



**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Appeal Reference: EA/2020/0012P

**Decided without a hearing
On 27 October 2020**

Before

**JUDGE HAZEL OLIVER
MR GARETH JONES
DR MALCOLM CLARKE**

Between

JATIN KARIA

Appellant

and

INFORMATION COMMISSIONER

Respondent

DECISION

The appeal is dismissed.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 10 December 2019 (FS50838686, the “Decision Notice”). It concerns information sought from the London Borough of Brent (the London Borough) about a decision whether to prosecute the appellant’s brother for littering.

2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. On 29 January 2019 the appellant's brother was issued with a fixed penalty notice ("FPN") for littering. He disputes the offence. The appellant's brother made representations to the London Borough on why he believed the FPN had been issued unfairly, and the appellant then began acting on his brother's behalf. Four weeks before a magistrates hearing was due to take place, a senior legal assistant at the London Borough wrote to the appellant's brother stating that she had considered whether or not to proceed with a prosecution and, *"Having considered the paperwork and analysed the case I am satisfied that both the Evidential [sic] and the Public interest tests have been met. However, as a gesture of good will the council has exercised its discretion and made a decision not to proceed with this matter."*

4. On 25 September 2018 the appellant made a request for information under the Freedom of Information Act 2000 ("FOIA") about the way his brother's case had been handled, in 10 numbered points ("Request 1"). The London Borough provided information in response to some of these points, and denied holding other information. On 18 October 2018 the appellant added a further request, which is the subject of these proceedings ("Request 2"). Request 2 was as follows:

"I would also now like to now request the full file/s in this matter, with all the correspondence between all the teams and officers. In particular I would like to see evidence of the decision making, deliberations, and reasons for deciding to progress this matter as far as Brent Council officers did. I believe we should be entitled to see evidence of some of the most the most bizarre, questionable, suspicious, unempathetic and compassionless decision making, I have come across."

5. The London Borough responded to Request 2 on 6 December 2018. It refused to provide the requested information. It took the position that the information was not the complainant's but his brother's, meaning it was the personal data of a third party and so exempt under section 40(2) FOIA. It said that the information could not be disclosed without the data subject's consent. It also stated that the legal file would be covered by legal professional privilege, specifically litigation privilege, and so exempt under section 42 FOIA.

6. The complainant requested an internal review of both responses on 21 December 2018. The London Borough sent the outcome of its internal review on 23 January 2019. It upheld its original position in relation to Request 1. The outcome did not specifically address Request 2.

7. The appellant complained to the Commissioner on 23 April 2019. He argued that his brother had been a victim of maladministration and that they both wished to investigate why this had happened. He also argued that he had his brother's consent to handle the whole matter including the making of FOIA requests. For the purpose of this appeal, the relevant findings of the Commissioner in relation to Request 2 are as follows:

- a. All the information that had been withheld was the appellant's brother's personal data. As the appellant had made the request on behalf of his brother, with his brother's consent and knowledge, he was therefore standing in his brother's shoes when making the request. The Commissioner had been provided with a copy of a letter authorising the appellant to act on his brother's behalf in pursuing the FPN with the London Borough, and noted that the email address which the appellant's brother initially used to correspond with the London Borough has been copied into most of the correspondence. On this basis the Commissioner took the view that the

appellant's brother was fully aware of the request and was content for the appellant to make the request on his behalf.

- b. Disclosure under FOIA is considered to be disclosure to the world at large and not to the appellant (or his brother) specifically. It is the equivalent of the London Borough publishing the information on its website. The Commissioner considered that the London Borough should not be publishing such information.
- c. Section 40(1) of FOIA was applied to prevent disclosure to the entirety of the information, on the basis that it is personal data of which the applicant is the data subject.
- d. The Commissioner was provided with copies of the withheld information and noted that some, if not all, of the information might attract legal professional privilege. However, she made no formal finding because section 40(1) FOIA was applied instead.

The Appeal and Responses

8. The appellant appealed on 5 January 2020. This states that the central and most important issue in the appeal is Request 2. (He also appealed a separate decision of the Commissioner which is not part of these proceedings).

9. His grounds of appeal in relation to Request 2 are as follows:

- a. The Commissioner should have made a considered and reasoned decision on legal professional privilege, and the London Borough erred in relying on this exemption. The Commissioner had not made it clear whether she had seen the legal advice and legal file. The London Borough had argued that they relied the advice of their legal department to proceed with prosecution, and the appellant refers to his and his brother's concerns about possible suspicious/corrupt behaviour.
- b. The appellant asks the Tribunal to: view the legal advice and file and adjudge whether it was correctly exempt under section 40; rule whether the London Borough could rely on legal professional privilege; consider whether there is any scope to order release of the advice/file; and consider whether the legal advice can be released if the data subject gives consent and any identity of the data subject is redacted.
- c. The appellant says it is a bizarre state of affairs if a person cannot obtain information/documents in this way due to FOIA and data protection legislation.

10. The Commissioner applied to strike out the appeal, which was unsuccessful in relation to the appeal about Request 2. The Commissioner's response can be summarised as follows:

- a. The Commissioner had no formal evidence that the appellant was acting on behalf of his brother in relation to the FOIA requests, but based on other documentation she decided that he was and so decided that section 40(1) FOIA applied.

- b. The requested information is the appellant's brother's personal data – it is the legal file relating to him being prosecuted, and so relates to him and would be identifiable to the appellant and the world at large if disclosed under FOIA.
- c. The information is exempt under section 40(1) if the appellant was acting on his brother's behalf.
- d. If the appellant was not acting on his brother's behalf, the information would be exempt under section 40(2) FOIA. It would be special category data as it relates to the alleged commission of a littering offence. There was no consent or other applicable condition in place to allow disclosure of such information to the world at large. Only article 6(1)(f) of the General Data Protection Regulation would potentially apply in the absence of consent. Disclosure was not reasonably necessary because there were other potential means of access, and disclosure would be without any confidentiality restrictions. In addition, it would not be possible to satisfy one of the conditions for processing under the Data Protection Act 2018 (DPA). A subject access request under the DPA provides a more appropriate and confidential way of accessing the information.
- e. The Commissioner accepts that the appellant's brother may not receive legally privileged information under his subject access rights. However, such information would be exempt under FOIA due to litigation or legal advice privilege, and the public interest in transparency would not be sufficient to warrant disclosure.

11. On 18 February 2020, Registrar R Worth refused the application to strike out this appeal, and made the following Direction:

“The Freedom of Information Act 2000 is about public access to information held by public authorities; if information is provided under the Freedom of Information Act 2000 then there is no restriction on its use. Mr Jatin Karia is asked to make submissions which deal with the following:

2.1 Does he agree that the request for information his brother's file was a request for personal information about his brother?

2.2 Why does he say that the information sought (about his brother's court matter) should be published without restriction – i.e. accessible to anyone who wants it?

2.3 He has mentioned that his brother is a vulnerable person; in Mr Jatin Karia's opinion does that vulnerability affect whether his brother's file should, or should not, be accessible to the public?”

12. The appellant replied on 28 February 2020. He said that he was not sure what is personal information and what is not, but *“if personal information is that which identifies my brother, and if the information requested refers to my brother and/or my brother is identifiable from all/part of the file and/or advice, then yes, it would be personal information, because that is how personal information is identified and defined.”* He said the information should be published without restriction as it is in the public interest, to help determine if the council was using a controversial approach in insisting on issuing proceedings, and using its power and bullying tactics to force people to pay unjustifiable littering fines. He says that neither he nor his brother have any issue with the information being available to the public. The appellant explains that

he referenced his brother's vulnerability because of the stress and risk of facing a prosecution and substantial fine, and this should not affect the release of the information to the public at all.

Applicable law

13. The relevant provisions of FOIA are as follows.

1 General right of access to information held by public authorities.

- (1) *Any person making a request for information to a public authority is entitled—*
- (a) *to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
 - (b) *if that is the case, to have that information communicated to him.*

.....

2 Effect of the exemptions in Part II.

.....

- (2) *In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—*
- (a) *the information is exempt information by virtue of a provision conferring absolute exemption, or*
 - (b) *in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*

.....

40 Personal information.

- (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 subsection (1), and*
 - (b) *the first, second or third condition below is satisfied.*
- (3A) *The first condition is that the disclosure of the information to a member of the public otherwise than under this Act—*
- (a) *would contravene any of the data protection principles, or*
 - (b) *would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.*

.....

42 Legal professional privilege.

- (1) *Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.*

14. Section 3(2) of the DPA defines "personal data" as "any information relating to an identified or identifiable living individual". The "processing" of such information includes "disclosure by transmission, dissemination or otherwise making available" (s.3(4)(d) DPA), and so includes disclosure under FOIA.

15. The data protection principles are those set out in Article 5(1) of the General Data Protection Regulation ("GDPR"), and section 34(1) of the DPA. The first data protection

principle under Article 5(1)(a) GDPR is that personal data shall be: “*processed lawfully, fairly and in a transparent manner in relation to the data subject*”. To be lawful, the processing must meet one of the conditions for lawful processing listed in Article 6(1) GDPR. These include where “*the data subject has given consent to the processing of his or her personal data for one or more specific purposes*” (Article 6(1)), and where “*processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data*” (Article 6(f)).

16. Information relating to criminal convictions and offences, or the alleged commission of an offence, has additional legal protections. Article 10 GDPR requires the processing of such data based on Article 6(1) to only be carried out under the control of official authority or when the processing is authorised by Member State law providing for appropriate safeguards for the rights and freedoms of the data subject. Under section 10(5) DPA, processing of criminal convictions/offences data will be authorised in the UK if the processing complies with a condition in Parts 1, 2 or 3 of Schedule 1 to the DPA 2018. This includes a condition that the data subject has given consent to the processing (Part 3 para 29).

17. Section 40(1) FOIA is an absolute exemption, and so not subject to the public interest test. Section 40(2) is also an absolute exemption, where the first condition applies (disclosure would contravene any of the data protection principles).

18. Legal professional privilege protects the confidentiality of legal communications. It has two parts. Legal advice privilege concerns confidential communications between lawyer and client for the purpose of giving or receiving legal advice or assistance. Litigation privilege concerns confidential communications between a client and their lawyers, or by either of them with third parties, for the dominant purpose of litigation. The litigation must be existing, pending or reasonably contemplated. Section 42 FOIA is subject to the public interest test, meaning if information falls within this exemption it can be withheld if, “*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*” (section 2(2)).

Issues and evidence

19. The issues are:

- a. Is the information requested in Request 2 exempt from disclosure under section 40(1) FOIA, as it constitutes personal data of which the applicant is the data subject?
- b. If not, is the information exempt from disclosure under section 40(2) FOIA, as it constitutes personal data and disclosure would contravene the data protection principles?
- c. If not, is the information exempt from disclosure under section 42 FOIA as it is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings?

20. In evidence we had:

- a. An original agreed bundle of open documents.
- b. A closed bundle of documents containing the withheld information and related correspondence between the Commissioner and the London Borough.

21. Neither party provided additional written submissions.

Discussion and Conclusions

22. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. We deal in turn with the issues.

23. *Is the information requested in Request 2 exempt from disclosure under section 40(1) FOIA, as it constitutes personal data of which the applicant is the data subject?*

The first question is whether the requested information is personal data of the appellant's brother. We find that it is. The appellant's reply to the Tribunal of 28 February agrees that this would be personal information, if the information requested refers to his brother, or if he is identifiable from all or part of the file. The requested information is a file relating to the proposed prosecution of the appellant's brother, and he is identifiable from this information. This is clearly the appellant's brother's personal data.

24. The next question is whether the real applicant is the data subject (the appellant's brother), or the appellant himself. Both the London Borough and the Commissioner appear to have proceeded on the assumption that the appellant was making this request on behalf of his brother. The Commissioner's position is that there was no formal evidence that the appellant was acting on behalf of his brother, but she took the view that the appellant's brother was fully aware of the request and was content for the appellant to make the request on his behalf - based on a copy of a letter authorising the appellant to act on his brother's behalf in pursuing the FPN with the London Borough, and the copying of correspondence to the brother's email address. We note that the appellant says he is acting on behalf of his brother in this matter. Looking at the evidence as a whole, we find that the appellant is acting on his brother's behalf in this matter, rather than making his own request under FOIA. This means that Request 2 must be treated as having been made by the appellant's brother.

25. Request 2 is for personal data of which the appellant's brother, who is treated as having made the request, is the data subject. This means that it is exempt from disclosure under section 40(1) FOIA. Personal data about the applicant must be sought by way of a data subject access request instead. We note that the appellant says this is a bizarre state of affairs. We also note that material which is covered by legal professional privilege can be withheld under a data subject access request, and this is not subject to a public interest test as under FOIA. However, this is the way the law is structured.

26. *If not, is the information exempt from disclosure under section 40(2) FOIA, as it constitutes personal data and disclosure would contravene the data protection principles?*

We have also considered the alternative position if the appellant was making this request on his own behalf, rather than on behalf of his brother. Request 2 is for disclosure of personal information about another person which relates to an alleged criminal offence. This means that it can only be disclosed to the appellant if this processing complies with a condition in Parts 1, 2 or 3 of Schedule 1 to the DPA 2018. If not, the processing will not be fair and lawful, meaning it would contravene the data protection principles and so the information would be exempt from disclosure under section 40(2) FOIA.

27. The only condition that potentially applies is that the data subject has given consent to the processing. If the appellant is not acting on behalf of his brother, then we do not have any evidence of express consent from the appellant's brother for disclosure of this information to

the world at large under FOIA. We have no direct communications from the appellant's brother at all. This means that the information would be exempt from disclosure under section 40(2) FOIA.

28. If not, is the information exempt from disclosure under section 42 FOIA as it is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings? We have found that the information is exempt from disclosure under section 40(1) or, in the alternative, section 40(2) FOIA. It is not strictly necessary for us to make a finding on legal professional privilege in order to decide this appeal, and the Commissioner did not make a finding on this point. However, the appellant says that the Commissioner should have made a reasoned decision on this issue, and has asked the Tribunal to do so. We have been provided with copies of the legal advice and file in the closed bundle. We therefore give a brief decision as follows.

29. Having viewed the withheld information in the closed bundle, we are satisfied that this is covered by litigation privilege. The information consists of communications between the London Borough and its legal advisers for the dominant purpose of pending litigation, namely the proposed prosecution of the appellant's brother.

30. Section 42 is subject to the public interest test, meaning this information can be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure. It has been accepted in numerous cases that there is a strong public interest built into legal privilege, based on the interest in public bodies being able to receive frank legal advice in order to assist them to make appropriate decisions (as confirmed by the High Court in *DBERR v O'Brien and IC* [2009] EWHC 164 (QB)). In the context of this case, we also note that legal advice about criminal prosecutions could potentially be used by individuals seeking to avoid prosecution if it is released publicly.

31. In relation to the public interest in disclosure, there is some general public interest in transparency, in relation to understanding of the legal advice provided to public bodies about criminal prosecutions. There would also be a particular public interest in this information if it revealed inappropriate behaviour by the London Borough. The appellant has alleged that there has been possible suspicious and/or corrupt behaviour. However, having viewed the closed material, we can see nothing in the information which would indicate that there is an enhanced public interest in disclosing it to the world at large under FOIA. We therefore find that the public interest in maintaining the litigation privilege exemption outweighs the public interest in disclosure.

32. We dismiss the appeal and uphold the decision of the Commissioner.

Signed: Hazel Oliver
Judge of the First-tier Tribunal

Date of Decision: 01 November 2020
Date Promulgated: 02 November 2020