



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

EA/2011/0132

**ON APPEAL FROM
The Information Commissioner's Decision
No FS50312938 dated 26 May 2011**

Appellant: Efifiom Edem

Respondent: Information Commissioner

Second Respondent: The Financial Services Authority

Date and place of hearing: 15 February 2012 at Field House

Date of decision: 16 April 2012

Before

**Anisa Dhanji
Judge**

and

**John Randall and Dr Malcolm Clarke
Panel Members**

Representation

For the Appellant: in person

For the Information Commissioner: No attendance

For the Financial Services Authority: Mr Greg Choyce, Solicitor

Subject matter

FOIA section 40(2) – whether information is personal data; whether disclosure would breach the first data protection principle.

Case Law

A v Information Commissioner (EA/2006/0012)

All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and the Ministry of Defence (GIA/150-152/2011)

Commons Services Agency v. Scottish Information Commissioner [2008] UKHL 47; 1 WLR 1550

Corporate Officer of the House of Commons v Information Commissioner (EA/2007/0060)

Corporate Officer of the House of Commons v Information Commissioner and Norman Baker MP (EA/2006/0015 & 0016)

Dr Peter Kelway v Information Commissioner and Chief Constable of Northumbria Police (EA/2008/0037)

Durant v Financial Services Authority [2003] EWCA Civ 1746

DWP v Information Commissioner (EA/2006/0040)

Guardian News & Media Limited v Information Commissioner (EA/2008/0084)

Harcup v Information Commissioner (EA/2007/0058)

Johnson v Medical Defence Union (2007) EWCA Civ 262

London Borough of Camden v Information Commissioner (EA/2007/0021)

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

EA/2011/0132

SUBSTITUTED DECISION NOTICE

Dated: 16 April 2012

Public Authority: The Financial Services Authority

Address of Public Authority: 25 The North Collonade
Canary Wharf
London E14 5HS

Name of Complainant: Efifiom Edem

The Substituted Decision:

We allow the appeal in part and substitute the following decision in place of the Commissioner's Decision Notice dated 26 May 2011.

The Tribunal finds that the Disputed Information is not personal data and therefore, is not exempt under section 40(2) of the Freedom of Information Act 2000 ("FOIA").

Within 20 working days of the Tribunal's determination being promulgated, the Public Authority must disclose the Disputed Information to the Complainant.

Except as set out above, the Commissioner's Decision Notice shall remain unaltered.

Signed

**Anisa Dhanji
Judge**

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

EA/2011/0132

REASONS FOR DECISION

Background

1. This is an appeal by Mr. Efifiom Edem (the “Appellant”), against a Decision Notice issued by the Information Commissioner (the “Commissioner”), on 26 May 2011.
2. The appeal arises from a request for information made by the Appellant to the Financial Services Authority (“FSA”) on 30 December 2009, for information held by them about him, and about complaints that he had made to the FSA to the effect that the FSA had failed, properly, to regulate Egg Plc.

The Request for Information

3. The request was made on the following terms:

“I hereby lodge an FIA 2000 information request for a copy of all information that the FSA holds about me and/or my complaint that the FSA had failed to correctly regulate Egg Plc.”

4. The complaints in question had been made by the Appellant in 2004. The Appellant subsequently clarified that he was not seeking copies of correspondence between himself and the FSA in relation to the complaints.
5. The FSA refused the request, relying on the exemptions in sections 31 and 40 of the Freedom of Information Act 2000 (“FOIA”). Following an internal review, some information previously withheld under section 31 was released, but other information was withheld on the basis that it was the Appellant’s own personal data and was therefore exempt under section 40(1), or was exempt under section 40(2) because it comprised the personal data of some of the FSA’s employees.
6. Not being satisfied with this response, the Appellant complained to the Commissioner under section 50 of FOIA.

The Complaint to the Commissioner

7. The Commissioner investigated the complaint. During the course of his investigation, the FSA released some of the information it had previously withheld under section 40(2). In respect of the remaining information, the Commissioner found that:
 - In relation to section 40(2), the FSA had properly withheld the names of its junior staff who had dealt with the Appellant’s complaints, as well as holiday arrangements of certain staff;

- In relation to section 31, the information withheld was not exempt and must be disclosed.
 - The FSA had been in breach of sections 1(1)(a), 10(1), 17(1)(a) and 17(7)(a), although the Commissioner did not require any remedial steps to be taken in respect of those breaches.
8. The Decision Notice was silent in relation to section 40(1).

The Appeal to the Tribunal

9. The Appellant has appealed to the Tribunal against the Decision Notice.
10. At a directions hearing on 26 August 2011, the Appellant confirmed that his grounds of appeal related only to sections 40(1) and (2). He accepted that other issues he had raised in his grounds of appeal (in particular, issues as to what information should be accessible through the FSA's website, and whether the FSA has complied with the Commissioner's Decision Notice in relation to information to be disclosed to the Appellant), were not within the Tribunal's jurisdiction. The Appellant has also complained about what he says are errors of fact in the Decision Notice. However, the errors he has identified (if they are indeed errors) are in no way material to the Commissioner's findings.
11. In relation to section 40(1), the Appellant disputes that the information in issue is exempt. He also asserts that to the extent the FSA has already provided him with information comprising his own personal data, it should not have done so under FOIA, because that amounts to disclosure to the world at large. He further maintains that the FSA holds certain personal data about him that it should not be holding.
12. In relation to section 40(2):
- he disputes that the information withheld by the FSA under section 40(2) (the "Disputed Information"), is limited to the names of certain members of the FSA's staff;
 - to the extent that the Disputed Information contains the names of certain members of the FSA's staff, he disputes that they are junior members of staff; and
 - to the extent that the Disputed Information contains the names of certain members of the FSA's staff, he disputes that the information is exempt under section 40(2), even if they are junior members of staff.
13. At the Appellant's request, the Tribunal held an oral hearing. The Commissioner informed the Tribunal that he did not intend to attend. He considered that any questions in issue were matters of fact on which the FSA would be best placed to assist the Tribunal.
14. The parties lodged an agreed bundle of documents and skeleton arguments. The FSA also lodged an open and a closed witness statement from Rosalyn Leaphard. The Appellant sought to lodge additional documents at the hearing. It is not clear why he did not lodge them sooner. In the event, although we

have considered them, they have been of little assistance to the issues in this appeal. For the avoidance of doubt, we should say that we have considered all documents submitted, even if not specifically referred to in this determination.

15. The Disputed Information comprises only the names of 3 members of staff. The names are contained in documents which have been provided to the Appellant with the 3 names redacted. The closed witness statement of Ms Leaphard simply gives the names of the three staff members in question and the dates on which each left the FSA. There has been no other closed material in this appeal and no closed sessions were involved in the hearing.

The Tribunal's Jurisdiction

16. 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.
17. 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.
18. As already indicated, the Appellant's grounds of appeal raise certain matters which are outside the Tribunal's jurisdiction. The Tribunal can only consider issues relating to the Appellant's right of access to information held by the FSA. Accordingly, the grounds of appeal and submissions have been read as being confined to such matters.

The Legislative Framework

19. Under section 1 of FOIA, any person who has made 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.
20. 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.

Issues and Findings

21. The only issues in this appeal are whether the information that the FSA has withheld under sections 40(1) and (2) is in fact exempt under those provisions.

Section 40(1)

22. The Appellant's request was for information held by the FSA about him and about the complaints he had made. As we explained to the Appellant at the hearing and previously, information which comprises his own personal data is exempt under section 40(1) of FOIA. This does not mean that the Appellant cannot access that information. It is just that he must do so under section 7 of the Data Protection Act 1998 ("DPA") rather than under FOIA.
23. The Appellant also asserts that to the extent that the FSA has provided him with information comprising his own personal data, they should not have done so under FOIA, because that amounts to disclosure to the world at large. We see no merit in this point since the Appellant has conceded that in fact, the FSA has only disclosed the information to him. As we explained to the Appellant at the hearing, that is not in any event a matter within this Tribunal's jurisdiction. Likewise, if the Appellant maintains, as he appears to, that the FSA holds personal data about him that they have no good reason to hold, that, too, is a matter outside this Tribunal's jurisdiction.
24. The Appellant's appeal in relation to section 40(1) is therefore dismissed.

Section 40(2)

25. The Disputed Information comprises the names of three members of staff. The Respondents say that this information amounts to the personal data of the staff members in question and is exempt under section 40(2). The Appellant disputes that the names amount to personal data and even if it does, he says that the information is not exempt under section 40(2).
26. The first question we must address is whether the information is the personal data of the 3 individuals in question. If it is not personal data, then it must be disclosed, since no other exemption is relied on.
27. The legal definition of "personal data" is found in section 1(1) the DPA and is incorporated into FOIA by section 40(7). It 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;*

28. 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”

29. Does the Disputed Information identify the individuals in question? The Appellant says that a living individual cannot be identified by name alone, and that proof of identity, including a postal address, date of birth and signature is also required. We do not agree. An individual can be identified in many different ways. In our view, the names of the three members of staff, taken together with information that they were employed by the FSA at a given date, and information as to the positions they held, may well be sufficient to identify them.

30. However, even if they can be identified, it does not follow that that the information is personal data. In Durant v Financial Services Authority, which is the leading case on the meaning of “personal data”, Auld LJ explained that the information must also be such as to affect the person’s privacy. He said 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.”

31. **Durant** is a decision of the Court of Appeal and the Tribunal is bound by it, although we would acknowledge that there has been some variation in exactly how it has been applied in different cases that have come before the Tribunal. Curiously, the Decision Notice is entirely silent about the application of **Durant** to the present case, and the Commissioner has also been silent about his own guidelines contained in the “Data Protection Technical Guidance Determining What Is Personal Data”.

32. Applying the **Durant** principles, is the information personal data? The names appear in a small number of internal e mails and documents in June and July 2004. The content is largely factual. The FSA has of course already disclosed the content of the e mails and documents. The names redacted are the names of the people who sent or received the e mails or who were parties to internal discussions. A fourth name was accidentally disclosed by the FSA.
33. Where on the continuum of relevance or proximity to the data subjects at one end, and transactions or matters in which they may have been involved to a greater or lesser degree at the other end, does the Disputed Information fall? We have considered the “two notions” put forward by Auld LJ. In our view, the Disputed Information is not biographical in any significant sense. The information does not go beyond the recording of the data subjects’ involvement in a matter that has no personal connotations. It simply concerns a transaction or matter in which the individuals in question were involved. Those individuals are in no way the focus of the information. The focus is an investigation into the handling of the Appellant’s complaint to the FSA.
34. The Disputed Information simply discloses the fact that they had been employed by the FSA and had been engaged in the regulation of a certain financial institution. We do not consider that the information adversely affects the individuals’ privacy, whether in their personal or family life, business or professional capacity.
35. We do not suggest that information about where an individual worked at some point in the past, together with some indication of his role, can never be personal data. There are a number of organisations, the nature of whose activities are such that information that a particular individual was employed by them, might well amount to personal data. If, for example, an individual was employed by an organisation licensed to conduct experiments on animals, that fact may well amount to personal data. It may disclose something about his likely opinion on the often contentious subject of animal rights, and could lead to harassment by so-called animal rights activists. In such a case, a compelling argument could well be made that the information is biographical and does affect the privacy of the individual concerned. That, however, is not the position in the present case.
36. For all these reasons, we do not consider that the Disputed Information is personal data. It follows that the information is not exempt under section 40(2) and must be disclosed.

Decision

37. We dismiss this appeal in relation to section 40(1) but we allow this appeal in relation to section 40(2).
38. Our decision is unanimous.

Signed:

[Signed on original]

Anisa Dhanji
Judge

16 April 2012

Paragraph 20 amended on 17 April 2012 under Rule 40 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009



**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)**

Appeal No: EA/2011/0132

RULING ON APPLICATION FOR PERMISSION TO APPEAL

Introduction

1. Mr Efifiom Edem (the “Appellant”), appealed against a Decision Notice issued by the Information Commissioner (the “Commissioner”), on 26 May 2011. The appeal arose from a request for information made by the Appellant to the Financial Services Authority (“FSA”). The FSA was joined in the appeal as a Second Respondent.
2. By the time the appeal came on for hearing, the only information in issue was the names of three former members of staff of the FSA. The Respondents considered that this information comprised the personal data of the individuals in question and was exempt, therefore, under section 40(2) of the Freedom of Information Act 2000 (“FOIA”).
3. The First-tier Tribunal held that the information was not personal data, and therefore, the exemption in section 40(2) was not engaged.
4. Both the FSA and the Information Commissioner (the “Commissioner”) have applied under Rule 42 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the “Rules”) for permission to appeal against the First-tier Tribunal's decision.

The Scope of the Tribunal's Consideration of an Application for Permission to Appeal

5. Rule 43 provides that on receiving an application for permission to appeal, the Tribunal must first consider, taking into account the overriding objective in rule 2, whether to review the decision in accordance with rule 44. Rule 44(1) provides that the First-tier Tribunal may only undertake a review if it is satisfied that there was an error of law in the decision.

6. If the First-tier Tribunal decides not to review the decision, or reviews the decision and decides to take no action, the First-tier Tribunal must consider whether to give permission to appeal to the Upper Tribunal. An appeal to the Upper Tribunal lies only on a point of law.
7. The first question therefore, is whether any of the grounds raised by the Appellant disclose an error of law in the First-tier Tribunal's decision.

Was There an Error of Law in the Tribunal's Decision?

8. In reaching its findings, the First-tier Tribunal sought to follow the Court of Appeal's decision in **Durant v Financial Services Authority** [2003] EWCA Civ 1746. The First-tier Tribunal noted that **Durant** is a decision of the Court of Appeal and it was bound by it.
9. The Respondents say that the First-tier Tribunal erred in applying **Durant**. The Commissioner says that the First-tier Tribunal failed to consider the context of **Durant**, it misapplied the "biographically significant" notion, and it erred in its application of the "focus" notion. The FSA says that it was not necessary to have recourse to the notions of biographical significance or focus and that even if it were, the First-tier Tribunal misapplied them.
10. The FSA also says that the procedure leading to the Tribunal's decision was unfair to the FSA because neither **Durant**, nor the two notions relied on by the First-tier Tribunal were raised by the Appellant in the written material filed by the Appellant, nor by the Appellant at the hearing, and that the First-tier Tribunal did not invite the parties to make submissions on **Durant**. The FSA concludes that the First-tier Tribunal carried out its own research after the hearing and says that the list of authorities on page 2 of the determination, none of which was the subject of submission by the parties, reinforces this conclusion.

Decision

11. I have considered whether to review the decision under Rule 43 of the Rule, taking into account the overriding objective in Rule 2. I am not satisfied that there was an error of law in the First-tier Tribunal decision and do not consider, therefore, that the First-tier Tribunal should review the decision.
12. However, I consider that permission to appeal should be granted. The grounds of appeal contain cogent arguments and raise an important point of law of general application in many cases that come before the First-tier Tribunal. As noted in the First-tier Tribunal's determination, there has been some variation in exactly how **Durant** has been applied in different cases that have come before the First-tier Tribunal. There is considerable merit, therefore, in the issue being considered by the Upper Tribunal.
13. Since the parties will have an opportunity, before the Upper Tribunal, to put forward their arguments in full, the FSA's allegations as to procedural unfairness perhaps do not need to be addressed. However, I would say, for completeness, that the record of proceedings show that **Durant** was in fact

raised by the Appellant at the hearing and the FSA replied to that. Bearing in mind the importance of **Durant** in any discussion of whether information is personal data, and bearing in mind also that **Durant** is a decision of the Court of Appeal binding on the First-tier Tribunal, it would be surprising if the FSA expected that the First-tier Tribunal would not need to consider that decision in reaching its findings. The cases cited on page 2 of the Tribunal's determination are some cases that have considered **Durant**. The First-tier Tribunal's findings did not rest on them.

Grant of Permission

14. I give permission to the Commissioner and the FSA to appeal to the Administrative Appeals Chamber of the Upper Tribunal on the grounds referred to in paragraph 9, above.
15. Under Rule 23(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008, as amended, the Commissioner and the FSA have one month from the date this Ruling is sent to them, to lodge their appeal with:

The Upper Tribunal (Administrative Appeals Chamber)
5th Floor, Rolls Building,
7 Rolls Buildings
Fetter Lane,
London, EC4A 1NL

[Signed on original]

Anisa Dhanji
Judge

15 May 2012



**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)**

Appeal No: EA/2011/0132

RULING ON APPLICATION FOR PERMISSION TO APPEAL

Introduction

1. Mr Efifiom Edem (the “Appellant”), appealed to the First-tier Tribunal against a Decision Notice issued by the Information Commissioner (the “Commissioner”), on 26 May 2011. The appeal arose from a request for information made by the Appellant to the Financial Services Authority (“FSA”). The FSA was joined in the appeal as a Second Respondent.
2. The First-tier Tribunal allowed the appeal in part and directed that the FSA must disclose the disputed information to the Appellant. The disputed information comprised the names of three former members of staff of the FSA which the First-tier Tribunal found was not exempt under section 40(2) of the Freedom of Information Act 2000 (“FOIA”).
3. Both the FSA and the Information Commissioner (the “Commissioner”) applied under rule 42 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the “Rules”) for permission to appeal against the First-tier Tribunal’s findings referred to in paragraph 2 above. Permission was granted in a Ruling dated 15 May 2012.
4. By an application dated 15 May 2012, the Appellant also seeks permission to appeal against the First-tier Tribunal’s decision. The purpose of this Ruling is to deal with that application.

The Scope of the Tribunal’s Consideration of an Application for Permission to Appeal

5. Rule 43 provides that on receiving an application for permission to appeal, the Tribunal must first consider, taking into account the overriding objective in rule 2, whether to review the decision in accordance with rule 44. Rule 44(1) provides that the First-tier Tribunal may only undertake a review if it is satisfied that there was an error of law in the decision.
6. If the First-tier Tribunal decides not to review the decision, or reviews the decision and decides to take no action, the First-tier Tribunal must consider

whether to give permission to appeal to the Upper Tribunal. An appeal to the Upper Tribunal lies only on a point of law.

7. The first question therefore, is whether any of the grounds raised by the Appellant disclose an error of law in the First-tier Tribunal's decision.

Was There an Error of Law in the Tribunal's Decision?

8. Paragraphs 2 to 5 of the Appellant's application set out what he asserts are factual errors or inadequacies in the First-tier Tribunal's decision. These do not identify any errors of law.
9. Paragraph 6 refers to a separate Appendix. This deals with the Appellant's appeal to the First-tier Tribunal in relation to section 40(1). The Tribunal had dismissed his appeal in this regard for the reasons set out at paragraphs 22 and 23 of its decision. The Appendix simply refers to the submissions the Appellant had made to the First-tier Tribunal. It does not identify any errors of law.
10. Paragraphs 7 - 9 deal with matters outside the First-tier Tribunal's jurisdiction.

Decision

11. I am not satisfied that the Appellant's application has identified any error of law in the First-tier Tribunal decision. I do not consider, therefore, that the First-tier Tribunal should review its decision under Rule 43. Permission to appeal is also refused.
12. The Appellant has one month from the date this Ruling is sent to him, to lodge his application for permission to appeal directly with:

The Upper Tribunal (Administrative Appeals Chamber)
5th Floor, Rolls Building,
7 Rolls Buildings
Fetter Lane,
London, EC4A 1NL

[Signed on original]

Anisa Dhanji
Judge

16 May 2012



**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)**

Appeal No: EA/2011/0132

RULING

1. On 16 April 2012, the First-tier Tribunal made a decision which required the Financial Services Authority (“FSA”) to disclose to Mr Efifiom Edem, the names of three former members of staff of the FSA.
2. By a Ruling dated 15 May 2012, the First-tier Tribunal granted the Information Commissioner and the FSA permission to appeal to the Administrative Appeals Chamber of the Upper Tribunal against the First-tier Tribunal’s decision.
3. The FSA has now applied for a stay of the First-tier Tribunal’s decision pending the outcome of that appeal.
4. Pursuant to rule 5(3)(l) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, the First-tier Tribunal hereby suspends the effect of its decision, pending the determination of the appeal by the Upper Tribunal

[Signed on original]

Anisa Dhanji
Judge

16 May 2012