



Neutral citation number: [2023] UKFTT 878 (GRC)

Case Reference: EA/2023/0153

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

Determined, by consent, on written evidence and submissions.

Considered on the papers on 11 October 2023.

Decision given on: 18 October 2023

Before

**TRIBUNAL JUDGE Stephen Cragg KC
TRIBUNAL MEMBER Anne Chafer
TRIBUNAL MEMBER Kate Grimley Evans**

Between

BRISTOL CITY COUNCIL

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is Allowed

Substituted Decision Notice: The requested information is exempt from disclosure pursuant to s44 FOIA, as explained in the reasons below.

REASONS

MODE OF HEARING AND PRELIMINARY MATTERS

1. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
2. The Tribunal considered a number of 'un-bundled' documents and a closed bundle and submissions from the parties.

BACKGROUND

3. On 7 April 2022, a requester (who has not asked to be joined to this appeal) wrote to the Bristol City Council (BCC) Appellant and requested information as follows:-

Under the Freedom of Information Act 2000 I wish to see the following:
Full copies of all declarations / registers of interests forms (paper and digital) submitted by [name redacted] since May 2016".

4. In its response dated 16 May 2022, BCC provided the requester with a redacted copy of the Mayor's 'Register of Member's interests' form, citing section 40(2) FOIA to withhold the redacted information.

THE DECISION NOTICE

5. The requester contacted the Commissioner on 22 June 2022, to complain about the way their request for information had been handled as they were unhappy about "redactions to property and land owned by the Mayor".

6. In a decision notice dated 15 February 2023 the Commissioner explained that the requester had sought information ‘about the declared interests of the elected Mayor’. The Commissioner concluded in the decision notice that the withheld information was personal data. The Commissioner said that the requester was pursuing a legitimate interest, and that disclosure of the withheld information was necessary to meet that legitimate interest. However, disclosure of some of the withheld information would contravene the data protection principle under Art 5(1)(a) UKGDPR and therefore that information would be exempt under section 40(2) FOIA.. It would be lawful, fair and transparent to disclose the parts of the withheld information which were then contained in a confidential annex to the decision notice. .

THE APPEAL

7. BCC appealed this decision in a appeal notice dated 14 March 2023. BCC asked that the Commisisoner’s decision to be overturned and substituted with the decision that the requester’s complaint should be dismissed on the basis that BCC was correct to withhold the requested information applying s.40(2) and/or s.44 FOIA. This was the first time that s44 FOIA had been cited by BCC.

8. The Commissioner’s response summarised BCC’s grounds of appeal as follows:-

(a) The disputed information is exempt under section 44 FOIA;

(b) Further, or in the alternative, the Commissioner erred in failing to conclude that the withheld information was exempt under section 40(2) FOIA.

9. In relation to s44 FOIA BCC argued that inclusion of sensitive information on the register of members’ interests is subject, under the Localism Act 2011, to the discretion of the monitoring officer, and thus ‘this operates as a statutory bar’ to disclosure under section 44 FOIA. The application of s40(2) FOIA is discussed above.

10. There is a ‘Declaration of a sensitive interest’ on the Register of Members Interests, of which we have seen a copy, from the Mayor states that:-

I request that the interest(s) which I have detailed below should be treated as sensitive interests for the reasons which I have stated, and as such I understand that they need not appear in the Register of Members Interests and will not be detailed on the Council's web pages.

11. The form states that the category of interest is 'land' together with the nature of that interest and an explanation as to why this is a sensitive interest (which includes the disputed information). The form has been signed in the box for 'Councillor's signature' on '7 July 2016' and then also by the Monitoring Officer on '7/9/2016'.

12. BCC's case is that the interest referred to:-

...is an interest for the purposes of the legislation and it is therefore within the gift of the monitoring officer to accede to the Mayor's request that this information should not be included on the register. If this information is required to be disclosed, then the discretion of the monitoring officer to make this decision will effectively have been overruled by the decision of the ICO.

13. BCC also argued that, in any event for the purposes of s40(2) FOIA, the legitimate expectation of the Mayor that the withheld information would not be disclosed under FOIA would be enhanced by the exercise of the discretion pursuant to the 2011 Act as explained above.

THE LAW

14. A person requesting information from a public authority has a right to have that information communicated to them, if the public authority holds it: s.1(1)(b) FOIA.

15. However that right is subject to certain exemptions including the exemption in s44 FOIA that:-

Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—

(a) is prohibited by or under any enactment ...

16. Section 44 FOIA is an absolute exemption and therefore not subject to the public interest balancing test.

17. Relevantly in this case s32 of the Localism Act 2011 (the 2011 Act) provides that:-

(1) Subsections (2) and (3) apply where –

(a) A member or co-opted member of a relevant authority has an interest (whether or not a disclosable pecuniary interest), and

(b) The nature of the interest is such that the member or co-opted member, and the authority’s monitoring officer, consider that disclosure of the details of the interest could lead to the member or co-opted member, or a person connected with the member or co-opted member, being subject to violence or intimidation.

(2) If the interest is entered in the authority’s register, copies of the register that are made available for inspection, and any published version of the register, must not include details of the interest (but may state that the member or co-opted member has an interest the details of which are withheld under this subsection).

18. Thus the 2011 Act requires that the relevant member and monitoring officer have to make a decision about details that should be excluded from inspection.

19. Where a statute gives a public authority a discretion to disclose information, the Commissioner is not obliged to examine the reasonableness or otherwise of the exercise of that discretion. Hence in *Ofcom v Gerry Morrissey and the IC* [2011] UKUT 116 AAC, where Ofcom had the power to exercise its functions so as to disapply a statutory bar on disclosing information, the Upper Tribunal held at paragraphs 63 and 72 that it was not for the Commissioner to consider whether Ofcom had acted unreasonably in not disclosing information where it had the statutory power to withhold.

DISCUSSION

20. As noted above, the original requester is not a party to the appeal, and confirmed this in an email to the ICO on 7 June 2023.

21. We are satisfied, as is the Commissioner, that the Mayor and the monitoring officer have carried out a consideration of the relevant interest for the purposes of s.32(1)(b) of 2011 Act and that a decision was taken that the information did fall within the category of

‘sensitive interest’ such that s.32(2) of the 2011 Act is engaged prohibiting the publishing of the details of the interest on the published version of the register.

22. Once the discretion not to publish has been exercised we are satisfied that the disclosure of the withheld information is prohibited by s32(2) of the 2011 Act and therefore, applying the approach on the *O’fion* case, the exemption in s44 FOIA is necessarily engaged.
23. We note that the Commissioner, in his submissions, is of the view that nevertheless he was correct to conclude in his decision notice that s.40(2) FOIA was not engaged. However, as the Tribunal finds that the withheld information is exempt under s.44 FOIA, we do not find it necessary to consider the case under s40(2) FOIA, and the Commissioner agrees that this would now be academic.

CONCLUSION

24. The Tribunal finds that there was an error of law by the Commissioner in the finding that some of the requested information should be disclosed. This is because the exemption under s44 FOIA applies to that information. We note, of course, that the Commissioner’s initial decision was that some of the information on the form should be disclosed on the basis of s40(2) FOIA. At that point BCC had not referred to the 2011 Act and its implications for the information withheld on the form.
25. In the event, the Tribunal makes no finding in relation to the application of s40(2) FOIA. A substituted decision notice to the effect that the withheld information is exempt from disclosure will be made.
26. On the basis of the above, the Tribunal allows the appeal.

Stephen Cragg KC

Judge of the First-tier Tribunal

Date: 17 October 2023

Date Promulgated: **18 October 2023.**