



**Appeal number: EA/2017/0235**

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

**MICHELLE SKINNER**

**Appellant**

**- and -**

**THE INFORMATION COMMISSIONER  
LONDON BOROUGH OF LAMBETH**

**Respondents**

**TRIBUNAL: JUDGE ALISON MCKENNA  
ROGER CREEDON  
GARETH JONES**

**Determined on the papers, the Tribunal sitting in Chambers on 8 May 2018**

## DECISION

1. The appeal is dismissed.

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## REASONS

### *Background to Appeal*

2. The Appellant made a request to the London Borough of Lambeth (“the Council”) on 17 February 2017 in the following terms:

*“Please supply the information contained in IR149997.*

- 10 *Circumstances have changed since that request: I have now obtained consent from a pupil that Lambeth Council confirmed was referred to in the emails. The consent is attached to this email”.*

- 15 3. This referred back to previous requests from the Appellant in May and November 2016, where the Council had refused to supply information in reliance upon s. 40 (2) FOIA, which concerns the unlawful processing of third party personal data. The email of November 2016 had asked specifically for details of emails sent, by reference to: *“Date/time sent, subject, domain name of addressee both to and from”*. It is important to note that we are not concerned with the earlier requests in deciding this appeal, which relates to the request made on 17 February 2017 only, but we mention it as relevant background.

- 25 4. The “consent” provided by the Appellant in her second request was a letter apparently written by one of the third parties whose personal data was withheld by the Council in the earlier responses. The Appellant’s view was that this written consent made the Council’s processing of the withheld personal data lawful, so that it could be disclosed to her.

5. The Council refused to confirm or deny whether it held the information requested on 17 February 2017, in reliance upon s. 40 (5) of the Freedom of Information Act 2000 (“FOIA”). The Council upheld this stance on internal review. The Appellant complained to the Information Commissioner.

- 30 6. The Information Commissioner issued Decision Notice FS50662928 on 12 October 2017, confirming that the Council had no obligation to confirm or deny whether it held the requested information and requiring no steps to be taken. The Decision Notice records that the requests were for e-mails about school exclusions and that confirmation or denial under FOIA could readily lead to the identification of  
35 the pupils concerned. The Decision Notice concludes that confirming or denying whether the Council holds the requested information in this case would not only represent an intrusion of privacy but could also cause unnecessary distress to certain individuals. The Decision Notice comments that a data subject access request can be

made by an adult on their own behalf or by a parent on behalf of a child, and that this may be the more appropriate route in this case.

7. The Decision Notice comments that the Council should have refused to confirm or deny in relation to the Appellant's earlier requests also, but that the earlier error does not affect the outcome in respect of the current request.

#### *Appeal to the Tribunal*

8. The Appellant's Notice of Appeal, her Reply and her final submissions to the Tribunal dated 21 March 2018 may collectively be summarised as follows.

- (i) That the Decision Notice contains errors of fact;
- 10 (ii) That the Decision Notice contains errors of law in not relying upon the specific written consent she provided, which rendered the processing of the data lawful. Further, that the Decision Notice is unreasonable in failing to explain why it does not rely on the consent provided;
- 15 (iii) That the Commissioner failed to assess a private interest in disclosure and misdirected herself to the effect that only a public interest could provide a legitimate basis for disclosure;
- 20 (iv) The Decision Notice unreasonably limits the scope of the request as one linked to the earlier correspondence. If the Council had explained its objections, the request could have been re-worded to exclude or permit the redaction of identifiers such as school, date, description of incidents, as these are not key components but were included by the Appellant to assist the Council;
- (v) The Council should have automatically processed the request under DPA if it was invalid under FOIA.

25 9. In her grounds of appeal to the Tribunal, the Appellant sought to clarify that her information request related to *"solely information relating to opinions about or actions taken with respect to one student only, who has consented...There is no desire or attempt to obtain the personal information of any person apart from the individual who has consented"*. She disputed that any other individuals could be identified from  
30 the information requested.

10. In her Reply to the Information Commissioner's Response, the Appellant submits that FOIA is best suited to her purpose as she requests documents and not merely personal data. She submits that the intention of the request was to uncover any breaches of education law and that she has no interest in the identities of the students.  
35 She suggests that *"objectively, the request should be read as 'please supply copies of emails between...and...with respect to the pupil whose consent is attached'"*.

11. The Information Commissioner's Response dated 21 November 2017 maintained the analysis as set out in the Decision Notice. It is submitted that, as the

Appellant herself clearly has information about the data subjects from other sources, the risk here is one of a “mosaic” disclosure, allowing pupils other than the one who has consented to the disclosure to be identified. It is submitted that the Tribunal could not in any event rely on the letter of consent without knowing the circumstances in which the letter was written. It is repeated that the Appellant could even now make a subject access request under the DPA.

12. The Council’s Response dated 12 December 2017 confirmed that it had no more submissions to make.

13. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered an agreed open bundle of evidence comprising some 140 pages, including submissions made by both parties, for which we were grateful. We also considered a closed bundle consisting of the un-redacted letter from the Council to the Appellant dated 30 August 2017, which appears in redacted form at page 118 of the open bundle. The redacted parts are subject to a direction from the Registrar under rule 14(6) of the Tribunal’s Rules.

#### *The Law*

14. Section 40 (5) (b)(i) FOIA provides that where a public authority receives a request for information which, if held, would be the personal data of a third party, it can refuse to confirm or deny whether it holds the requested information where it would contravene the requirements of the Data Protection Act 1998 (“DPA”) so to do.

15. Where information is requested by an applicant who is the data subject, this must be treated as a request falling under the DPA, as the requester may not use FOIA to obtain it – see s. 40 (1) FOIA.

16. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

*“If on an appeal under section 57 the Tribunal considers -*

*(a) that the notice against which the appeal is brought is not in accordance with the law, or*

*(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*

*On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”*

17. The Appellant has referred in her submissions to a number of Decisions of differently-constituted panels of the First-tier Tribunal. These do not establish precedent and turn on their own facts. We are bound to follow relevant Decisions of the Upper Tribunal and Higher Courts.

18. We note that the burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

*Conclusion*

19. The Tribunal can only consider the request as originally drafted (see paragraph 2 above). We regard the Council's and the Information Commissioner's understanding of that request as a reasonable one. We reject the Appellant's submission that the request should have been interpreted differently, as described at paragraph 10 above.

20. That being the case, we understand the request to have been for the details referred to in the November 2016 request. Those details (if held) would reveal the personal data of persons other than the person who has provided consent to the processing of their personal data. We are satisfied for this reason that s. 40 (5) applied to the request and that the Council was obliged neither to confirm or deny whether it held the requested information.

21. We are not satisfied that it would be appropriate for the Tribunal to rely on a form of consent provided by a minor without knowing whether that young person had a sufficient understanding to give informed consent.

22. We have some sympathy with the Appellant's submission that she should have been told to use the DPA from the outset if that was the case. However, it remains the case that she can make a subject access request and that s. 40 (1) FOIA precludes her from making a FOIA application for that same information.

23. We discern no error of law or fact in the Decision Notice. For these reasons, the appeal is dismissed.

**(Signed)**

**ALISON MCKENNA**

**DATE: 19 June 2018**

**CHAMBER PRESIDENT**