ON APPEAL FROM

THE INFORMATION COMMISSIONER'S DECISION NOTICES NOS:FS50610307 (1) AND FS50616552 (2)

Dated: (1) 23rd. March, 2016

(2) 12th. April, 2016

Appeal Nos. EA/2016/0106

(the first appeal) and

EA/2016/0105

(the second appeal)

Appellant: Jonathan Baggs ("JB")

Respondent: The Information Commissioner ("the ICO")

Before

David Farrer Q.C.

Judge

and

Malcolm Clarke

and

Michael Hake

Tribunal Members

Date of Decision: 11th. October, 2016

The Appeal was determined on written evidence and submissions

Subject matter : FOIA S. 40(2)

Whether disclosure of invoices and claim forms revealing the identity of an individual who contracted with the subsidiary of a community trust which received funding from the Big Lottery Fund would amount to unfair processing of that individual's personal data and therefore breach the First Data Protection Principle "The FDPP").

The Tribunal's decisions

The first Decision Notice was not in accordance with the law. Disclosure would not breach the FDPP.

The first appeal is allowed. The requested information, namely two claim forms and seven invoices are to be provided to the Appellant, unredacted, within 35 days of service of this decision upon the Big Lottery.

The second appeal is adjourned sine die.

David Farrer Q.C.

Tribunal Judge

11th. October, 2016

The relevant statutory provisions

1. The Data Protection Act, 1998 s.1(1))

(Personal data are . .)

"…data which relate to a living individual who can be identified-

(i). From those data, or

(ii). 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 include any expression of opinion about the individual . . .".

2 Schedule 1. Part 1 §1 to the Data Protection Act, 1998 (The First Data Protection Principle")

"(1) Personal data shall be processed fairly and lawfully, and in particular, shall not be processed unless-

(i). at least one of the conditions in Schedule 2 is met,

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3 Schedule 2 Condition 6(1) (the only condition which require consideration here) .

"(1) 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".

Abbreviations In addition to those relating to the parties the following are used in this Decision –

FOIA	The Freedom of Information Act, 2000
The DN	The Decision Notice.
The FDPP	The First Data Protection Principle
The DPA	The Data Protection Act, 1998
BLF	The Big Lottery Fund which distributes a proportion of the funds raised by the National Lottery.
SORP	(Charities accounting) Statement of Recommended Practice.

Our Decision

Two DNs – One Decision

1. This appeal is from two DNs, one dated 23rd. March, 2016, the second 12th. April, 2016. If we had taken a different view of the merits of these appeals, it would have been necessary to distinguish in certain respects the issues arising and to issue two Decisions. In the event, the issues requiring determination are identical and the sensible course is to issue a single Decision.

The Background

2. In 2009 a grant was made by BLF to Melness and Tongue Community Development Trust ("MTCDT") in Sutherland to assist with the construction of a triple turbine wind farm to be owned by the community. It was intended that land would be leased for the purpose. The plan was that income from the sale of electricity generated by the wind farm would finance a number of community projects. It seems that it provoked significant local opposition, as is common with such proposed developments,

3. MTCDT, through its trustees, owned a company, Melness and Tongue Community Energy Ltd. ("MTCE"), which evidently provided or subcontracted services relating to the wind farm project. Substantial sums were drawn down against the National Lottery grant. They were released

on production of invoices by MTCDT, the grant holder, or (albeit incorrectly) by MTCE.

4. After substantial work had been done and expenditure incurred, the project had to be halted when the proposed lessors of the land decided not to grant a lease. MTCDT obtained BLF's consent to investigate alternative possibilities, which have no bearing on this appeal.

5. Not surprisingly, there was local concern at the lack of any benefit from an outlay of charitable funds over a four – year period amounting to £360,000, part capital, part revenue expenditure. That said, there is no evidence before the Tribunal that any of those funds had been misapplied.

6. JB is a local resident and owns a local retail business. On 30th. June, 2015 he submitted by email to BLF a wide – ranging FOIA request for information relating to the grant application, the monitoring, the use of funds, the accounts of MTCDT and MTCE and the treatment of their directors and trustees. On 3rd. July, 2015, following discussions with the relevant manager, Craig Russell, he submitted a request ("the first request") for –

   "details of any money received by (MTCDT) and associated entities, including amounts and proposed uses. If possible could we have any details of audits on the money spent".

   In a separate email he made a further request which was one of several which were not the subject of either DN and do not, therefore, feature in this Decision.

7. On 30th. July, Mr. Russell replied on behalf of BLF. He explained that the information sought was, in the BLF's opinion, "environmental information" as defined in EIR 2(1) and that BLF had removed names from many documents in compliance with reg.13(1). He provided a considerable volume of documentary information within the scope of the amended request. It included spreadsheets showing the sums released and the proposed uses for which they were intended. He interpreted the request for details of audits as a request for the claim forms submitted by MTCDT and the supporting invoices to which they related which was clearly what JB was seeking. These classes of document included two claim forms and a series of seven invoices from which the name and business address of an individual ("W"), as distinct from a corporate or partnership supplier had been redacted, as indicated in Mr. Russell's letter.

8. That form and those invoices, supplied in that redacted form give rise to these appeals. Other exclusions of names in other documents supplied are unchallenged.

9. Faced with this reply and following an internal review which maintained the refusal to disclose W's identity, JB submitted a letter on 12th. September, 2015 ("the second request"), asking for confirmation that the excluded information on the invoices and claim form –

"were not from a Director or Trustee of either related entity, MTCDT or MTCE. A simple yes I can confirm that they were/ or were not a Director or Trustee. Can you also confirm that this statement includes the company secretary at the time . . . .?"

He observed that the relevant Statement of Recommended (accounting) Practice ("SORP") required that MTCDT, as a charity, should declare any payments to a director or trustee.

10. On 24th. September, 2015 Mr. Russell confirmed that no payments made to MTCDT were for any director or trustee of MTCDT, which, as the grant holder, was the only company on which he could comment. He pointed out that a company secretary is neither. He added that BLF was satisfied as to the propriety of the invoices. JB asked for an internal review of this reply.

11. BLF provided a detailed and carefully argued review on 13th. November, 2015. It recited the history of the requests and responses. It concluded that the requests should have been handled under s. 40(2) of FOIA, since this was not environmental information. It stated that the letter of 13th. September, 2015 had not been treated as a FOIA or EIR request because it asked for an interpretation of information held rather than recorded information. Information as to whether the invoices related to a director or trustee of MTCE had not been held when requested. It was held now but the directors or trustees of MTCE were a small group and confirmation or denial could breach data protection rights. The SORP did not apply to MTCE since it was not a charity. BLF therefore neither confirmed nor denied holding the requested information.

12. JB complained to the ICO as to both his requests on 22nd. December, 2015. The ICO decided to treat the requests as separate matters requiring two DNs. As to the second request (if it was a request), he clarified that it concerned "*whether the invoices that were submitted to BLF related to a director or trustee of MTCDT and/or of MTCE Ltd. Or to any other*

related entity." (The evidence does not suggest that there was any further related entity.)

The DNs

13. The ICO (rightly, in our view, though which regime applies has no practical importance) ruled that neither request involved environmental information, hence that FOIA s.40(2) governed issues of personal data. Plainly, the first request involved the personal data of W. W did not give his/her consent to disclosure. The first DN concluded that disclosure of W's name would breach the FDPP. W would reasonably expect that his/her name would not be made public; that was also what BLF expected. Given the strong feelings aroused by the issue of the wind turbines, W was at risk of suffering ostracism, distress and even physical abuse, if identified. As to compliance with condition 6 of Schedule 2 to the DPA, whilst there was a legitimate public interest in the greatest possible transparency, where significant sums of money raised for charitable purposes were spent, especially where nothing had come of that expenditure, nevertheless disclosure was unwarranted, considering the prejudice to W's rights to privacy and a peaceful personal life. The ICO did not expressly consider whether disclosure was necessary for that legitimate interest but stated that service of the redacted documents "serves that purpose", which suggests that it was not.

14. The second DN did not address the question whether the second request was a request for the purpose of FOIA s.1. It observed that the requested information had not been held by BLF at the date of the request but only later. However, it proceeded to consider whether disclosure would involve W's personal data and noted that there were only two persons

who were directors of MTCE but not of MTCD, hence that that there was a strong likelihood that a positive answer to the question posed (should that be the right answer) would identify the individual, just as though his/ her name had been disclosed.

15. The second DN acknowledged the *"strong argument in favour of disclosure of the position/ role of the individual(s) who submitted the invoices"* and *"a public interest in such organisations (as MTCE) being accountable for the spending of public money."* It evidently recognized JB's "legitimate interest" in the information and perhaps, by implication, the necessity of disclosure if such interest was to be satisfied. However, it found that W had no reasonable expectation of disclosure and that, given the attitude of many local residents, it would cause W unwarranted distress and possibly even *"damage"*. It would, therefore be unfair and would breach W's rights under the FDPP. a reply neither confirming nor denying (NCND) that it held the information. The correct - and certainly the less problematic - reply was, however, that it did not hold the information when the request was made.

16. JB appealed both DNs by notice dated 14th. April, 2016. Put summarily, the relevant grounds were that £20,000 (the total of the amounts charged on the invoices) was public money and that the local community should know how it was spent and to whom it was paid. The SORP recommendation extended to entities linked to those receiving charitable funds so that BLF must state whether W was a director of MTCE. W cannot have had a reasonable expectation that he/she would not be identified to the public. His reply to the ICO's response was a commentary on each paragraph, indicating both agreements and dissent. In essence it reflected the above summary.

17. The ICO, in her response, submitted that the Tribunal should uphold the first DN for the reasons already specified. She invited the Tribunal to substitute for the second decision notice a notice stating that BLF was not under a duty to provide the requested information since it did not hold it at the material time, alternatively to uphold the DN on the ground that BLF was entitled to NCND the request pursuant to FOIA s.40(5)(i). The difficulties inherent in either of those findings are not considered in this Decision since the Tribunal finds that the information sought in the first request is disclosable.

The reasons for our decisions

18. Important considerations specific to the first appeal are contained in the Closed Annex. Nevertheless, a number of relevant factors can be discussed in this open Decision.

19. We concur with the ICO's assessment of the general public interest in the greatest possible transparency in the application of public funds, especially perhaps, where they are committed to charitable purposes. Furthermore, it is obvious that such an interest could not be satisfied in this case without the disclosure of W's identity. The precise strength of that public interest can only be assessed by reference to the nature of the link between W and the grant – holder. We put the matter in that way because the very fact that W received payment for his/her services from MTCD's subsidiary created a link of sorts.

20. The fact that no public benefit was derived from the expenditure, whilst no fault of W, heightens, to some extent, the public interest in where the money went, quite regardless of the good faith of all concerned.

21. The strength of the public interest is further examined in the Closed Annex.

22. When assessing W's reasonable expectations of identification, it is fair to assume that he was aware, when his services were engaged, that the funding came from the National Lottery, hence that public scrutiny of its use might well be intense especially where it involved a bold innovative project such as wind turbines intended to produce income for community objectives, yet facing a substantial risk of failure. Such considerations might well, without more, alert W to the possibility that, in a relatively small community, there could be particularly substantial and successful pressure for publication of the identity of contractors, especially if the project encountered difficulties. The fact that BLF considers that individuals invoicing MTCD would not expect disclosure, is of limited relevance, since BLF's knowledge of the contractors would be limited to a name and the nature of the service provided, as they appeared on a claim form. It is entirely right that BLF would not volunteer their identities unless lawfully required to do so.

23. When considering the issue of prejudice to W's rights and interests said to be likely to result from disclosure, it is not unreasonable to compare with W's asserted vulnerability, the position of individuals, whether directors or partners, controlling the companies and partnerships of which the names were disclosed, on the face of their invoices, in response to JB's request. As to two of the partnerships, the partners were named on

the stationery; as to the companies and the other partnership, the directors and partners could be identified by the most straightforward research. They were not global giants but, seemingly, with one exception, modest – sized locally or regionally – based companies and partnerships - judging by the number of partners in the latter case. It is plainly arguable that those individuals, partners and directors, were readily identifiable from the publication of the company and partnership names and equally exposed to local opprobrium. Of course, if BLF was under a duty, pursuant to s.40(2), to protect W's personal data, the fact that it failed to do the same for others (if indeed it did) would not justify disclosure of W's identity in breach of the FDPP. However, it may justify reflection as to whether W had a reasonable expectation of anonymity whereas, in BLF's and the ICO's view, such directors and partners of entities likewise receiving BLF – funded payments did not. The corporate or partnership name was a flimsy veil, if a veil at all, for their identities.

24. Furthermore, if W's expressed fears of retribution were realistic, it might be expected that some evidence of subsequent animosity towards individuals directing these other entities, whose identities have been publicized or readily discoverable for nearly a year (since 13th. November, 2015) might be available. None was adduced and we are entitled to conclude that no significant hostility has been demonstrated. Of course, these matters must be judged as at the date of the request but subsequent events, or the lack of them, may be relevant to the material question : was there real substance in W's apprehension or was it an understandable but baseless anxiety ?

25. A further factor material to expressions of hostility and consequent distress is the geographical relationship between the community of

Melness and Tongue and W's business and residence. W's business address appears on the unredacted invoices, as is to be expected. It is fair to assume in the absence of contrary evidence, which would be instantly available, if it existed, that W's home is relatively close to his business. His business address is a very considerable distance from Melness or Tongue. That address and the approximate distance, as available on the internet, is stated in the Closed Annex.

26. The Tribunal considered JB's argument as to the application of the SORP material to charities. Paragraphs 9.13 – 9.17 set out the recommendations as to the disclosure of transactions between charities, such as MTCD and "related persons" (entities). That class is defined in Appendix 1 to SORP and clearly includes subsidiary companies such as MTCE (The evidence is that MTCE is wholly owned by MTCD, which is itself a trust.) That recommendation has been followed. MTCE is not a charity and the SORP does not appear to extend the duty of disclosure to transactions between related persons and third parties, corporate or individual. We do not place any reliance, therefore, on this argument, in reaching our decisions.

27. We therefore find that disclosure of the information covered by the first DN would not be unfair. Implicit within that finding is our conclusion that Condition 6 of the First Schedule to the DPA is satisfied because disclosure is necessary to satisfy the legitimate public interest in knowing to whom the sum of £20,000 charged by the redacted invoices was paid and that disclosure in this case is not unwarranted by reason of prejudice to W's rights and freedoms or legitimate interests.

28. For the reasons set out in this Decision and in the Closed Annex, the first appeal is therefore allowed.

29. As to the second appeal, the ICO's Decision is, with respect, of no practical consequence, given the Tribunal's decision on the first appeal. We see no purpose in dismissing the appeal on the ground that MTCD did not hold the information at the material time, since a fresh but now pointless request could be made. To strike it out would be quite inappropriate. We shall therefore adjourn this appeal sine die but give all parties permission to submit short written argument on this outcome within 14 days of receiving this Decision, if so advised.

30. Our decisions are unanimous.

David Farrer Q.C.

Tribunal Judge

11th. October, 2016