FIRST – TIER TRIBUNAL

GENERAL REGULATORY CHAMBER

Information Rights

Appeal Number: **EA/2013/0059**

Appellant: **Howard Roberts**

Respondent: **The Information Commissioner**

Second Respondent **The Home Office**

Before:

Brian Kennedy QC (Tribunal Judge)

Alison Lowton (Tribunal Member)

Michael Hake (Tribunal Member)

Oral Hearing: Temple Court, Bull Street, Birmingham on 3 October 2013.

Appearances:

The Appellant.

Subject matter: Freedom of Information Act 2000, and the engagement of the exemption under Section 36(2), 40(1), 40(2) & 42 and the application of the public interest test.

DECISION

The Tribunal upholds the decision notice (FS50433433) dated 26 February 2013 and dismisses the appeal.

REASONS

Introduction:

1. The Appellant in this case made a previous request ("the original request") to the second respondent ("the Home Office") on 11 October 2009. The subject matter of a previous appeal at this Tribunal, Appeal No: EA/2012/0032. The Appellant wrote to the Home Office on the 10th January 2011 and in reference to the original request, requested the following information under the Freedom of Information Act 2000 ("FOIA"); *"I formally request a copy of all letters, notes, memoranda, emails, faxes, or other communications, exchanged between any person in your Information Access Team, or your supervisory Home Office Managers; and any person working for, or connected with, (a) HMIC (B) Senior Appointments Panel, or (c) the wider Home Office, since 11th October 2009 which has related, in any way to my (1) Freedom of Information (2) Subject Access request, or (3) mentions myself, or a combination of these matters. Also I seek copies of any such (of all the above types) of communication between any member of your team, and any Home Office supervisory Manager that relates to: my (1) Freedom of Information, (2) Subject Access request, or (3) mentions myself, or a combination of these matters."*

2. This "requested information" comprises internal and external correspondence on the subject of how the Home Office should respond to the original request. The respondent ("the Commissioner") considers this a "Meta Request" i.e. a request about the handling of a previous request. As the meta request focused on a previous request made by the Appellant, some of the requested information was the Appellant's personal data. Consequently the Home Office considered the meta request under the FOIA and the Data Protection Act 1998 ("the DPA").

3. The Home Office responded on the 11th April 2011 confirming that it holds information within the scope of the request, providing some of the requested information and withholding other information under sections 36(2)(b)(i), 36(2)(c), 40(2) and 42(1) of the FOIA. The Home Office also advised that the Appellant's personal data was exempt under section 40(1) of the FOIA and that this would be considered separately under the DPA.

4. Following an internal review the Home Office wrote to the Appellant on the 4th August 2011 upholding that decision that it had correctly applied the exemptions cited to the requested information.

5. The Appellant contacted the Commissioner on 1 February 2012 and brings this appeal against a Decision Notice, Ref. No: FS50433433, ("DN") issued by the Commissioner on the 26 February 2013 upholding the refusal by the Home Office to disclose most of the requested information but requiring the Home Office to provide some of the requested information. The DN deals comprehensively with the issues therein giving detailed reasons to support his conclusions and is a matter of public record. We shall not rehearse it herein but brief reference will be made to the pertinent issues dealt with by the Commissioner.

Statutory Framework:

- Under section 1(1) of FOIA: *"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".*
- Section 36 of FOIA is contained in Part II (exempt information). It applies to information held by the Home Office and *Section 36(2)(b) provides that: (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 (b) would, or would be likely to, inhibit (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation ------".*
- Section 40(2) of the Act states that:- *"(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) either the first or second condition below is satisfied- (3) The first condition is:- (a) in a case where the information falls within any of the 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 that under this Act would contravene- (i) any of the data protection principles----"*

The Issues for the Tribunal:

a) The Parties agree that the Section 42(1) [Legal Professional Privilege] exemption is engaged and the Appellant accepts it is not the subject matter of this appeal in relation to the withheld information where it has been cited.

The Appellant argues:

b) That the Commissioner erred in concluding that the exemption under section 36(2)(b)(i) of the Act was engaged with respect to some of the disputed information

c) In the event that the exemption under section 36(2)(b)(i) of the Act was engaged with respect to some of the withheld information, the Commissioner erred in concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure.

d) The Commissioner erred in concluding that the exemption under Section 40(2) of the Act was engaged with respect to the names and job titles of all individuals referred to in the withheld information.

6. **On Section 36 (2)(b)(i),** the Commissioner has considered that the opinion formed by the qualified person was reasonable and has used the dictionary test that it is *" in accordance with reason; not irrational or absurd";* and argues if it is an opinion that a reasonable person could hold, then it is reasonable. The Tribunal accept this proposition. In essence the appellant argues that the decision was not reasonable given the circumstances of wrongdoing on the part of the Home Office and breaches of the Act and the DPA by HMIC and the Home Office. The Tribunal discussed this at length with the Appellant during the course of this appeal and made specific reference to the material in the voluminous evidence in the open bundle before this Tribunal as well as to the conclusions of

the Tribunal hearing the appeal in EA/2012/0032. This appeal proceeded notwithstanding more recent disclosure by the Home Office of the withheld information the appellant was seeking however the appellant wants a decision in respect of the correctness of the DN at the time it was given. In so far as there remains any dispute between the parties, we accept the Commissioners' argument that the qualified person's opinion is not rendered unreasonable simply because another person could have come to a different (and equally reasonable) opinion. On the facts of this case we find no evidence to support the contention that the opinion was in any other way unreasonable. We find no evidence of wrongdoing by the Home Office in the open or closed papers before us or at the hearing of this appeal.

The Public Interest Test:

7. This Tribunal further accepts the conclusion made by the Commissioner in his DN that comments and opinions expressed would still have been quite fresh at the relevant time and that their disclosure would therefore have a more pronounced impact on relationships between the Home Office and its stakeholders and this is a significant factor in favour of non disclosure of the withheld information.

8. Further, and having considered all the withheld information, in the circumstances of this meta request, we too are satisfied that disclosure of the remaining withheld information would lead to the conclusion that stakeholders would be less free and frank in their input and the lack of candour. We are persuaded that this "chilling effect" would have a significant negative impact on responses to requests under the Act and has a bearing on the public interest test, which we find favours non disclosure of the withheld information.

9. This Tribunal finds no evidence either in any of the papers before us (and in particular in the withheld information), or at the hearing of this oral appeal that the Home Office was unduly influenced to make a particular decision or acted inappropriately, as suggested by the Appellant and accordingly there is no reason to give any weight to such a proposition in exercising the application of the public interest test.

10. This Tribunal made it clear to the Appellant that it is not hearing an appeal of the previous Tribunal decision and that any such attempt by him to raise any grounds of appeal on that decision cannot be considered. Further we explained at length the reasoning behind the public interest test being in favour of the application of the exemption to the withheld information. The appellant confirmed he understood the strength of the arguments but on principle did not wish to withdraw the grounds of his appeal.

11. In all the circumstances of this case the tribunal has not been persuaded that the Commissioner was wrong in concluding that the balance of public interest favours withholding the withheld information in so far as it continued to withhold information. On the contrary we come to the same conclusion for the above reasons.

12. In relation to Section 40(2) (referred to at d) above) the Appellant repeated many of the same arguments however, with the exception of the emails, he generally acknowledged the Home Office position as set out in the penultimate paragraph of their letter of 5 November 2012 to the Commissioner at page 186 of the open bundle which reads as follows; *"The Home Office maintains that the redactions of Home Office staff names was done in accordance with s. 40(2) for a number of reasons: a) the majority of the staff mentioned in the information were at a level where they would not reasonably have had an expectation that their names would be released: b) the Home Office staff who were at a grade where they may have considered that their names could be considered for release did not have any decision making responsibilities with regard to the appointment process for police personnel and the role of HMIC: c) the release of the personal data of the individuals included in a number of emails or letters would add nothing to any public interest arguments being suggested by Mr. Roberts in his arguments that information should be released."*

13. The Tribunal agrees with the position taken by the Home Office on the Section 40(2) exemption as it applies to the particular facts of this case provided the position set out in their letter of 5 November 2012 at a) and b) are correct (and we see no evidence to suggest otherwise). Accordingly in our view disclosure of the names and job titles of the individuals in the withheld information would be unfair and contravene the first data protection principle in the circumstances of this case.

Conclusion:

14. Accordingly we find that the Commissioner was correct in the findings made in the DN which included disclosure of some information and reference to Procedural requirements that the Home Office failed in (under Section 1, Section 10(1) and Section 17(1) of FOIA) which are not the subject of this appeal.

Brian Kennedy QC

31 October 2013.