



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal References: EA/2017/0237 & 0238**

**Decided without a hearing**

**Before**

**JUDGE DAVID THOMAS**

**TRIBUNAL MEMBERS MIKE JONES AND HENRY FITZHUGH**

**Between**

**CHRISTINE JAMES**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**DECISION AND REASONS**

*NB Numbers in [square brackets] refer to the open bundle*

1. These are two appeals by Mrs Christine James against the rejection by the Information Commissioner (the Commissioner) on 18 and 19 September 2017 of her complaints that Caerphilly County Borough Council (the Council) and Gwent Police (the Police), respectively, had wrongly refused to disclose certain information to her under section 1(1)(b) Freedom of Information Act 2000 (FOIA).
2. By Case Management Directions on 10 November 2017, the Registrar ruled that the two appeals had sufficient in common for it to be appropriate to hear them together. For the same reason, it is appropriate to issue a compendious decision.
3. The parties opted for paper determination of the appeals. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal

Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).<sup>1</sup>  
Neither the Council nor the Police is a party to the appeals.

### **The requests**

4. Mrs James made two requests for information.

#### *The request of the Council*

5. On 5 December 2016, she made this request of the Council [56]:

*'I am aware of incidents of neighbour disputes between owners of No. 45 & 46 Cwrt-Ty-Mawr, Caerphilly which the council was involved in. Whilst I am not seeking any personnel (sic) data information I do require the Council to provide me with details of the dates of reported incidents between the occupiers of No. 45 & 46 Cwrt-Ty-Mawr which Officers of the Council became involved with to be sent in the post please'.*

6. Following a request for clarification from the Council, Mrs James explained that she wanted 'dates of neighbor (sic) disputes between the previous owners of No. 46 Cwrt-Ty-Mawr and the neighbor (sic) of No. 45 when Officers of the Council became involved with'. Mrs James now lives at No 46 with her husband, Robert. It appears that they own it.

7. It seems that by 'neighbour of No. 45' Mrs James meant the current occupier.

#### *The request of the Police*

8. On 20 December 2016, Mrs James (along with her husband) made this request of the Police [72]:

*'Could you please provide me with log details of all incidents referring to No. 45 & 46 Cwrt-Ty-Mawr, Caerphilly, Mid Glam. CF83 3EQ Whilst not seeking any personnel (sic) data in relation to the occupiers of these properties I do required dates, log numbers and brief explanation relating to each call'.*

### **Some statutory definitions**

9. As will become apparent, the issues in the appeals revolve around the Data Protection Act 1998 (DPA 1998), via section 40 FOIA (the personal information exemption). It is therefore necessary to understand some of the terminology used in DPA 1998. (That Act has now been replaced by the Data Protection Act 2018 but it was the legislation in force at the time in question).

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<sup>1</sup> SI 2009 No 1976

10. DPA 1998 deals with 'personal data', defined in section 1(1) as:

*'... 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'.*

11. 'Data' is also defined by section 1(1).<sup>2</sup>

12. 'A data subject' is 'an individual who is the subject of personal data'. In the present context, it means principally (though not exclusively) the current occupier of no 45 and the previous occupiers of no 46.

13. 'Data controller' is defined in this way: 'Subject to subsection (4) ["Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller"], a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed'. In the present context, both the Council and the Police are data controllers.

14. With a FOIA request 'processing' in effect means disclosing.

### **The duty to confirm or deny**

15. Under section 1(1) FOIA, a requester has two rights: first, to know whether a public authority holds particular information and, second, if it does, for it to be disclosed. The first is set out in section 1(1)(a) and the second in section 1(1)(b).

16. However, both rights are subject to a number of exemptions, set out in Part II of FOIA. Section 40 is an example. Some of those exemptions are subject to a public interest test. These are called 'qualified exemptions'. Where a qualified exemption is engaged, the public authority still has to weigh the public interest in withholding requested information against the public interest in disclosing it.

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<sup>2</sup> 'information which –

(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,

(b) is recorded with the intention that it should be processed by means of such equipment,

(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system,

(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68; [or

(e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d)'

Section 40(2) is, in fact, an absolute exemption (for present purposes), such that the public interest test does not have to be applied.

17. Even where a requester has not asked whether information is held, a public authority can refuse to confirm or deny whether it is, where to do so would itself engage an exemption.
18. It is important to understand this because both the Council and the Police have refused to confirm or deny whether they hold the information Mrs James has requested. The primary question for the Tribunal is whether they were entitled to take this stance. Ultimately, of course, it is the information Mrs James wants, not confirmation or denial whether any is held. In all that follows, it should be borne in mind that the legal issues relating to confirmation/denial and disclosure are largely the same and it makes more sense at times to focus on disclosure. Indeed, even if the Tribunal decided that the Council and/or the Police were wrong to refuse to confirm or deny, it would, following the recent three-judge Upper Tribunal decision in *Information Commissioner and Malnick v Advisory Committee on Business Appointments*,<sup>3</sup> have to go on to consider whether any information held was disclosable.

### **The reasons for the requests**

19. Under FOIA, requesters do not usually have to explain why they want the information they have requested. The reasons can sometimes be relevant, however.
20. Mrs James has not explained why she wants the information. It may be surmised, however, that she and her husband are experiencing difficulties with their neighbour at no 45. It appears likely that they want the information for one of two reasons. First, they may feel that their vendors should have disclosed any history of disputes. They may be considering bringing legal proceedings against them for misrepresentation or non-disclosure, or against their solicitor for negligence, and therefore want to know the history. Second, they may wish to make a complaint against their neighbour to the relevant authorities and believe that a complaint would be bolstered by the history. It is possible that both reasons apply.

### **The initial responses and reviews**

21. On 22 December 2016, the **Council** refused to confirm or deny whether it held the requested information, relying on section 40(5)(b)(i) FOIA:

*‘The duty to confirm or deny—*

...

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<sup>3</sup> [2018] UKUT 72 (AAC) (1 March 2018): see para 109

*(b) does not arise in relation to other information [i.e. third party personal data] 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 ...*

*...'*

22. The Council explained that it regarded the requested information as third party personal data within section 40(2) FOIA.
23. In short, its position was that it would neither confirm nor deny that it held the dates of any disputes between the previous owners of no 46 and the (current) owner of no 45 Cwrt-Tŷ-Mawr.
24. Mrs James sought a review on 3 January 2017, making the point that she was not seeking personal information but rather 'environmental services data in respect of council records concerning matters which affected and continues to affect my property'.
25. The Council sent its review decision on 27 February 2017 [62]. The review was carried out by Mr Chris Burns, interim CEO. He said that he assumed Mrs James simply required a list of dates. However, that information would still constitute personal data because it would enable the identification of living individuals.
26. Mr Burns explained that the Council was relying on the first data protection principle:

*'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—*

*(a) at least one of the conditions in Schedule 2 is met, and*

*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met'.*

27. Mr Burns suggested that two conditions in schedule 2 could in principle apply:

- Condition 1: 'The data subject has given his consent to the processing'. However, the data subjects had not given their consent
- Condition 6: '(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 ...'

For this condition to be satisfied, the legitimate public interest in confirming or denying whether the requested information was held must, Mr Burns said, be

greater than the data subjects' rights to privacy. That was not the case here, bearing in mind that disputes between neighbours were essentially a private matter. To confirm or deny whether the information was held would therefore breach the first data protection principle.

28. Mr Burns added that the Council would only be able to comply with the request on receipt of a court order.
29. **Gwent Police** also relied on section 40(5)(b)(i) FOIA in its (undated) refusal. Mrs James requested a review on 8 February 2017 [81]. As with the Council, she explained that she was not seeking personal data.
30. By its email of 16 February 2017, the Police confirmed the initial decision. Unless the caller was Mrs James herself, the information in logs constituted third party personal data. The Police confirmed its decision on 21 February 2017.

### **Proceedings before the Commissioner**

31. Mrs James lodged complaints with the Commissioner against the two decisions in April 2017. She did not explain her grounds.
32. On 13 June 2017, Mr Steve Woolway of the Police wrote to Mrs James [96]. He explained that, by focussing on only two premises, it might be possible to identify individuals from the information requested. He acknowledged that the Police had a duty to assist her under section 16 FOIA<sup>4</sup> and, in that connection, suggested that, as a compromise, she broaden the request to include all crime and incidents for the whole of Cwrt-Tŷ-Mawr for a five-year period. That would mean that individuals and premises would not be identified (Mr Woolway presumably meant that the information would be given in statistical form). Mrs James was not prepared to accept the suggestion.
33. The Commissioner issued her Decision Notice (DN) in the Council case on 18 September 2017 [1]. She held, first, that the requested information constituted personal data because confirming or denying whether it was held would enable living individuals to be identified. Second, she decided that confirming or denying would not be fair to the data subjects. In this regard, she took into account three factors. First, the data subjects would have had a reasonable expectation that the Council would not disclose whether it held information about disputes between them (bearing in mind that disclosure under FOIA is deemed to be to the public at large). She referred to her guidance on section 40 FOIA. This acknowledged that there were no hard and fast rules about disclosing private as opposed to public information but said:

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<sup>4</sup> Section 16(1) provides: 'It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it'

*'Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned'.*

So, information about an individual's private life (their home, family, social life or finances) was deserving of more protection than information about their work. The present case fell into the former category.

34. Secondly, the Commissioner considered that confirming or denying whether the requested information was held had the very real potential to cause damage or distress to the data subjects. Finally, whilst Mrs James had a personal interest in obtaining the information, there was not a more general public interest in confirmation or denial.
35. Weighing up all the factors, the Commissioner concluded that the Council had been entitled to rely on section 40(5)(b)(i).
36. On 19 September 2017, she gave essentially the same decision in the Police case [32].

### **The Grounds of Appeal and the Commissioner's Response**

37. Mrs James' Grounds of Appeal were the same in each case. She reiterated that she did not want personal information and any information referring to or identifying individuals could be redacted.
38. The Commissioner lodged a compendious Response on 20 November 2017 [18]. She made the point that, for section 40(5)(b)(i) to apply, a public authority only needed to show that *either* confirmation *or* denial, not necessarily both, would breach one of the data protection principles. She noted that Mrs James did not challenge her finding that confirmation or denial would disclose third party personal data. The Commissioner also noted that the House of Lords said in *Common Services Agency v Scottish Information Commissioner*<sup>5</sup> that there was no presumption in favour of the release of personal data under the general obligation of disclosure contained in FOIA. (It may be added that there is no presumption the other way, either: there is no presumption in favour of withholding personal data on a FOIA request).
39. In paragraph 34 of the Response, the Commissioner made a point she had not made in her DN, although the Council had when responding to Mrs James' request. This was that confirming or denying could reveal the personal data of Council employees. Similarly, it could reveal the personal data of individuals who had reported relevant neighbour disputes to the Police.

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<sup>5</sup> [2008] UKHL 47 at [7]

40. The Commissioner continued that confirmation would reveal that Mrs James' neighbour at no 45 had had disputes with the previous occupant(s) of No 46 (the James' house) and that could result in the neighbour being targeted and caused distress.

## Discussion

### *Does the requested information constitute 'personal data'?*

41. As explained earlier, to constitute 'personal data' information must relate to a living individual who can be identified from the data (perhaps in conjunction with other data). It must be about him or her in some way. <sup>6</sup> Incidentally mentioning someone does not suffice.

42. The Council request asks only for dates of disputes. If relevant information were held, it could identify and relate to the current occupier of no 45. It could also identify and relate to previous occupiers of no 46 because it would be possible to match the dates of disputes to those occupiers. It could not, however, identify Council employees.

43. The Police request is broader. It does not only ask for dates but also for details in logs. Information could again relate to and identify the current occupier of no 45 and previous occupiers of no 46. It would also relate to and potentially identify any third party informants and police employees, to the extent that the logs revealed such information (although, as Mrs James says, their names could be redacted, under section 40(2)).

44. Mrs James says that she does not want personal information. However, disclosing the information she has requested would relate to an identifiable (living) individual or individuals. That is why it is 'personal data'.

### *Can section 40(5)(b)(i) in principle apply?*

45. As the Commissioner says, for a public authority to be absolved of the duty to confirm or deny, it need only show that either confirmation or denial would engage an exemption: it does not have to show both. Here, denial could not apply because that would not identify any living individual. However, confirmation could apply, because that would indicate that the Council or the Police (or both) held relevant information about the current occupier of no 45 (whose identity the James' obviously know). Confirmation by itself could not identify the relevant previous occupiers of no 46 because the requests are chronologically open-ended and so confirmation that information was held would not tell the James' (or anyone else) which of the previous occupiers of their house had come to the attention of the authorities through a dispute with the current occupier of no 45.

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<sup>6</sup> See the Commissioner's guidance <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf> (2012)



However, it is sufficient that giving confirmation would identify a single living individual (the occupier of no 45) and, as discussed, disclosure itself could also identify previous occupiers of no 46 with whom the occupier of no 45 had had disputes.

### *The first data protection principle*

46. The data protection principles set out in part I of schedule 1 to DPA 1998 apply both to confirmation or denial and to disclosure. All the principles must be adhered to. If just one would be breached, processing (disclosing) would not be appropriate and section 40(2) would therefore apply.
47. With the first principle – set out above – processing of (non-sensitive) data must (i) be fair; (ii) be lawful (as disclosing under FOIA would be); and (iii) meet at least one of the conditions set out in schedule 2. If the data is ‘sensitive’, one of the conditions in schedule 3 must also be met.
48. As explained above, given that the data subjects have not consented to disclosure the only schedule 2 condition potentially relevant is condition 6. In the context of FOIA, this condition in effect requires a weighing of the legitimate interests of the requester and those of data subjects. There is considerable overlap between that weighing exercise and the concept of fairness: if condition 6 is not met because the interests of the data subject override those of the requester, it is difficult to see how disclosure could be fair. For that reason, the Tribunal will focus on condition 6.
49. A reminder that condition 6(1) 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 ...’.
50. The first question, then, is whether Mrs James (and her husband) have a legitimate interest in the information she has requested. The Tribunal considers that she does. Whatever the precise reason for the requests and whatever they intend to do with the information, they have a legitimate interest in knowing the history of any disputes between their predecessor and their current neighbour, especially if (as seems likely) difficulties continue.
51. Even if that was characterised as a private interest, it could still be a legitimate interest: the Supreme Court in *South Lanarkshire Council v Scottish Information Commissioner (South Lanarkshire)* said that a legitimate interest could be ‘purely private interest’.<sup>7</sup> In fact, Mr Burns, the Council’s interim CEO, is not quite right when he says that neighbour disputes are essentially private matters. When either

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<sup>7</sup> [2013] UKSC 55, [2013] 1 WLR 2421 at [24] <http://www.bailii.org/uk/cases/UKSC/2013/55.html>

the police or a local authority becomes involved, there is inevitably a public dimension. Public resources are expended in investigating and, if appropriate, taking action. Criminal offences may have been committed, certainly if the police is involved but also quite possibly if a local authority is involved (for example, environmental offences). Mrs James' motive in seeking the information may be to advance her private interests. However, the Tribunal does not agree with the Commissioner that there is no wider public interest in it.

52. The second question is whether disclosure is necessary to promote Mrs James' legitimate interests. 'Necessary' means 'reasonably necessary': see *South Lanarkshire*. In effect, the issue is whether Mrs James could obtain the information other than through a FOIA request. The Commissioner in her Response argues that she could, by seeking a court order and adopting the Police's suggestion of a street-wide request (which would then incorporate disputes between the former occupiers of no 46 and the current occupier of no 45). It is indeed possible that Mrs James and her husband could find out about disputes between the previous occupiers of their house and the current occupier of no 45, through court proceedings against their vendors. However, this is speculative and the Commissioner was wrong to assume that they could necessarily get the information this way. They would need a strong enough case of misrepresentation or non-disclosure and the resources to embark on it (which might not be cost-effective if the anticipated damages would be modest).
53. The Police's suggestion of street-wide information would not meet Mr and Mrs James' needs. They want to know whether there have been disputes relating to their house and next door, not about general criminality or neighbour relations across the whole street. The Police's suggestion was no doubt well-meant but it is not surprising that Mrs James rejected it.
54. The Tribunal therefore considers that a FOIA request is necessary to advance Mrs James' legitimate interests in the information.
55. That leaves the third question: do the interests of the data subjects (principally, the previous occupiers of no 46 and the current occupier of no 45) override those of Mr and Mrs James? The Tribunal has concluded that they do. Because disclosure under FOIA, at least notionally, is to the world at large, the history of any disputes could become public knowledge whereas they might at present be known only to the protagonists. Although the Council request asks only for dates, and could not therefore give any information about the nature of any disputes, the Police request could do so. Even the Council request could reveal that there have been disputes, and that is information the people involved might well not want made public.
56. The Tribunal considers that the data subjects have a reasonable expectation that information of this kind would not be made public and that considerable distress might be caused to them were it revealed. It is information about their (current or former) homes. As the Commissioner says, information about a person's home

should generally not be made publicly available without their consent, absent strong countervailing factors. Although there is some public interest in the information, it is not, in the Tribunal's judgment, strong enough to displace the data subjects' reasonable expectation of privacy.

57. As explained above, even confirming that information was held (if it is) would tell the public that the Council and/or the Police knew about disputes in which the current owner of no 45 had been involved. In the Tribunal's judgment, that is sufficient to override Mrs James' legitimate interest in the information. Under the Council's request, actually disclosing the information could show that he or she had been involved in a number of disputes, and the same could apply with the previous occupants of no 46. Under the Police request, information about the nature of any disputes would also be revealed.
58. Processing the request would therefore breach the first data protection principle. Section 40(5)(i) applies and the Council and the Police were justified in refusing to confirm or deny whether the information was held. Even if this is wrong, they were entitled to refuse to disclose the information, under section 40(2). All this applies to the former occupiers of no 46 and the current occupier of no 45 and also, in relation to the Police request, to any informants. Processing the requests would not be fair – for essentially the same reasons that condition 6(1) is not satisfied – and none of the conditions in schedule 2 DPA 1998 apply.

### *Sensitive personal data*

59. There is an additional factor with the Police request (in particular).
60. The first data protection principle requires that at least one of the conditions in schedule 3 to the DPA 1998 is also met if personal data is 'sensitive'. Section 2 defines as sensitive personal data falling into specified categories. One of the categories is 'the commission or alleged commission by him of any offence'. That could clearly apply to any disputes in which the Police was involved. (It could also apply to any disputes in which the Council was involved depending on the precise circumstances).
61. Schedule 3 sets out the conditions at least one of which must be met for processing of sensitive personal data to be permitted:
1. *The data subject has given his explicit consent to the processing of the personal data.*
  2. *(1) The processing is necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment ...'*
62. Neither condition applies here. This represents an additional reason why the first data protection principle would not be met, at least with the Police request.

## **Conclusion**

63. For these reasons, the appeal is dismissed. The Tribunal's decision is unanimous.

Signed

Judge of the First-tier Tribunal

Date: 21 June 2018