First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2019/0472P

Decided without a hearing
On 12 November 2020

Before

JUDGE ANTHONY SNELSON

Between

MOHAMMAD CHAMANI

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

The decision of the Tribunal is that the appeal is dismissed. No further step is required.

REASONS

Introduction

1. On 19 March 2019 Mr Mohammad Chamani, the Appellant in these proceedings, wrote to the Department for Work and Pensions ('the DWP') requesting, pursuant to the Freedom of Information Act 2000 ('FOIA'), disclosure of the "direct email address" of the Independent Case Examiner

('ICE'), Ms Joanna Wallace. The role of the ICE is to deal with complaints about certain government organisations that deal with benefits, work and financial support. The ICE service is independent of government but is funded by the DWP. It operates through a team based in Liverpool. Less than a fortnight before his request Mr Chamani had received from the ICE a report bearing her signature which had partially upheld a complaint of his against the DWP and recommended that he should receive an apology and "financial redress" of £50.

2. The DWP responded on 27 March 2019, declining to provide the requested information on the ground that it was "personal information" and, as such, exempt under FOIA, s40(2). The ICE office email address (already published on the ICE website) was supplied.

3. Mr Chamani took issue with that response but, in a letter of 2 April 2019 sent following a review, the DWP stood by it.

4. On 3 April 2019, Mr Chamani complained to the Commissioner about the way in which his request for information had been handled. An investigation followed. By a decision notice dated 21 November 2019 the Commissioner determined that the DWP had correctly applied s40(2).

5. By a notice of appeal dated 20 December 2019, Mr Chamani challenged the Commissioner's adjudication. From his lengthy attachment I distil the following main points:[1]

    (1) The ICE is a public figure. Her name is recorded in public documents.
    (2) The ICE's personal work email address is not her personal data.
    (3) The ICE has (impliedly) consented to the proposed disclosure.
    (4) It is "necessary" to process the data requested because:

        (a) The ICE's independence from DWP is most important;
        (b) she performs an important public function;
        (c) she signs reports and takes personal responsibility for them;
        (d) "two-way access" between the public and her is required;
        (e) transparency and accountability must be safeguarded;
        (f) email is the "least intrusive" means of access;
        (g) only direct email access can put the ICE within effective public reach.

    (5) The burden is on DWP to show that processing the data sought would be unlawful. No evidence has been supplied to that effect (or that Ms Wallace has refused her consent to it being processed).

[1] I have sought to extract what seem to be the most pertinent arguments, but I have had regard to the entire document and all the other material before me.

6. The Commissioner resisted the appeal in a response dated 24 January 2020. Her core submissions were as follows.

(1) The information sought is the personal data of Ms Wallace.
(2) Processing the data would not be lawful because:

(a) Ms Wallace has not consented to the proposed processing;
(b) the 'necessity' test is not satisfied;
(c) the 'balancing' test is not satisfied.

7. The appeal came before me in the form of a video hearing to be held by CVP, Mr Chamani having requested an oral hearing. The Commissioner did not attend, having given notice that she was content to rely on her written case. Without explanation, Mr Chamani also did not attend. Having reminded myself of the First-tier Tribunal (General Regulatory Chamber) Rules 2009 (as amended), rule 36, I was satisfied that he had had due notice of the hearing and that it was in the interests of justice to proceed. I have reached my decision on the basis of the written representations and other documents submitted by the parties.

The Statutory Framework

The freedom of information legislation

8. FOIA, s1 includes:

> **(1) Any person making a request for information to a public authority is entitled–**
>
> **(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and**
> **(b) if that is the case, to have that information communicated to him.**

'Information' means information "recorded in any form" (s84).

9. By s40 it is provided, so far as material, as follows:

> **(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.**
>
> **(2) Any information to which a request for information relates is also exempt information if—**
> **(a) it constitutes personal data which does not fall within subsection (1), and**
> **(b) the first, second or third condition below is satisfied.**
>
> **(3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act—**
> **(a) would contravene any of the data protection principles …**

The language and concepts of the data protection legislation are translated into the section (subsection (7)). The exemptions under s40 are unqualified under FOIA and the familiar public interest test has no application. Rather, the reach of the exemptions is, in some circumstances, limited by the data protection regime (see below).

The data protection legislation

10. The data protection regime under the Data Protection Act 2018 ('DPA 2018') and the General Data Protection Regulation ('GDPR') applies to this case.

11. DPA 2018, s3 includes:

> **(2) "Personal data" means any information relating to an identified or identifiable living individual ...**
>
> **(3) "Identifiable living individual" means a living individual who can be identified, directly or indirectly, in particular by reference to —**
> **(a) an identifier such as a name, an identification number, location data or an online identifier …**
>
> **(4) "Processing", in relation to information, means an operation or set of operations which is performed on information, or on sets of information, such as —**
> **…**
> **(d) disclosure by transmission, dissemination or otherwise making available …**
>
> **(5) "Data subject" means the identified or identifiable living individual to whom personal data relates.**

12. GDPR, Article 5 sets out the data protection principles. It includes:

> **Personal data shall be:**
>
> **1. processed lawfully, fairly and in a transparent manner in relation to the data subject …**

13. Article 6, so far as material, provides:

> **1. Processing shall be lawful only if and to the extent that at least one of the following applies:**
>
> **(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;**
> **…**
> **(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.**
>
> 2
> **Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks.**

The Tribunal's powers

14. The appeal is brought pursuant to the FOIA, s57. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

> **(1) If on an appeal under section 57 the Tribunal consider –**
>
> **(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.**
>
> **(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.**

Authorities

15. The starting-point is that, where they intersect, privacy rights hold pride of place over information rights. In *Common Services Agency v Scottish Information Commissioner* [2008] 1 WLR 1550 HL, Lord Hope reviewed the legislation, including the EU Directive on which the domestic data protection legislation is founded. At para 7 he commented:

> **In my opinion there is no presumption in favour of release of personal data under the general obligation that FOISA[2] lays out. The references which that Act makes to provisions of [the Data Protection Act] 1998 must be understood in the light of the legislative purpose of that Act, which was to implement Council Directive 95/46/EC. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data …**

This statement of principle is of equal application today, notwithstanding the fact that the Data Protection Act 1998 has been superseded.

16. In *Ittihadieh v 5-11 Cheyne Gardens RTM Co Ltd & others* [2017] EWCA Civ 121, Lewison LJ, giving the only substantial judgment on behalf of the Court of Appeal remarked (para 62):

> **The expression "personal data" "undoubtedly covers the name of a person in conjunction with his telephone details …**

Moreover, data may be personal data even if it does not it is not identify the data subject by name (*A v Information Commissioner* IT, 11 July 2006, para 11).

[2] The proceedings were brought under the Freedom of Information (Scotland) Act 2000, but its material provisions do not differ from those of FOIA.

17. The case-law relating to condition 6(1) in the DPA 1998, Sch 2, which was similarly worded to GDPR, Article 6(1)(f), can safely be treated as a guide to interpreting the new law. Three principles are noteworthy in the present context. First, 'necessary' means reasonably necessary and not absolutely necessary: *South Lanarkshire Council v Scottish IC* [2013] UKSC 55. But in order for something to be 'necessary' there must be no other reasonable means of achieving it: *IC v Halpin* [2020] UKUT 29 (AAC). Second, 'necessity' is part of the proportionality test and requires the minimum interference with the privacy rights of the data subject that will achieve the legitimate aim in question: *R (Ali & another) v Minister for the Cabinet Office & another* [2012] EWHC 1943 (Admin), para 76. Third, in carrying out the balancing exercise, it is important to take account of the fact that disclosure under freedom of information legislation would be to the whole world and so, necessarily, free of any duty of confidence: *Rodriguez-Noza v IC and Nursing & Midwifery Council* [2015] UKUT 449 (AAC), para 23.

The Commissioner's Guidance[3]

18. In her Guidance on Determining what is Personal Data, the Commissioner expresses the opinion that many email addresses, such as those including the individual's name and workplace, will amount to 'personal data'. In her Guidance on Requests for Personal Data about Public Authority Employees, she states (p13):

> **The data protection exercise of balancing the rights and freedoms of employees against the legitimate interest in disclosure is different to the public interest test that is required for the qualified exemptions listed in section 2(3) of FOIA.**
>
> **In the FOI public interest test, there is an assumption in favour of disclosure because you must disclose the information unless the public interest in maintaining the exemption outweighs the public interest in disclosure.**
>
> **In the case of section 40(2), the interaction with the DPA means the assumption is reversed and a justification is needed for disclosure.** [4]

Analysis and Conclusions

19. In my judgment this appeal has no merit.

20. The first question is: is the personal work email address the 'personal data' of the ICE (DPA 2018, s3(2))? Plainly, it is. Ms Wallace is an identified living individual and the address 'relates to' her. Moreover, even if she was not already identified, she would (no doubt) be identifiable from it.

[3] The Guidance does not have the force of law.

[4] The ICE is not a civil servant and may strictly speaking be an office-holder rather than an employee, but the part of the Guidance here cited is clearly equally applicable to data subjects who are not employees.

21. I turn to the GDPR analysis, which begins and ends with this question (Articles 5(1) and 6(1)): Would the proposed processing be lawful? Mr Chamani first submits that the ICE has consented to the data being processed (Article 6(1)(a)). With respect to him, that argument is hopeless. She has done the very opposite. That is why we are here. The fact that a general office email address, through which she and her team may be contacted, is made public is obviously no ground for saying that she has consented to her personal work email address being published.

22. That brings me to Article 6(1)(f). Allowing that, as the Commissioner has found, Mr Chamani has identified a legitimate interest in corresponding with the ICE, I am satisfied that he fails entirely on the question of necessity. I agree that the ICE performs an important public function, that her independence from DWP is most important and that transparency and accountability must be safeguarded, but these truths do not assist the argument that publication of her personal work email address is desirable, let alone necessary. It is a fact that she signs reports and takes personal responsibility for them. But again that lends no support to the appeal. It is right that "two-way access" between the public and the ICE is required, but such access does not depend on her personal work email being published. The submission that email is the "least intrusive" means of communication is debatable but in any event does not help with the argument that the disclosure sought is necessary. The proposition that only direct email access can put the service within effective public reach is, to my mind, self-evidently wrong. The ICE plainly *is* within effective public reach, as Mr Chamani's own experience demonstrates.

23. Having addressed the main arguments advanced by Mr Chamani and stepped back to review the appeal generally in the light of all the circumstances, I am satisfied that the disclosure sought is not remotely 'necessary' for the purposes of any legitimate interest pursued by the DWP, the ICE or Mr Chamani.

24. Given my view on 'necessity', the balancing exercise under GDPR, Article 6(1)(f) does not arise. If it did, it would be determined against Mr Chamani in any event. The premium which the law places on the protection of privacy[5] would inevitably trump any small (I would be more inclined to say imaginary) 'transparency' dividend derived from the act of publishing the email address.

25. For all of these reasons, I conclude that the processing which Mr Chamani seeks would not be lawful. Accordingly the information requested is exempt.

Disposal and Postscript

26. It follows that the appeal must be dismissed.

[5] As already noted, Mr Chamani argues that it was for the public authority to show that *withholding* disclosure was necessary. This betrays a serious

27. I regret that this appeal was pursued. In my view it was not merely groundless but futile. A moment's reflection should suffice to lead any reasonable and dispassionate observer to the conclusion that a decision compelling the ICE to publish her personal work email address would in very short order have resulted in (a) her ability to perform her functions confidentially, securely and efficiently being severely impaired, and (b) a consequential decision to (i) leave emails sent to that address unanswered (save, no doubt, for an automatic reply advising correspondents to write to the office account already published) and (ii) create a new personal work email account to replace that which had been made public. I am unable to see any benefit to Mr Chamani or to the public in general which this litigation could possibly have served. I will not speculate on his motivation in bringing the case, but I hope that he will think very carefully before embarking on such an exercise again.

(Signed) Anthony Snelson

Judge of the First-tier Tribunal

Dated: 8 January 2021

Promulgated: 19 January 2021