



IN THE FIRST-TIER TRIBUNAL

Case No. EA/2014/0105

GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice No: FS50518598

Dated 15th April 2014

BETWEEN Mr J Cordock Appellant

And

The Information Commissioner Respondent

Determined on 15th September 2014 at Field House

Date of Decision: 7th October 2014

BEFORE

Fiona Henderson (Judge)

Alison Lowton

And

Marion Saunders

Subject matter: FOIA– s40(5)(b)(i) Neither confirm nor deny

s40(2) (Personal Data)

Edem v The Information Commissioner and Another [2014] EWCA Civ 92

Decision: The Appeal is refused

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision FS50518598 dated 15th April 2014 which concluded that whilst s40(2) FOIA was engaged, North East Lincolnshire Council (NELC) ought to have refused to confirm or deny whether it held the requested information in accordance with s40(5)(b)(i) FOIA.

The Information Request

2. The Appellant wrote to NELC asking for:

“A copy of the Independent Persons report presented to the standards referral angel (sic)¹ on the 8th July 2013 regarding complaint [reference given including name of individual about whom the complaint had been made].”

3. NELC replied confirming that it held the information but issued a refusal notice dated 18th October 2013 relying upon s40(2) FOIA and the refusal was upheld following internal review on 25th October 2013 for the same reasons.
4. The Appellant complained to the Commissioner in a letter received on 29th October 2013. The Commissioner issued a Decision Notice holding that whilst s40(2) was engaged, NELC ought to have relied upon s40(5) because even confirming or denying whether the Independent Person's Report was held would reveal personal data about the individual that the request named.

The Appeal

5. The Appellant appealed on 24th April 2014 and indicated that he was content for the case to be determined upon the papers. The Tribunal is satisfied under rule 32(1)(b) of the *Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) Rules 2009* that it can properly determine the issues without a hearing. A bundle has been provided and both parties have had the opportunity to make submissions in writing, the Tribunal has also been provided with a closed bundle.

¹ The Tribunal understands this to be a typing error and a reference to the standards referral panel.

6. The Appellant appeals on the grounds that disclosure would not be unfair or unwarranted in light of the applicable legitimate interests and thus disclosure would not breach the data protection principles.

Scope of the Appeal

7. The Appellant made a further request on 30th October 2013 asking for material placed before the Standards Referral Panel which considered the Independent Person's report that is the subject of the original request. This second request is not the subject of decision notice FS50518598 and since an appeal under s57 FOIA is an appeal against the substance of the Commissioner's Decision Notice we are satisfied that this second request is outside the scope of this appeal.

Personal Data

8. S40 FOIA provides

(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)², and

(b) either the first or 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, ...

9. Personal data has the same meaning as in section 1(1) of the Data Protection Act (DPA) and means:

² Personal data of which the requestor is the data subject.

... 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;

10. It is not disputed that the independent report is the personal data of the individual complained about. We agree the individual is still living and can be identified from the report. The report relates to them because, it is about them, has biographical significance for them, is used to make decisions about them and it has them as their main focus.

11. The Commissioner considered whether disclosure to the world at large would breach any of the data protection principles. The first data protection principle states that “*personal data shall be processed fairly and lawfully*” and that at least one of the conditions of schedule 2 should be met.

12. The DPA further provides that:

1(1) In determining for the purposes of the first principle whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed.

13. The Appellant argues that the Commissioner did not distinguish between an “average person” and the individual who was the subject of the complaint in light of their seniority and status in determining what was fair. We have taken into consideration the person complained about’s position. NELC accepted that the individual complained about would have an expectation that they would be subjected to greater scrutiny than other citizens of NELC because of their role (so as to provide reassurance and understanding that complaints about potential misconduct are properly explored and to ensure accountability). We are satisfied that this does not affect their expectation around disclosure of the withheld information as scrutiny is achieved by the production of a

report by an Independent Person, the complaint being considered by the Standards Referrals Panel and the publication of the outcome and the basis of the decision by reference to the file number on the website.

14. We accept the arguments made by the NELC in their response to the Commissioner³ that when a complaint is made about an individual their expectation is:
 - a) that whilst the person who made the complaint will be informed of the outcome of the complaint they will not be entitled to receive all the information collated in the investigation of the complaint.⁴
 - b) Only if it is felt that a breach has occurred will the matter be progressed to a Hearings Panel which is held and reported in public.

15. The NELC argued that the expectation of the individual would be informed by the fact that the NELC procedure followed was that at the stage that when a case was referred to the Standards Referrals Panel:
 - a) it was minuted and appeared as an agenda item by case reference alone and with no identifying details, and
 - b) the press and public are excluded from the part of the meeting where the complaint is considered pursuant to paragraph 1 of Schedule 12 A of the *Local Government Act 1972*.

16. The NELC argued that disclosure of the report would prejudice any appeal process to the Local Government Ombudsman (LGO). The Tribunal does not have information as to whether the LGO would be provided with a copy of this report in support of any appeal and as such is not satisfied on the evidence before it, that disclosure would be unfair on that basis.

17. The Appellant argues that a précis can be disclosed and that this would not breach the data protection principles. The Commissioner remarks that the public authority cannot be required to produce a fresh document for the purposes of disclosure, but the Tribunal is satisfied that a précis could include a redacted version of the withheld information.

³ P61 OB

⁴ As evidenced by the terms of the letter to the complainant in this case p 42 OB.

18. The Tribunal takes into consideration that the minutes of the Standards Referral Panel already appear on the website in anonymised form and in reciting the conclusions and basis of their decision which they specify concurs with the opinion of the Independent Person is itself a form of précis and has already been made public.
19. In concluding that the report itself cannot be disclosed in redacted form we take into consideration *Edem v The Information Commissioner and Another [2014] EWCA Civ 92* which requires us to consider context. The redacted information would be disclosed to the Appellant in response to a request which includes the name of the individual whose name has been redacted thus nullifying any further attempt at redaction. Additionally having had regard to the contents of the withheld material we are satisfied that the identity of the individual would be apparent to a knowledgeable member of the public from the contents of the report even if the name and job title were redacted.
20. Condition 6 of Schedule 2 of DPA is the only possible relevant provision to ring the request within the terms of s40 FOIA on the facts of this case. This which provides:
The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
21. The Appellant argues that the applicable legitimate interests are:
- a) Transparency, the person complained of could be said to hold power and influence over the panel who are to make a judgement regarding a complaint against this individual.
 - b) There is a need for public scrutiny to ensure that a complaint has been dealt with fairly and impartially.

Whilst we accept that transparency and accountability are important legitimate interests we are satisfied that the mechanism of having an investigation by an Independent Person is protection against a perception that the panel might be swayed by the individual complained about, as is the fact that the panel have justified their decision with reference to the conclusions of the report in public (albeit in anonymised form) as part of the

minutes of the panel meeting. This enables transparency in relation to the rigour of the procedure followed without revealing the personal data of the individual concerned.

22. The Appellant further contends that:

- a) There is no mechanism for a complainant to check the evidence considered by the Independent Person and whether this accords with their recommendation,
- b) The public need the ability to judge if the panel has followed the recommendations of the Independent Person or not.

Although the evidence considered by the Independent Person is not made public, the fact that the decision did accord with the report has been explicitly stated on the website. The Independent Person was present at that meeting and is named (so their suitability for the role can be scrutinised). In the event that the publicised minute is not a fair representation of the report or the meeting, the Independent Person is in a position to challenge this. We are satisfied that sufficient detail and reasoning has been provided to enable the public to assess whether the appropriate procedure has been followed.

23. The Appellant also argues that the Independent Person's report had been referred to as the basis upon which NELC had dismissed a separate complaint made by this Appellant and he was unable to view the material upon which the decision in his case was based. The Tribunal has had regard to the closed material and is satisfied that the Independent Person's report was not prepared for the purpose of the Appellant's separate complaint. It was unnecessary for NELC to refer to the report in support of their determination of the Appellant's complaint, as the issue in question ought to be apparent from the constitution of the Council.

24. We are satisfied that disclosure would be unwarranted as the complaint was unsubstantiated, would cause distress (as disclosure in these circumstances would be contrary to the expectations of the person complained about) and is not necessary in light of the information already publicly available.

The duty to confirm or deny

25. S40 FOIA provides

(5)The duty to confirm or deny— ...

(b) does not arise in relation to other information if or to the extent that either—

(i)the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles ...

26. The Tribunal observes that by confirming that the information was held, the NELC have disclosed that a complaint was made about the named individual of a type that necessitated an Independent Person's report and consideration by the Standards Referral Panel. They have also confirmed the link between the name and the complaint number and thus attributed a name to the information provided anonymously on the website. We are satisfied that for the same reasons set out above confirmation that the information was held contravened the first data principle and NELC ought to have relied upon s40(5) FOIA in their response.

Conclusion

For the reasons set out above this appeal must fail. Our decision is unanimous

Dated this 7th day of October 2014

Fiona Henderson
Tribunal Judge