



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2015/0206

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50564749
Dated: 19 August 2015

Appellant: RICHARD JOHN NIXON
Respondent: INFORMATION COMMISSIONER
Heard at: CRAWLEY MAGISTRATES' COURT
Date: 4 FEBRUARY 2016
Date of decision: 29 FEBRUARY 2016

Before

ROBIN CALLENDER SMITH
Judge

and

DR HENRY FITZHUGH and ROSALIND TATAM
Tribunal Members

Attendance:

For the Appellant: Mr R Nixon in person.

Written Submissions:

For the Respondent: Ms E Kelsey, Counsel instructed by the Information
Commissioner.

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

Subject matter:

Freedom of Information Act 2000

Absolute exemptions

- Personal data s.40 (2)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 19 August 2015 and dismisses the appeal.

REASONS FOR DECISION

Background

1. Mr Richard Nixon (the Appellant) believes that, in certain areas of the country, applications for court-issued Non-Molestation Orders (NMO's) are being used as a device then to get civil legal aid for divorce and family matters.
2. He asked the Ministry of Justice (MoJ) for information relating to the gender split of applicants applying for NMOs and Occupancy Orders from 1 January 2011 to 30 June 2014.
3. The gov.uk website states:

You can apply for an "injunction" if you've been the victim of domestic violence. An injunction is a court order that either

 - protects you or your child from being harmed or threatened by the person whose abused you – this is called a "non-molestation order"
 - decides who can live in the family home or enter the surrounding area – this is called and "occupation order".

If you need protection immediately, ask for an emergency order when you apply. You don't have to tell the person you want protection from that you're applying so it's known as a "without notice" "ex-parte" application.

4. The Appellant's requests took the following form:

Request 1

.... I would like to ask an additional FOI request about the data obtained in the attached table. Can you please provide the quarterly split in the data for each court for the period 1 January 2011 to 31 March 2014 to show the split into:

ex-parte NMO and with notice NMO obtained by women

ex-parte NMO and with notice NMO obtained by men

ex-parte Occupancy Orders and with notice Occupancy Orders obtained by women

ex-parte Occupancy Orders and with notice Occupancy Orders obtained by men

Request 2

....Can you please provide the quarterly split is the data for each court for the period 1 April 2014 to 30 June 2014 to show the split into:

ex-parte NMO and with notice NMO obtained by women

ex-parte NMO and with notice NMO obtained by men

ex-parte Occupancy Orders and with notice Occupancy Orders obtained by women

ex-parte Occupancy Orders and with notice Occupancy Orders obtained by men.

5. The MoJ provided a single response to the two requests on 5 December 2014. It clarified what it considered to be the request. It confirmed it held information but refused to provide it on the basis of the section 40 (2) FOIA in relation to personal information.
6. The Appellant asked for an internal review on 14 January 2015 on the basis that he did not see how it was not in the public interest to be told the total number of men and women obtaining such non-molestation orders and occupancy orders in all courts in England and Wales.

7. Following an internal review on 10 February 2015, the MoJ revised its position. It provided him with the redacted version of the requested information.
8. The data it provided for the orders issued from 2011 to Quarter 2 of 2014 were split by type of order, court and gender apart from where, numerically, there were five or fewer individuals in question.
9. In those cases it withheld the information on the basis that section 40 (2) applied.

The complaint to the Information Commissioner

10. The Information Commissioner accepted that the Appellant might have specific reasons for wanting access to the requested information. He also had to take into account the fact that FOIA disclosure was effectively an unlimited disclosure to the public at large, without any conditions.
11. The MoJ's position had been that section 40 (2) applied because there was a risk that, in releasing some of the requested information, individuals might be identified. That would be a breach of the Data Protection principles and, to prevent this, it had chosen not to provide an exact figure in cases where the true number ranged between 1 and 5.
12. The Information Commissioner considered the information in question and the number of individuals involved. He concluded that disclosure of the exact numbers, in the circumstances of the range being withheld by the MoJ, might identify the individuals concerned, particularly if there was only one individual involved.
13. He acknowledged that the chances of any member of the public being able to cross-reference the information to do this identification of specific individuals was not high but – using the test of an assessment of whether a “motivated intruder” might be able to do so – he concluded that

someone with knowledge of domestic violence issues in a particular area might be able to do so.

14. On the basis that the information did comprise the personal data of third parties he then concluded that disclosure would contravene the first data protection principle.
15. This was on the basis that the information, if disclosed, would reveal information about individuals who had applied for a protective order against domestic violence. Releasing such information might cause distress to the individuals involved.
16. The individuals would not have expected information about their application for a court order to be disclosed to a third party.
17. While there was a legitimate public interest in the release of information which increased transparency and accountability about the way in which public authorities operated, disclosure of this level of detail would breach section 40 (2).

The appeal to the Tribunal

18. Both in his grounds of appeal and at the oral hearing the Appellant pointed to ways in which the information which he had been given could be further broken down and, in effect, that the withholding of the figures in the relevant range was inconsistent with the information he had already been given.
19. One specific example he highlighted was at Horsham Family Court in Quarter 2 of 2014. 11 Non-Molestation Orders had been issued of which 9 had been issued ex-parte to women and an undisclosed number (designated by *) had been issued to women with notice. By subtracting 9 from 11 the value for * was clearly 2.

20. Given that family hearings were held in private, he would not be able to determine the identities of the two women and he could not understand, by analogy, why greater detail and transparency had not been applied to all the information he was seeking.
21. He maintained that Non-Molestation Orders were being abused and used as a lever to get civil legal aid. He said that he knew of at least two people in Crawley who had been able to get NMOs.
22. He added that where it was possible to identify people who had gained legal aid in such situations he wished to be able to suggest to the police that these individuals should be investigated for possible criminal proceedings.
23. The MoJ had provided to the Tribunal the un-redacted information being sought by the Appellant.
24. The Tribunal reminded itself of the recent guidance for the approach to be taken by courts and tribunals in respect of any closed material procedure.
25. In *Bank Mellat v HMT (no. 1)* [2013] UKSC 38, which was not a case about FOIA, Lord Neuberger said at paragraphs 68-74 that:
- i) If closed material is necessary, the parties should try to minimise the extent of any closed hearing.
 - ii) If there is a closed hearing, the lawyers representing the party relying on the closed material should give the excluded party as much information as possible about the closed documents relied on.
 - iii) Where open and closed judgments are given, it is highly desirable that in the open judgment the judge/Tribunal (i) identifies every conclusion in the open judgment reached in whole or in part in the light of points made or evidence referred to in the closed judgment and (ii) says that this is what they have done.
 - iv) A judge/Tribunal who has relied on closed material in a closed judgment should say in the open judgment as much as can properly be said about the closed material relied on. Any party excluded from the

closed hearing should know as much as possible about the court's reasoning, and the evidence and the arguments it has received.

26. In *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC) the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA cases, noting that such practices are likely to be unavoidable in resolving disputes in this context:

i) FOIA appeals are unlike criminal or other civil proceedings. The Tribunal's function is investigative, i.e. it is not concerned with the resolution of an adversarial civil case based on competing interests.

ii) Closed procedures may therefore be necessary, for consideration not only of the disputed material itself, but also of supporting evidence which itself attracts similar sensitivities.

iii) Parliament did not intend disproportionate satellite litigation to arise from the use of closed procedures in FOIA cases.

iv) Tribunals should take into account the Practice Note on Closed Material in Information Rights Cases (issued in May 2012). They should follow it or explain why they have decided not to do so.

v) Throughout the proceedings, the Tribunal must keep under review whether information about closed material should be provided to an excluded party.

27. The closed bundle in this appeal contained the withheld information. It was necessary for the Tribunal to see this information – and consider the totality of it – in relation to the exemption claimed.

28. The Tribunal has considered carefully and rigorously the Appellant's points and concerns already expressed in the notice of appeal and in his other representations and submissions.

29. As a result of its conclusions and reasons, the Tribunal's decision is an open one with no closed, confidential annex.

Conclusion and remedy

30. In one sense this is an unusual appeal because what the Appellant is seeking to do – with his information request – is to identify individuals who he believes are “playing” the civil legal aid system.
31. As he told us, he believed that Non-Molestation Orders were being abused and used as a lever to get civil legal aid. He said that he knew of at least two people in Crawley who had been able to get NMOs. When and if he can identify where that is happening he wishes to draw the attention of the police and other authorities to this.
32. However, in admitting candidly that this is what he wishes to do, he is exactly the type of “motivated intruder” in respect of the information he is seeking that the Information Commissioner identified as someone who should not receive the information.
33. For clarity, the “motivated intruder” is someone who is able to recognise an individual even though some data is redacted or anonymised because that individual is intent on doing so.
34. The individual is someone who will take all reasonable steps to achieve such identification even without prior knowledge of the individual he or she is seeking to identify. The “motivated intruder” test highlights the potential risks of re-identification of an individual from information which, on the face of it, seems to have been fully anonymised.
35. Although the Appellant has what might be regarded as a laudable motive for seeking to do what he wants to do with more detailed information that clearly breaches the Data Protection principles.
36. Apart from the Appellant’s specific desire to identify individuals he believes should be further investigated there is also the danger that if he is given information in the lower numerical ranges then he might be able, by way of

jigsaw identification from information in press reports and local information available to him, to identify individuals as well.

37. The MoJ has adopted a proportionate response to the information request and provided a significant amount of information to the Appellant. That level of disclosure addresses the general public interest in this area.

38. The Tribunal finds that the information in question engages section 40 (2) FOIA and, as a result of considering the public interest balance in this case, is exempt from disclosure.

39. Our decision is unanimous.

40. There is no order as to costs.

Robin Callender Smith

Judge

29 February 2016

Promulgated 21st March 2016