consider ‘biographical significance’ only where information is not ‘obviously about’ an individual or clearly ‘linked to’ him.”

35. We have also been referred to a number of decisions of the First-Tier Tribunal, including **Dundas v Information Commissioner & City of Bradford**, **Benford v Information Commissioner & DEFRA**, and **England v London Borough of Bexley and Information Commissioner**. Whilst not binding upon us, it is helpful of course to take account of the approach adopted in previous cases when considering requests for information which include post codes or addresses. In those cases, the disclosure of a post code or address, when combined with other information about the person living at that address (for example participation in a consultation exercise (*Dundas*), undertaking a particular profession (*Benford*), or the status of a particular property (*England*)), was held to amount to disclosure of personal data. The Respondents say that the same finding should be reached here where the information requested (in this case whether a TV licence is held), in combination with the basis of the request (in this case, the post code), would result in the disclosure of information that relates to an individual who is identifiable (namely whether he holds a TV licence).
36. As already noted, the Appellant’s request is for information about the TV licensing status of households within certain post codes. A post code specifies a small and distinct geographical area. It may comprise only one property, or it may comprise a large number of properties. The Respondents say, and we accept, that the identities of individuals living at a

given post code can be readily identified from a variety of publicly available information, including the electoral rolls, the Land Registry data base, Google Street view, and other such sources.

37. Where a post code contains only one property (as is the case with 3 of the post codes specified by the Appellant), there can be no doubt that the individuals living at those properties can be readily identified, and that the Disputed Information is therefore personal data. The Appellant does not dispute this. He accepts that some of the Disputed Information comprises personal data. The question is whether all of it does.
38. In particular, what is the position where a postcode contains numerous properties? Would the Disputed Information, taken together with other publicly available information, allow a person of reasonable competence, with access to resources such as the internet and libraries, and who is willing to employ investigative techniques (referred to by the Commissioner in his Code of Practice on “Anonymisation: Managing Data Protection Risk” as a “motivated intruder”), to identify the individuals who did or did not have a TV licence?
39. In their written submissions, neither Respondent has really addressed this question. Given its concern about setting any kind of precedent, it may be that the BBC does not want to nail its colours to the mast. At the hearing, we asked the BBC how it would respond to a hypothetical request for information for the number of television licences held at a specified post code if there were, say, 500 licensable premises in that post code. Would the data not then be effectively anonymised? Neither the BBC nor the Commissioner gave a particularly clear answer. Mr Jonathan Scherbel – Ball, in particular, maintained that whether or not the information is personal data is not a function of the number of licensable premises in a given post code, but he would go no further than to say that it is necessary to look, in each case, at the nature and quality of the information.
40. In our view, the number of licensable premises in a given post code must be an important factor in determining whether the information is personal data. The question in every case is whether the data relates to an identifiable person. In answering that question, the number of licensable premises in a given post code is likely to be highly relevant. Clearly, if there are a large number of licensable premises in a particular postcode, then it may be that the individuals are not identifiable. Indeed, the example given in Mrs Doubtfire witness statement about the “Name and Shame” campaign, called “Target Zero”, shows that the BBC has effectively accepted that this is so. That was a campaign in 2000 in which the BBC quoted numbers of unlicensed homes in about 50 streets across the country. She says that the streets used were selected in part because of the sufficiently large number of licensable premises they contained which meant that the information disclosed was essentially anonymised and that no personal data was disclosed. One such street (Broom Lane), comprised approximately 240 licensable premises. Other streets had between about 180 to 950 such premises.

41. However, we accept that the number of licensable premises may not be the determining factor. There may be other factors that mean that it is still possible to identify the individuals to whom the data relates. So for example, it may be that in a post code comprising 300 residential homes on an ordinary city street, the information would not be personal data. However, the position may be quite different if the licensable premises comprised 300 units of student accommodation in an environment where people's lives are connected. In that situation, if information was disclosed that, for example, 80% of the premises had television licences, a "motivated intruder" may well be able to work out which occupants do or do not have television licences. The same may apply in other relatively homogenous communities like army barracks, a seniors' community, and such like.
42. In the present case, the BBC's evidence is that of the 19 post codes comprising the Appellant's request, 14 postcodes contain less than 30 licensable premises, while 4 contain between 50 to 100, and one post code has between 150 to 200. The common feature in these post codes (and of course the reason they have been chosen by the Appellant) is because they comprise, for the most part, licensable premises connected with the royal family. We are satisfied that because of the relatively small number of premises, together with that common feature, the individuals concerned could be identified by a person motivated to do so.
43. We have considered whether that is also the case for the one postcode which has between 150 to 200 licensable premises, bearing in mind that Broom Lane had 240 licensable premises and that the evidence is that other streets in the "Name and Shame" campaign may have had as few as 180. However, based on the closed evidence, we are satisfied that the nature of the licensable premises comprising that postcode means that there is an even higher possibility of the individuals concerned being identified.
44. We find, in short, that the Disputed Information relates to individuals who it is possible could be identified, if not from the data itself, then from the data used in conjunction with other information that is publicly available. The Disputed Information is therefore, "personal data".
45. The next question is whether disclosure would breach any of the data protection principles. As the case has been put, only the first data protection principle is relevant. This provides that personal data shall be processed fairly and lawfully, and in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met. The parties agree that the only relevant conditions in Schedule 2 is condition 6(1).
46. Condition 6(1) provides as follows:

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.

47. Condition 6(1) effectively requires a balancing exercise to be undertaken. The interests of the data subject as well as the data user, and where relevant, the interests of the wider public, must be taken into account. This wide approach is endorsed by the observations of Arden LJ in **Johnson v Medical Defence Union** at paragraph 141:

“Recital (28) [of Directive 95/46] states that “any processing of personal data must be lawful and fair to the individuals concerned”. I do not consider that this excludes from consideration the interests of the data user. Indeed the very word “fairness” suggests a balancing of interests. In this case the interests to be taken into account would be those of the data subject and the data user, and perhaps, in an appropriate case, any other data subject affected by the operation in question.”

Although that case concerned the provisions of the Freedom of Information (Scotland) Act 2002, the principles apply equally in relation to FOIA.

48. The following passage in **Corporate Officer of the House of Commons v IC and Norman Baker MP** at paragraph 28, also offers helpful guidance about the balancing exercise to be undertaken:

“If A makes a request under FOIA for personal data about B, and the disclosure of that personal data would breach any of the data protection principles, then the information is exempt from disclosure under the Act: this follows from section 40(2) read in conjunction with section 40(3)(a)(i), or (when applicable) section 40(3)(b) which does not apply in these appeals. This is an absolute exemption - section 2(3)(f)(ii) FOIA. Hence the Tribunal is not required to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure under section 2(2). However... the application of the data protection principles does involve striking a balance between competing interests, similar to (though not identical with) the balancing exercise that must be carried out in applying the public interest test where a qualified exemption is being considered.

49. The key issues that arise from the first data protection principle, and condition 6(1), are whether disclosure:
- would be fair;
 - is necessary for the purposes of a legitimate interest that is being pursued; and
 - is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects.
50. The first and last of these are closely related. It is the second issue, however, on which the Appellant has concentrated most of his arguments in this appeal.

51. Would disclosure be fair? The Respondents' arguments in relation to fairness centre on the question of the reasonable expectations of the data subjects. They say that the Disputed Information relates to the television licensing status of households within the specified post code areas and that the individuals concerned would have a reasonable expectation that information of this nature will not be made publicly available. They say that paragraph 1(1) of Part II, Schedule 1 of the DPA 1998 stipulates that "*In determining for the purposes of the first principle whether personal data are processed fairly, regard is to be had to the method by which they are obtained...*" Similarly, paragraph 2(1) of Part II, Schedule 1 of the DPA stipulates that "*for the purposes of the first principle personal data are not to be treated as processed fairly*" unless the data subject has been provided with certain information, which is specified in paragraph 2(3)(c) as including the purpose for which the data are intended to be processed.
52. The BBC points to the TV Licensing Privacy Policy which states that personal data submitted to the BBC will only be used "for the purposes of administering TV licensing", and that it will not be shared with third parties without the data subject's prior consent unless required by law. It also points to BBC's Privacy Policy that states that personal data submitted to the BBC will only be used for specified purposes, and will not be shared with third parties unless required or permitted by law. Based on this, they say that since the data subjects provided their personal data to the BBC on the understanding that it would not be disclosed to third parties, and were not told that their personal data could be made available to the world at large in response to requests under FOIA, they would reasonably expect that their data would not be disclosed in response to the Appellant's request.
53. In our view, the fact that television licence holders were not told that their personal data could be made available in response to requests under FOIA, is not the strongest of arguments. If it were, then public authorities could rely on their own failing to bring this to the attention of those from whom it collected data. We also consider that the public should be taken to know the implications of FOIA. We do accept, however, that television licence holders, even those who may be connected to the royal family, but who obtain (or who choose not to obtain) licenses in their private capacities, would have a reasonable expectation of privacy in that regard, and would not expect that information to be disclosed to the world at large by the licence provider. The Appellant says that this argument does not apply to those who do not have a television licence, and who therefore would not have been given any assurance by way of a Privacy Policy. Even if this were right, it is not only those who do not have a television licence whose personal data would be disclosed through the Disputed Information, but also those who do. The request does not distinguish between the two, and indeed it is difficult to see how the request could be framed so as to make that distinction.
54. The Respondents acknowledge that disclosure may still be fair if it is necessary for the purposes of a legitimate interest, but they say that there is no such legitimate interest (beyond a generic interest in public authorities being transparent and accountable), and that even if there was a legitimate interest, disclosure would not be necessary.

55. As already noted, the Appellant's arguments in this appeal have focused on what he says is a legitimate interest in disclosure. Indeed, he says, in his grounds of appeal, that this is why he is appealing. He says there is "*a glaringly obvious public interest matter has been, in my opinion, negligently overlooked by the ICO. This is the main factor in my appeal*". He goes on to say that reliable journalistic sources have disclosed that many of the staff and other non-royal residents in palace accommodation do not pay for television licenses, and that this is a criminal offence. He further says that if these individuals are being protected and not actively pursued by the BBC because of their links to the Monarch, then that is a matter of considerable public interest.
56. It is not of course for the Tribunal to make any findings about whether these allegations are well founded. However, although we don't criticise the Appellant for this, we would note that there is no evidence before us as to the basis of these allegations. Bearing in mind the absence of such evidence, the BBC's denial of the allegations, and that the Appellant has accepted this denial (see paragraph 20), we do not consider that it can be said that there is a legitimate interest in disclosure, beyond the generic interest in public accountability.
57. We also think the Appellant's argument that disclosure is necessary for any such interest as there may be, is not the strongest. "Necessary", in this context, has been held to reflect the meaning attributed to it by the European Court of Human Rights when justifying an interference with a recognised right, namely that there should be a pressing social need and that interference must be both proportionate as to the means, and fairly balanced as to ends. See **Corporate Officer of the House of Commons**, paragraph 43. More recently, in **Farrand**, the Upper Tribunal stressed (at paragraphs 26), that "necessary" does not mean essential or indispensable. That is too strict a test. Rather, the word connotes a degree of importance or urgency that is lower than absolute necessity, but greater than a mere desire or wish.
58. The BBC says that disclosure would not further the Appellant's interest. Disclosure of the Disputed Information might give the Appellant a misleading picture because, for instance, the post codes may include premises which do not need to have a TV licence, therefore distorting any statistical information. There is also the question of whether disclosure can be said to be necessary if there is another way of meeting any such interest as there may be, without disclosure of personal data. In the present case the BBC has said that the allegations are unfounded and the Appellant does not challenge this assertion.
59. Even if there was a legitimate interest and disclosure was necessary, we consider that disclosure would be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects.
60. First, as already noted, it is not just those who have a television set and do not have a licence whose personal data would be disclosed through the Disputed Information, but also those who do, along with those who are not required to have a licence because they do not have a television set. In our view, disclosure would be an unwarranted intrusion into their privacy. We

also bear in mind the media interest that may follow disclosure of the Disputed Information in the case of data subjects who have royal or government connections. We find it likely that they would feel distress at having their personal data disclosed, and for that reason too, disclosure would be unwarranted.

61. For all these reasons, we find that the Disputed Information is personal data and that disclosure would breach the first data protection principle. It follows that we find that the Disputed Information is exempt under section 40(2) of FOIA.
62. Having reached this finding, it is not necessary to go on to consider whether the information is also exempt under section 31 of FOIA.

Other issues

63. There are two further issues to briefly mention. First, we canvassed with the parties at the hearing, whether, if the Disputed Information could not be provided in relation to the 19 specific postcodes without contravening section 40(2), could it be provided on an aggregate basis for all 19 postcodes? The Appellant indicated that he would find it useful to have such information. The BBC resisted our suggestion that under section 16 of FOIA (duty to provide assistance and advice), it should have explored that option with the Appellant. We indicated that we would consider this point further and made directions for any written submissions as the parties wished to make on the issue, to be lodged following the hearing. The BBC and Commissioner both lodged submissions and both resisted such a finding. Having considered the issue further, we consider that while it may well be the case that disclosure of the information in aggregate form would not breach section 40(2), and while it may be that the BBC should have explored this option with the Appellant, we must keep in mind that the Appellant did not ask for the aggregated information, and has not challenged the BBC's refusal or the Commissioner's Decision Notice on the basis of section 16. In these circumstances, we consider that it would not be appropriate for us to address what level of release would most closely match the Appellant's request while not involving the release of personal data, nor to direct that such information be disclosed.
64. Second, the Appellant has questioned whether the Commissioner has a vested interest in protecting the royal household and can truly be impartial in determining his complaint. We consider that there is no basis to say that the Commissioner does not discharge his statutory functions in an independent manner. There is also no evidence that the Commissioner has acted anything other than impartially in this case.

Decision

65. We dismiss the appeal and uphold the Decision Notice dated 16 January 2014.
66. Our decision is unanimous.

Signed

Anisa Dhanji

Judge

Date: 23 October 2014