



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

Appeal Reference: EA/2019/0210

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Paul Taylor
and
Gareth Jones

**Determined, by consent, on written evidence and submissions.
Considered on the papers on 15 January 2020 at Riverside House, Edinburgh**

Between

Tony Morris

Appellant

and

The Information Commissioner

And

Devon and Somerset Fire and Rescue Service

Respondents

DECISION AND REASONS

Background and developments

1. The Appellant requested information relating to a contract for new fire engines from Devon and Somerset Fire and Rescue Service (DSFRS). DSFRS provided some information and withheld the remainder under sections 43(1) and (2) FOIA (commercial interests) and 40(2) (personal information) FOIA. DSFRS also confirmed that it did not hold some of the requested information. The request, made on 29 March 2018, read as follows: -

Would you please provide copies of all original documents (reports, risk assessments, trials, studies etc.) held by the Devon & Somerset Fire & Rescue Authority, or Devon & Somerset Fire & Rescue Service, that contain information on the following topics:

1. The justification, rationale, benefits and risks regarding the introduction of Light Rescue Pumps.
2. The justification, rationale, benefits and risks regarding the introduction of Rapid Intervention Vehicles.
3. The justification, rationale, benefits and risks regarding the introduction of Incident Support Units.
4. The risks related to the replacement of full size, conventional pumping appliances with Light Rescue Pumps or Rapid Intervention Vehicles.
5. The intended locations of Light Rescue Pumps and Rapid Intervention Vehicles (including draft documents, if these have yet to be finalised).
6. The impact of the above changes on Retained Duty System crewing at fire stations.

I have searched your website, but been unable to find any such documents. However, if any of them are there, then a link to their location will be acceptable in place of the document copy."

2. The Appellant was unhappy about the information that continued to be withheld by DSFRS and complained to the Commissioner. The subsequent decision notice dated 20 May 2019 explains as follows: -

2. The Commissioner's decision is that Devon and Somerset Fire and Rescue Service has appropriately applied section 43(2) to some of the withheld information ie technical drawings. However, she does not consider that section 43(2) is engaged in relation to final evaluation scores. She also considers that DSFRS has applied section 40(2) appropriately to the personal data. The Commissioner also considers that Devon and Somerset Fire and Rescue Service is correct to state that it does not hold some of the requested information.

3. However, the Commissioner considers that Devon and Somerset Fire and Rescue Service has not dealt with question 4 of the request appropriately. She also considers that Devon and Somerset Fire and Rescue Service breached sections 10 (Time for compliance) and 17 (Refusal of a request) of the FOIA.

3. The issue in relation to s40(2) FOIA and personal data relates to the redaction by DSFRS of the details of its junior members of staff from documents which otherwise have been disclosed. As can be seen from the above the Commissioner was satisfied that DSFRS had applied the exemption in s40(2) FOIA appropriately and that disclosure would unjustifiably and unfairly breach the privacy rights of the members of staff concerned. DSFRS said that details of the senior members of staff involved in the decision-making process had been disclosed into the public domain.
4. The issue in relation to point 4 of the request was explained by the Commissioner as follows: -

92. The Commissioner notes that DSFRS explained to the complainant that it had not considered the following as part of the internal review as it had not formed part of his initial request for information:

"copies of all original documents (reports, risk assessments, trials, studies etc.)" which included: "the risks related to the replacement of full size, conventional pumping appliances with Light Rescue Pumps or Rapid Intervention Vehicles."

93. The Commissioner has considered the wording of the request. She notes that at point 4 of the request, the complainant has requested the information in question. The Commissioner asked DSFRS about this. DSFRS explained that it considered that it had disclosed information to the complainant regarding associated risks, in its initial response.

94. It is not clear whether DSFRS has disclosed relevant risk assessments or not. The Commissioner also notes that DSFRS has stated that the complainant had not requested the information originally; however, as explained above, she considers that the complainant requested risk assessments. She therefore considers that DSFRS will need to reconsider part 4 of the request and provide him with a fresh response to it.

5. The decision notice summarises the action to be taken by DSFRS in the following terms: -

4. The Commissioner requires Devon and Somerset Fire and Rescue Service to take the following steps to ensure compliance with the legislation.

- Provide the complainant with a complete response to question 4 of his request.
- Disclose the final evaluation scores.

6. The outcome of the complaint and to the Commissioner and subsequent further disclosure by DSFRS has satisfied the Appellant to some extent. However, there were two issues about which the Appellant was not satisfied and these were raised in his notice of appeal.

7. The first was that the Commissioner's decision and the directions made as a result failed to refer to a document entitled the 'Delivery Strategy ISU Redacted' document, provided to the Appellant in response to the request but which, as suggested by the title, has significant redactions which the Appellant claimed were not covered by any of the exemptions accepted as relevant by the Commissioner elsewhere in the decision notice. The

Appellant submitted that the result of the Commissioner's consideration should have included a decision that an unredacted copy of this document should be disclosed.

8. The second was that the Appellant did not agree with the application of s40(2) FOIA and the redaction of the details of members of staff of DSFRS. His main point is that publishing the names of those responsible for 'authoring, assessing, evaluating, reviewing and approving' the documents that the request sought, is a 'vital part of accountability and very much in the public interest'. The Appellant argues that those involved in these processes were 'essential contributors to the decision-making process' and he suspects that 'the staff involved were mid-level managers, not junior members of staff'.
9. In relation to the first point, the Commissioner has accepted that the decision notice did not deal with the redacted report referred to by the Appellant. In response to the appeal, the Commissioner offered the opinion that the information should be disclosed and suggested that DSFRS should be joined as a party to be asked for its view. This duly happened and DSFRS agreed to disclose the outstanding information, subject to redacting the name of the author of the document, citing s40(2) FOIA.
10. One further issue has arisen since the Commissioner's decision notice. As referred to above, the Commissioner directed that DSFRS make a fresh response to the Appellant in relation to point 4 of the request. We understand that DSFRS has made further disclosures as a result, but the Appellant is of the view that DSFRS has failed to disclose all the information it holds which is within scope of point 4. The Appellant argues that DSFRS has referred, for some time, to risk assessments that have been carried out (information about which would be covered by the request in point 4), but has not disclosed them. DSFRS, as we understand

it, says that all the relevant information within scope has been disclosed. There is information in the bundle which shows that the Commissioner has been pursuing this point with DSFRS. We understand that the Commissioner has opened a new case to address the Appellant's complaint that DSFRS holds further information within scope of point 4 which it has not disclosed. It will be for the Commissioner to form a view as to whether further information is held as part of that new case. The Commissioner has not made that decision yet and the issue is not before this Tribunal for consideration. So far as we are concerned, the Commissioner has decided that DSFRS should make a fresh decision about information within the scope of point 4, and no one has disputed that finding.

Discussion and decision

11. On that basis the only substantive issue before us is whether the Commissioner was correct to find that DSFRS had appropriately applied the provisions of s40(2) FOIA to withhold the details of some members of staff from disclosure.
12. At the time of DSFRS's initial response to the request on 24 May 2018, the relevant legislation regarding personal data was the Data Protection Act 1998 (DPA 1998).
13. The central core of the section 1 DPA 1998 definition of "personal data" is that it "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".
14. It is not disputed that the name of an individual is that person's personal data.

15. Section 40(2) FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and its disclosure would breach any of the data protection principles or section 10 of the DPA 1998.
16. Paragraph 1(1)(a) of Part I of Schedule 1 to the DPA 1998 provides that the first data protection principle is that “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”.
17. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be fair, lawful and would meet one of the DPA 1998 Schedule 2. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.
18. The Commissioner has proceeded, rightly in our view, on the basis that the only Schedule 2 condition in issue in the present appeal was paragraph 6(1) of Schedule 2:

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.
19. Under the first principle, the disclosure of the information must be fair to the data subject. Assessing fairness involves balancing the data subject’s rights and freedoms against the legitimate interest in disclosure to the public.

20. In undergoing this exercise, the Commissioner has considered the following factors in the decision notice: -

- (a) None of the individuals concerned have given their consent to the disclosure of the information.
- (b) Disclosure of the information would disclose the names of members of staff who DSFRS have explained were not the decision makers and were junior members of staff.
- (c) DSFRS also explained that these staff members would not expect to have their personal details put into the public domain, and were not featured as public contacts and were not part of the public debate.
- (d) DSFRS also pointed out that it has already disclosed details of the senior members of staff involved in the decision-making process, into the public domain.

21. The Commissioner was of the view that disclosing this information would not be fair. She also considered that it would be very likely to cause distress to the individuals involved or have an unfair impact on them. She noted DSFRS's concern that disclosure could lead to inappropriate contact being made with the individuals and naming of the individuals in the media, although there is no specific evidence of this and we note the Appellant's protestations that these concerns are unfounded.

22. In our view, more junior members of staff who do not have a public facing role do have a reasonable expectation that their personal data will not be disclosed, and that they might be surprised and distressed if this is done, to the extent that disclosure would not be fair when taking into account their rights to privacy. We bear in mind the Appellant's point that some of the individuals concerned may be better described as middle-managers rather than 'junior' staff, but in our view at this stage of the analysis, and in circumstances where senior staff have been identified, the unfairness in disclosing names is the same.

23. However, that is not the end of the matter and we have set out above paragraph 6(1) of Schedule 2 to the DPA 1998 then needs to be applied. In *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55; [2013] 1 WLR 2421 Lady Hale DP observed (at paragraph 18) that the proper interpretation and application of condition 6 required three discrete questions to be answered:

- “(i) Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
- (ii) Is the processing involved necessary for the purposes of those interests?
- (iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?”

24. In our view the Appellant is pursuing a legitimate interest as he is seeking to make those involved in the decision-making process (and not just those who make the decisions) accountable in the important area of purchasing new fire vehicles. The Appellant asks how the public can know that the officers are competent and properly qualified if their names are not known. He argues that the staff members involved, given the tasks in which they have been involved, will have management responsibilities even if they are not the actual decision makers.

25. However, it seems to us on the facts of this particular case, disclosure of the names is not necessary for the purposes of that legitimate interest. DSFRS has disclosed the name of the ultimate decision makers and senior staff members. We also note that the redactions apply only to the actual names of more junior officers and not to their job title or the area/department in which they work. Thus, anyone wishing to analyse the decision-making process knows the identity of the ultimate decision makers and can also see where those involved in evaluation, assessment,

and writing of reports fit into the hierarchy and the level at which they are working.

26. In our view that information provides the necessary level of detail to enable the Appellant and others to scrutinise the decision-making process revealed by the disclosed documents. Thus, we have found that disclosure is not necessary for the purpose of the Appellant's legitimate interests, and we do not need to go on to consider whether the privacy rights of the individuals would, in any event, make disclosure unwarranted.

Conclusion

27. Having made those findings, our conclusions are that: -

- (a) The appeal is allowed in part in relation to the information not considered in the decision notice by the Commissioner as it should have been. That information has now been disclosed (subject to the s40(2) FOIA issue which is covered above), and no further action is required.
- (b) We dismiss the Appellant's appeal insofar as it argues that s40(2) FOIA has wrongly been applied to the redaction of the names of staff on the information otherwise disclosed.
- (c) We do not address the issue of whether further information is held in relation to point 4 of the request, noting that this is an issue before the Commissioner upon which a decision has not yet been taken.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 27 January 2020