IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)

EA/2016/0265

B E T W E E N:-

CLAIRE MILLER

Appellant

-and-

INFORMATION COMMISSIONER

Respondent

Hearing

Held on 28 March 2017 at Field House.

Before Alison Lowton, Stephen Shaw, and Judge Taylor.

Decision

We uphold the appeal, unanimously finding for the Appellant. This decision is to be treated as a substituted Decision Notice.

Steps to be taken: The Department for Communities and Local Government is required to disclose to the Appellant the material that she requested on 7 December 2015 within 20 working days.

Reasons

Background

1. The Department for Communities and Local Government ('DCLG') explains that since 1996, it has collected quarterly statistics on homelessness from every local authority in England using its P1E form. Since 2012, local authority level data has been routinely published.

2. The data collected forms the principal evidence base for government, local authorities and the wider public as to the numbers of households becoming homeless, the types of households affected, reasons for homelessness, and numbers being housed in temporary accommodation. The data is used by central government for formulating and monitoring policy and allocating resources, by local authorities for benchmarking and planning services, by the voluntary sector for evaluating policy and fundraising, and by the public for understanding homelessness and assessing the performance of government.

Request

3. On 7 December 2015, the Appellant requested from DCLG as a public authority for the purposes of the Freedom of Information Act 2000 ('FOIA'):

> *"Under the Freedom of Information, please could you provide me with the data supplied through P1E returns on homelessness from local authorities for each local authority for the financial years 2009/10, 2010/11 and 2011/12.*
>
> *Data for April 2012 onwards is published as Detailed Local Authority level homelessness figures (https://www.gov.uk/government/statistical-data-sets/live-tables-on- homelessness) and this is the information I am looking for, just for earlier time periods.*
>
> *Please provide this information as a spreadsheet or CSV."*

4. On 21 December 2015, DCLG confirmed it held the information and refused to provide it relying on section 12 FOIA (*concerning costs of compliance*). There followed correspondence between the Appellant and DCLG with the former suggesting means of providing the information.

5. On 23 December, DCLG's caseworker responded:

> *"Apologies for any misunderstanding but I understand that the data is currently held in a database and will require extraction before it can be used to populate the spreadsheets. Data suppression is only one part of the production process… However, it is likely that the Department will be publishing this data in the near future when resources allow. Would you like me to keep you up to date when there is progress with this?" (Emphasis Added.)*

6. On 2 February 2016, the Appellant emailed:

> *"…I understand the database may have personal information within it, although the specific information I have asked for does not. I am trying to work out why it is so complicated to get… This What Do They Know requests suggests the summarised detailed local authority spreadsheets with data from P1E forms were produced long*

before they begun to be published… and this is what I am requesting. Would it be possible to check if you hold these older spreadsheets somewhere?"

7. From the papers, it seems that the Appellant had not received a substantive reply to this email when she wrote on 30 March 2016 as follows:

"Please could you answer the following questions:

- *Is the relational database SQL based?*
- *What are the primary and foreign keys for the relational database?*
- *… How is the data submitted by councils through P1E forms entered into the database*
- *This What Do They Know requests suggests the summarised detailed local authority spreadsheets with data from the P1E forms were produced long before they began to be published, (https://www.whatdotheyknow.com/request/national_p1e_statistics_detail in), and this is what I am requesting. Would it be possible to check if you do hold these older spreadsheets?"*

8. On 26 April 2016, DCLG replied to the email of 30 March. It provided responses to all questions raised save for the last (*that started "This What Do They..."*), which it withheld relying on section 22 FOIA (concerning information intended for future publication.). It explained:

> *"This information is held by the Department but is exempt.. as there is an intention to publish the information at a future date and, in line with section 22(1)(c), it is considered reasonable in all the circumstances that the information should be withheld from disclosure until the date of publication…*
>
> *There are clear generally applicable public interest reasons for releasing the information requested, not least the principle that disclosure of information held by public authorities, in general, increases transparency and accountability and makes for a more informed public better able to understand and engage in matters to which the information relates. Release of the information in this case may help to further these aims in terms of the homelessness data to which your request relates.*
>
> *However, we must also consider the fact that the datasets will be published in the future although we have, as yet, not determined a firm date for that. Given the intention to publish at that time the information you have asked for, we consider the public interest is served in that way and there is no particular public interest served by its early disclosure…"*

9. The Appellant replied asserting that this response showed that DCLG held the information and most likely in the format requested such that the section 12 would not apply. She stated that she did not believe that DCLG had a settled intention to publish the information when she had made her request of 7 December because it had not mentioned it. When it had first mentioned it on 23 December, this was a vague intention. It had stated "it is likely" that the Department would be publishing the data in the hear future when resources allowed.

10. The DCLG treated the Appellant's assertions as a request for an internal review. This found that as regards request of 7 December, section 12 had been wrongly relied on. It treated the email of 30 March as a second request. It stated:

"…Guidance issued by the Information Commissioner's Office … on the use of s.12 makes it clear that the cost of redacting exempt information cannot be considered when applying s.12. Since it was required in this instance due to data protection considerations, I consider that the small data suppression is a form of redaction which would take place under the provisions of s.40(2) of FOIA; as such, it cannot be counted towards the appropriate limit.

As noted above, the database in question was specified and designed for use by Departmental analysts and the requested information would need to be extracted from this database in order to be usable. Some extraction effort would therefore have been required. It is estimated, however, that this would take 12 hours of staff time and cost £300, therefore not exceeding the appropriate limit.

… Following receipt of your second request, and on consultation … spreadsheets containing the requested information were located which had not shown up in the initial searches. As such, … these spreadsheets were held, but again withheld the information, citing s.22 of FOIA, since there was a clear intention to publish this information.

Upon taking up the post in summer 2015, the officer currently responsible for this role quickly identified that the Department receives regular requests for local authority data older than that currently published and that, ideally, all data held that is of sufficient quality should be published. In order to achieve this, a programme is being developed which would enable the tables needed to be run straight from the statistics database. The Department hopes to be able to finalise this task shortly.

The ICO guidance on the use of s.22 makes it clear that it is not necessary for a publication date to have been set in order for this exemption to be engaged, and accepts that a public authority may be able to apply s.22 if publication will take place once other actions have been completed. I am satisfied, therefore, that s.22 can be engaged; there was and is a clear intention to publish and actions are being taken to enable this to take place…

Your second request of course led to the belated identification of spreadsheets containing the information you had asked for. Once those spreadsheets were located, as referred to in the Department's second substantive response, s.12 was no longer considered to apply. In my view, as I have said, it was never engaged given the limited amount of extraction effort needed in any case to extract the requested information from the database. As noted above, I conclude that s.22 was correctly engaged, since the Department is taking steps to prepare this data with a clear intention to publish...

I note your reference to small data not being suppressed prior to 2013/14; the Department's position on suppression of small data has changed, as you will see from more recent releases, and it is not considered appropriate to release the information in question unsuppressed, regardless of what was released previously and under different circumstances. The Department considers, therefore, that s.40(2) of FOIA applies in respect of this, since release of small data could allow for individuals to be identified, thus disclosing their personal data. Section 40(2) of the FOIA provides that personal data relating to other persons is exempt information if disclosure would breach the Data Protection Act 1998 (DPA)…" (Emphasis Added.)

11. The internal review reasoned that the second request led to identification of spreadsheets containing the information requested and these would be published. As regards personal data, the DCLG referred to this as the "suppression of small data". It stated:

"I note your reference to small data not being suppressed prior to 2013/14; the Department's position on suppression of small data has changed, as you will see from more recent releases, and it is not considered appropriate to release the information in question unsuppressed, regardless of what was released previously and under different circumstances. The Department considers, therefore, that s.40(2) of FOIA applies in respect of this, since release of small data could allow for individuals to be identified, thus disclosing their personal data. Section 40(2) of the FOIA provides that personal data relating to other persons is exempt information if disclosure would breach the Data Protection Act 1998 (DPA).
We consider that disclosure of this information is likely to breach the first data protection principle in Schedule 1 to the DPA, which relates to the fair and lawful processing of personal data. Therefore, we have concluded that this information is exempt from disclosure under section 40(2) read in conjunction with section 40(3)(a)(i)of the FOIA." (Emphasis Added.)

12. The Appellant progressed the matter, leading to the Information Commissioner's ('Commissioner') investigation and decision notice that found in favour of the Department. The Appellant now appeals this decision. She states in her Notice of Appeal that she is seeking the information she requested on 7 December 2015 (the 'December request').

The Law

13. Under s.1(1)FOIA, a person making an information request to a public authority is entitled to be informed in writing whether the public authority holds the requested information and to have it communicated to him, unless it is exempt from disclosure under the Act.

Section 22 - future publication

14. For our purposes, information falls to be exempt where (a) it satisfies the requirements of section 22(1)(b); and (b) "*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information*" (s.2(2)(b)FOIA).

15. Section 22(1)(b) provides:

22.- (1) Information is exempt information if-

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
(b) the information was already held with a view to such publication at the time when the request for information was made, and
(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a)."

Section 40(2): Personal Data

16. Section 40(2) FOIA provides in relevant part 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 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****...'*
(Emphasis Added.)

17. For the exemption to be relevant, the requested information must be 'personal data'. This is defined under Section 1(1) DPA as:

> *'"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.'*

18. It is sometimes possible to anonymise a document, such that it would not be possible to identify a living individual from the document and 'other information which is in the possession of, or is likely to come into the possession of, the data controller. If so, considerations under section 40(2) fall away because there is no longer personal data to consider.

The Task of the Tribunal

19. The Tribunal's remit is governed by s.58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where it involved exercising discretion, whether she should have exercised it differently. The Tribunal is independent of the Commissioner, and considers afresh the Appellant's complaint. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact. This is the extent of the Tribunal's remit in this case.

20. We have received a bundle of documents. We have carefully considered all of the points made even if not specifically referred to below.

21. DCLG has not sought to be a party to this appeal, and has advanced no submissions. Both parties were content for the matter to be determined without attending a hearing and we are satisfied that it may fairly be considered on the basis of the information before us.

The Issues

22. It is clear from the Notice of Appeal that the Appellant seeks for the information requested on 7 December 2015 to be released. Therefore, the issues before us concern: 1) Whether the December request was refined, replaced or revoked; If not, 2) Whether the information within that request has been properly complied with; and 3) Whether section 40 was properly relied upon.

Issue 1: Request refined, replaced or revoked?

23. The Appellant argues that since the internal review found that the original reason for refusal (i.e. section 12) did not apply to extracts from the database related to the December request, that material should then have been released.

24. We refer to paragraphs 12 to 22 of the Decision Notice, which are not necessary to repeat here. The Commissioner found that the Appellant had made a request on 7 December, but that on 26 April she had refined it. As a result, she seems to have considered that the 7 December request was no longer extant. By April 2016, DCLG had a firm intention to publish the material request such that the refined request did not need to be complied with.

25. We find this reasoning problematic. We do not think the Appellant refined her request. As is clear from the facts and our summary set out above, the December request asks for the data from P1E Forms, but only to the extent that it equates to the kind of data published from 2012 onwards. She was told she could not have it for cost reasons. She then tried to reason with DCLG so as to procure what she wanted within the appropriate cost limit. In March, she finds a route for procuring the information more quickly as the P1E Forms would have been summarised on spreadsheets. Essentially, she explains that the information contained in those summaries is the same information and asks whether these spreadsheets are held. Therefore, the Appellant explained that the 30 March request did not replace the December request because the information was always the same and there was no second request. From the information before us, it seems that the Appellant asked for information from P1E Forms, and then for information from spreadsheets, but that the information is the same. The Appellant did not seem to mind whether it was provided from the spreadsheet or original P1E form source. From what we have seen, it would not be correct to conclude that she revoked or refined her request as the facts do not bear this out. She never stated an intention to revoke, refine or replace it. She never narrowed what she was wanting, she just tried to find a quicker or cheaper way for DCLG to provide it.

26. Subsequently, the internal review concluded that regardless of whether the information came from the P1E Forms or the spreadsheets, it would not exceed the section 12 appropriate limit. We consider that the December request was still extant at this time, and still is. (Even if we are wrong about this, any refining, replacing or revoking ought be considered within the context of having needed to do so because of being wrongly told that the requested information could not be provided, such that she would not have been doing so on a fully voluntary basis.[1])

27. It is valid to conclude, that she made two separate requests one for the information contained in the P1E Forms and one for the same information contained in the spreadsheets. It is also possible to conclude she made one request, in December, and continued to seek that data. We consider choosing between these scenarios somewhat artificial as they would both be correct for FOIA purposes. We do not need to do so. In either case, the December request remains extant.

[1] Further, arguably even if the request had been refined, the date of the request for the purpose of s. 22 FOIA would still have been in December 2015, and there was no settled intention to publish at that time.

Issue 2: Should December request be complied with?

28. It has not been disputed that section 22 was not relied upon at the time of the request made on 7 December 2015 and that there are no section 12 considerations.[2] Save for any valid section 40 considerations, once the internal review or Decision Notice accepted that section 12 was wrongly relied upon for the December request, the information requested from the P1E Forms should have been provided.

29. Accordingly, we find that the material requested on 7 December 2015 should be provided.

Issue 3: Was Section 40 properly relied on?

30. The Appellant's submissions include:

    a) Whilst the database may contain personal information, the specific information that has been asked for does not.

    b) The tables published on the DCLG website prior to the year 2013 to 2014 contains information that has not been suppressed. The decision to continue to publish this information, after it has been pointed out to the Department that it contains non-suppressed information, is based on a disclosure risk review, that shows that there is little disclosure risk from unsuppressed values in older spreadsheets.

    c) "… the data for the year 2012 to 2013 is currently published without low numbers suppressed online (https://www.gov.uk/government/statistical-data-sets/live-tables-on-homelessness). The DCLG appears to have made the, I believe reasonable, decision that data that is more than four years old is highly unlikely to be identifiable and therefore can be released unsuppressed. Given this, there is a reasonable expectation that this data about homelessness would be published. It seems likely the age of the data is the key factor here. The data is a snapshot in time of applicants, all of whom are likely to be in very different circumstances in the current period. The information I have requested is even older than what has already been published."

    d) "There is a risk of self-identification with this data, although with the passing of time people may be less clear on which quarter their case was counted in so this risk may be lower. However, it is highly unlikely that damage or distress would be caused by self-identification, especially given the passage of time and the change in circumstances for the individual. The individuals whose cases are counted in the data would recognise that only someone who already knew about their homelessness application and details about its outcome would be able to identify them, and therefore no additional information is revealed. Given the passage of time it would be impossible for a third party to identify individuals from this data, without knowing very specific details about their circumstances at that point in time, for example the outcome of their application. Changes in

[2] See para. 18 of the Decision Notice.

age, household make-up, and location would all make it even more difficult to link people to past data… I do not believe Section 40(2) applies to this information so no time is needed to suppress low numbers."

31. The Commissioner's position set out in its Response is as follows:

> "The Commissioner did not make any finding on section 40(2) FOIA, that it is entirely appropriate for the DCLG to seek to ensure that any data [is] released in an anonymous form."

32. The Commissioner notes, in its Decision Notice, DCLG's 'heavy' reliance on time taken to suppress 'low numbers data in order to comply with section 40(2)', but again does not address the point of whether and why suppression is needed.

33. The Commissioner's position is somewhat vague. Presented with a paucity of reasoning, we have looked through the full Bundle to find any position from the Respondent and DCLG on the matter. We found the following:

    a) It is clear from the internal review that DCLG relies on section 40(2). According to this review, it seems to have initially factored in the need to suppress data for section 40 purposes when considering calculations of costs under section 12. Whilst it treats the need to anonymise data as a sine qua non, it fails to explain in any detail the reasons why. *(See para.s 10 and 11 above).*

    b) In response to questions raised by the Commissioner during her investigation, the DCLG expands on its reasoning as follows:

> "The Department is applying section 40(2) in respect of those fields within the requested spreadsheets which contain fewer than 5 responses; in addition, the Department is applying section 40(2) in respect of some fields within the requested spreadsheets which contain more than 5 responses but which would enable numbers less than 5 to be discovered by calculation from other figures. Until such time as the Department has been able to carry out the necessary anonymisation, this information constitutes the personal data of respondents as the risk of identification is reasonably likely through the use of data matching or similar techniques. This approach to anonymisation is in line with that taken by the Office of National Statistics, and also with the Information Commissioner's Anonymisation Code of Practice, which states:
>
> ***"Low Numbers*** *- Once the number of overall responses to a particular question drops to a low level, the question may become identifiable. For that reason all questions with less than 200 overall responses have been suppressed. In addition, where there are multiple responses to a question, it is possible that a response given by only a minority of respondents is also identifiable. For this reason, where less than 10 responses have been given to an answer that identifies something factual, all variables relating to that question have been suppressed. It should be noted that attitudinal questions are not bound by this rule, in addition to responses of 'Don't know', 'Refused', 'Other or similar."*

.. the Department considers that it is sufficient to suppress those fields with fewer than 5 responses, and that it is not necessary to go to the extent above under these circumstances."

"… None of the withheld information is also sensitive personal data."

"… The data subjects are private individuals and could have no reasonable expectation that their data would be disclosed in this manner; to do so would not be "fair" and would breach the first data protection principle. None of the individuals concerned have been consulted regarding disclosure of their personal data. Even if it were possible to do so, this would be unreasonably time consuming and would arguably engage section 14(1) of FOIA, since each requested spreadsheet contains approximately 100,000 cells of data."

34. An extract of the type of information the Appellant is requesting is found on page 27 of the Bundle. As identified by the Appellant, the data is a snapshot in time (from some time ago). We do not consider that there would be any reasonable likelihood that disclosure of equivalent information to that found on page 27 would result in personal data of an identifiable individual being disclosed, even where the figures are between 1 and 5. Accordingly, we prefer the Appellant's reasoning on this issue. We have not been presented with any compelling reason to doubt that the requested material is not already sufficiently anonymous, and there seems to be a remarkable lack of analysis on the point. For our part, we cannot ourselves envisage any such reason.

35. DCLG refers to taking an approach in line with the Office for National Statistics and the Information Commissioner's Anonymisation Code of Practice ('CoP'), but does not provide anything to support this. It quotes a paragraph from the CoP, but does not do so in a way that makes a coherent argument as to the relevance of the quote or why anonymisation is needed. The paragraph quoted appears to be a bullet point showing one of a list of rules by which variables were suppressed within Case Study 10, where the CoP presents eleven case studies within its Annex 2 of anonymisation. The case study seems particularly complex and it is unclear why it would be considered comparable or relevant to reference in this case. We note that elsewhere in the CoP, Appendix 2 of the Code of Practice refers to anonymisation techniques where it states that "*Some cell values (eg small ones such as 1-5) in statistical data can present a greater risk of re-identication. Depending on the circumstances, small numbers can either be suppressed, or the values manipulated (as in Barnardisation).*" However, it is not clear why in this case an individual would be identifiable from the data requested (together with any other data available). Whilst suppression or barnadisation of data may be relevant in some cases, for instance concerning sophisticated systems for collecting medical data, we think this case is very different.

36. Accordingly, we find that section 40 was not properly relied upon. We conclude that the information requested on 7 December 2015 should be provided to the Appellant within 20 working days.

Other

37. This Tribunal is known as 'inquisitorial' in nature, and we may ask questions to ascertain facts and positions we consider of relevance. Accordingly, we have considered whether to seek fuller reasoning from the Commissioner in relation to Issue 3. We have also considered whether to join the DCLG to determine if it could advance a fuller reasoning of its reliance on section 40. Both would have necessitated adjourning the hearing.

38. Having regard to the overriding objective in rule 2 of The Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009 S.I. 2009 No. 1976 (L. 20) ('the rules'), we consider that an adjournment would be disproportionate, cause substantial delay and wasted costs of the Appellant, Commissioner and Tribunal, and be procedurally unfair to the Appellant. Factors considered in reaching this conclusion are:

    a) Rule 2 provides:

> *'2.- (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.*
>
> *(2) Dealing with a case fairly and justly includes -*
>
> > *(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;*
> > *(b) avoiding unnecessary formality and seeking flexibility in the proceedings;*
> > *(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;*
> > *(d) using any special expertise of the Tribunal effectively; and*
> > *(e) avoiding delay, so far as compatible with proper consideration of the issues…*
>
> *(4) Parties must—*
>
> > *(a) help the Tribunal to further the overriding objective; and*
> > *(b) co-operate with the Tribunal generally.*

    b) Where parties have opted for a hearing to be determined on the papers, we consider it an implicit duty and extremely important that they provide the Tribunal with their complete submissions to enable the Tribunal to resolve the matter fully on the day of the hearing, particularly where the party is legally represented or very experienced. Likewise, a public authority wishing to have its arguments before the Tribunal would need to have applied to be joined and provide such arguments prior to the hearing. For the administration of justice to be effective and efficient, adjournments are appropriate only in exceptional circumstances.

    c) There has been no suggestion that the Commissioner intended for the Court to call on it for further representations on this issue, and it did not express this. In any event, to intend otherwise would not have been considerate to the Appellant or Court (due to the delays and costs necessitated). In our view, it would also have (a) breached rule 2(4); and (b) been potentially unfair to the Appellant where she had prepared fully in

advance of the hearing, and we would be essentially inviting the public authority to have a second go.

d) As public bodies with access to legal representation, it is their responsibility to decide how best to present their case. They would have known that section 40(2) would be an issue were we to have found against them on Issues 1 and 2, particularly where the Appellant fully alerted her to the issues in good time for the hearing. Therefore we conclude that the Commissioner has chosen not to address this matter in commensurate detail.
e) Likewise, it seems implicit in rule 2(4) that if a public authority has any intention to be joined to an appeal, it should apply to do so promptly. DCLG was aware of the appeal and had an opportunity to apply to be joined. It would also have been aware of the consequences of a Tribunal finding against the Commissioner. We can see from the Bundle, that it had also presented its case to the Commissioner, and we have considered these arguments.

f) This case does present matters of relative importance as it concerns the statistics on homelessness. We consider unnecessary delay is not appropriate where we are satisfied that we have given proper consideration of the facts and the law.

g) We cannot find or foresee any appropriate reason for the requested information to fall within section 40 as we have no reason to consider it not to already be made anonymous.

39. Our decision is unanimous.

Judge Taylor

20 April 2017