



Appeal number: EA/2017/0220

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

CYRIL BENNIS

Appellant

- and -

**THE INFORMATION COMMISSIONER
STRATFORD -ON-AVON DISTRICT COUNCIL**

Respondents

TRIBUNAL:

**JUDGE ALISON MCKENNA
ROGER CREEDON
GARETH JONES**

Determined on the papers, the Tribunal sitting in Chambers on 8 May 2018

DECISION

1. The appeal is allowed in part.
2. The Tribunal concludes that the Decision Notice was wrong in its assessment of the public interest test as it related to both of the exemptions relied on by the Council under s. 36 FOIA.
3. The Tribunal finds that the Council was correct to refuse part of the requested information under s. 40 (2) FOIA.
4. Accordingly, the Tribunal requires no steps to be taken.

REASONS

Background to Appeal

5. The Appellant made a complaint of misconduct against a local authority councillor in relation to their handling of a planning matter. That complaint was not upheld.
6. The Appellant subsequently made a request to Stratford-On-Avon District Council (“the Council”) for disclosure of the advice it had received when considering the complaint of misconduct. That advice had been provided to the Council’s Monitoring Officer by an Independent Person, one of two such people (“IPs”), appointed for that purpose under s. 28(7) of the Localism Act 2011¹.
7. His request was made on 23 January 2017 in the following terms:

“I have requested under the Freedom of Information Act all correspondent [sic] relating to my complaint”.
8. The Council provided the Appellant with all the information held within the scope of the request except for the advice received from the IP. This included the councillor’s comments on the complaint, provided with their consent. It refused to disclose the advice from the IP in reliance upon the following sections of the Freedom of Information Act 2000 (“FOIA”): s. 40 (2) (*personal data*), s. 36 (2) (b) (i) (*inhibition of free and frank advice*) and s. 36 (2) (c) (*prejudice to the effective conduct of public affairs*). The Council relied, for the purposes of s. 36 FOIA, on a Qualified Person’s Opinion provided by its Head of Governance and Democracy and Monitoring Officer.

¹ <http://www.legislation.gov.uk/ukpga/2011/20/section/28>

9. The Council explained that it was unable to conduct an internal review because there were no constitutional arrangements permitting another person to review the Monitoring Officer's decisions. The Appellant complained to the Information Commissioner.

10. The Information Commissioner issued Decision Notice FS50669439 on 4 September 2017, upholding the Council's reliance on s. 36 (2) (b) (i) and s. 36 (2) (c) FOIA. The Information Commissioner was satisfied that the Qualified Opinion was provided by an appropriate person and was reasonable. She was satisfied that both of the s. 36 exemptions relied on were engaged in this case, on the basis described at paragraph 34 of the Decision Notice as follows:

"...With regard to s. 36(2)(b)(i), it is reasonable to consider that IPs would be constrained by the knowledge that their views in respect of allegations could be made public, which in turn would be likely to prejudice the free and frank provision of advice. With regard to s. 36 (2)(c), this may refer to an adverse effect on a public authority's ability to offer an effective public service or to meet its wider objectives or purpose. In the Council's view, it is reasonable to consider that the disclosure of the IP's views may lead to a number of outcomes, including IPs being less willing to engage frankly with the process, and including possible prejudice in the event of a further complaint being made to the LGO".

11. Turning to the public interest test, the Decision Notice concluded that, whilst there is a public interest in transparency and accountability, the circumstances of this case caused the balance of public interest to lie in maintaining the s. 36 exemptions. In reaching this conclusion, the Information Commissioner gave weight to the views of the Qualified Person that disclosure would inhibit the future provision of advice to the Council, which would prejudice the effective conduct of public affairs going forward. She noted that the IPs themselves had objected to disclosure of the advice and concluded that they had a reasonable expectation that their advice would not be disclosed under the terms of their appointment. She concluded that the public interest in conducting thorough investigations, including the IP's contribution, was high, whereas the public interest in the particular information requested in this case was not significant, despite the local interest in the underlying planning issue in respect of which the Appellant's complaint had arisen.

12. Having reached these conclusions in relation to the two s. 36 exemptions, the Information Commissioner did not go on to consider s. 40 (2) FOIA in the Decision Notice.

13. The Appellant appealed to the Tribunal.

Appeal to the Tribunal

14. The Appellant's Notice of Appeal dated 29 September 2017 relied on grounds related to principles of transparency, accountability and public confidence in the conduct of local government. We have interpreted these grounds as not including a challenge to the engagement of s. 36 FOIA in relation to the information requested, but

rather to consist of a challenge to the correctness of the Information Commissioner's conclusion that the public interest balancing exercise favoured withholding the requested information.

15. The Information Commissioner's Response dated 17 November 2017 maintained the analysis as set out in the Decision Notice and applied for the Notice of Appeal to be struck out as having no reasonable prospect of success because the grounds of appeal alleged no error of law. That application was refused by the Chamber's Registrar on 6 December 2017, who directed that the appeal should be determined by a Tribunal panel.

16. The Appellant's Reply dated 3 December 2017 repeated his concerns about the integrity of the Council's procedures and the desirability of full scrutiny by residents and rate-payers.

17. The Council's Response dated 19 December 2017 referred to the statutory regime for the appointment of IPs and the Council's internal procedures and policies. We note that, if the Monitoring Officer had decided that a formal investigation should have been undertaken in this case, a public hearing would have ensued (see "Protocol Relating to Independent Persons", page 121 open hearing bundle) at which the IPs would have been expected to give their views orally or in writing and that these would be minuted.

18. The Council's Response made clear that, in addition to adopting the Information Commissioner's submissions on s. 36 FOIA, it continued to rely on s. 40 (2) FOIA. This was because the withheld information contains the personal data of the councillor who was the subject of the complaint, and also the personal data of the IP who provided the advice to the Monitoring Officer. The Council submitted that the councillor against whom the complaint had been made and the IP both had a legitimate expectation that the Council, as the data controller, would treat the withheld information as confidential in circumstances where the complaint against the councillor had been found to be unsubstantiated. It submitted that the disclosure of the requested information would have breached the Data Protection Act's requirement for fair and lawful processing in these circumstances.

19. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered an agreed open bundle of evidence comprising 140 pages, including submissions made by both parties, for which we were grateful. We also considered a small closed bundle, comprising the withheld information only.

The Law

20. S. 36 FOIA provides (where relevant) as follows:

"(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(a) ...

- (b) *Would, or would be likely to, prejudice –*
 - (i) *The free and frank provision of advice, or*
 - (ii) *...*
- (c) *Would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”*

21. S. 40 FOIA provides (where relevant) as follows:

“(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

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

(a) it constitutes personal data which do not fall within sub-section (1) and

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

(3) The first condition is-

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

(i) any of the data protection principles” ...

22. S. 40 (2), where engaged, provides an absolute exemption falling under s. 2 (2) (a) FOIA. The other exemptions relied on here are so-called qualified exemptions giving rise to the public interest balancing exercise required by s. 2 (2) (b) FOIA.

23. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

“If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

24. We note that the burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

Conclusion

25. The Tribunal regrets that it has not received the benefit of the Information Commissioner’s views as to the application of s. 40 (2) FOIA in this case. However, we concluded that it would be fair and just to consider its application without reverting to the parties for additional submissions because that exemption was clearly “in play” in the appeal, having been relied on by the Council initially and raised again in its submissions to the Tribunal. We concluded that in these circumstances, the other parties should be viewed as having chosen not to comment on that claimed exemption when given the opportunity. We also noted that the Appellant’s pleaded case had only ever been directed towards the public interest test, which is not relevant to the application of s. 40(2) FOIA, and so it seemed unlikely that he would now wish to comment on the engagement of an unqualified exemption.

26. In considering whether there was a real and significant risk that an inhibition of the IP’s views would result from disclosure, the Decision Notice (paragraphs 26 and 43) took into account the Council’s submission that, although the names of the IPs are in the public domain, their views are not routinely published. At paragraph 51, the Decision Notice records that the IPs had themselves objected to disclosure of their views. Whilst it was submitted by the Council that the IPs had a reasonable expectation that their views would be treated as confidential, we note that the IPs would have been unaware, at the time they provided their advice to the Monitoring Officer, whether the complaint would proceed to a hearing or not. It is clear from the Council’s letter to the Information Commissioner (page 98, open bundle) that their views would be made public in the context of a formal panel hearing.

27. The Decision Notice thus attributed considerable weight to the argument that the IPs would be inhibited in giving robust advice if they knew that their views were to be made public, and that this would in turn prejudice the effective conduct of public affairs. However, in our view, the Decision Notice failed when assessing the public interest balance to take into account the fact that the IP’s views would in any event have become public if a hearing had been directed.

28. We consider that the failure to consider this point was a material one in weighing the undoubted public interest in seeing the Council’s procedures being conducted in accordance with its published policies as against the stated preferences of the IPs. The fact that the Council’s formal processes envisage disclosure of the IP’s advice in certain circumstances lends weight, in our view, to the Appellant’s arguments in favour of transparency. Weighing these factors into the balance, we would have reached a different conclusion on the public interest test to the one reached in the Decision Notice.

29. However, we agree with the Council that details of unsubstantiated complaints against councillors ought not generally to be disclosed to the world at large under the provisions of FOIA. We consider that the proper approach to such information is to consider the rights of the councillor concerned as a data subject. We are satisfied that the Council could not disclose the councillor's personal data in this case (consisting of their name and opinions expressed about them) without breaching the data protection principles and that s. 40 (2) FOIA is therefore engaged.

30. We are not satisfied that s. 40 (2) FOIA may also be applied to the personal data of the IP's, as their names are already in the public domain, they occupy senior public roles, and their views may be disclosed if there is a public hearing.

31. For the above reasons, whilst we find that the Decision Notice was erroneous, we do not direct the disclosure of the withheld information because we conclude that it is exempt from the duty of disclosure under s. 40 (2) FOIA.

(Signed on the original)

ALISON MCKENNA

DATE: 12 June 2018

CHAMBER PRESIDENT

DATE PROMULGATED: 13 June 2018