



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

Appeal No: EA/2013/0073

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50481987

Dated: 27th March 2013

Appellant: Antony Chapman

Respondent: The Information Commissioner

Second Respondent: HS2 Ltd

Heard on the papers

Before

Judge Melanie Carter

and

Roger Creedon and Paul Taylor

Tribunal Members

Date of Decision: 27th November 2013

DECISION

1. This is Mr Chapman's appeal against the Decision Notice of the Information Commissioner dated 27 March 2013, arising from a request for information under the Freedom of Information Act 2000 (FOIA). The Tribunal met on 8 October and 20 November 2013 and decided that the appeal should be partially upheld.
2. The Decision Notice arose from Mr Chapman's earlier requests, in the summer 2013, to see the organisation chart of HS2 Ltd (HS2). He had initially been refused this information on account of it being otherwise available on HS2's website (section 21 FOIA). He complained to the Information Commissioner and as a result some information was provided. On 16 November 2012 the Appellant had written to HS2 stating:

'[the chart] is not complete. The following have attended forums and are not on your list: [various names]... There may well be others from other forum areas, which please check. Please now send me a complete list.'

He followed this up on 19 November 2012 stating:

'I now know that 6 more people have been involved in forums, so should have been included in your organisation chart. They are [various names]... Please let me have a full organisation chart.'

3. It was apparent that Mr Chapman had been aware of the names of the individuals mentioned in the two requests on account of their having attended the Community Forum meetings set up by HS2 and their having been named in the published minutes, available online. The Tribunal noted that the minutes of these meetings were available on HS2 website and remained so to this day.
4. These two emails dated 16 and 19 November 2012 were treated by HS2 and the Information Commissioner as fresh requests for information (rather than a continuation of the ones made earlier in the year), such that the Decision Notice under appeal, strictly relates to these only. However, in the Tribunal's view, they fell to be interpreted in terms of scope and meaning in the light of the earlier requests for information. Most particularly, on 8 August 2012 the Appellant had asked for:
'an organisation chart showing the names and job titles of all HS2 Limited staff who are attending Forums, and who they report to.' It was clear to the Tribunal that this was essentially the scope of the requests made on 16 and 19 November.
5. HS2 had refused these later requests stating that certain information is exempt from disclosure under section 21 FOIA because it is already available on the internet, and that other information is exempt from disclosure under section 40(2) FOIA on account of it consisting of individuals' personal data, the disclosure of which would, it was argued, be a breach of those individuals' data protection rights. The Commissioner

considered that the Appellant's requests of 16 and 19 November 2012 were primarily aimed at accessing the information which had not so far been disclosed to him (i.e. the names of those staff which HS2 classed by the organisation as being non-public facing junior (i.e. non-executive) staff).

6. In his Decision Notice the Commissioner therefore considered whether HS2 was entitled to refuse to provide the Appellant with its full internal organisation chart (it already having disclosed what it considered to be a chart showing its public facing staff, their names and positions within the organisation). The Commissioner decided that HS2 was entitled to rely on section 40(2) FOIA to refuse to provide the Appellant with the names of junior, non-public facing members of its staff.
7. It became apparent during the course of the proceedings that the withheld information (not seen by the Tribunal) fell into two categories that is, insofar as not already disclosed to Mr Chapman:
 - a. the **names** of certain members of staff, that is:
 - i. those who had attended the forum meetings but only their job title had been recorded in the minutes; and
 - ii. the names of their line managers;
 - b. the **job titles** of the line managers of those members of staff who had attended the forum meetings and been mentioned in the minutes.
8. The Appellant argued that it was important to know these names and/or their positions within the organisation in order to assess the relative weight of what was said by the HS2 staff at the public meetings.

Section 40(2)

9. If section 40(2) applied to the personal data contained within the withheld information then, this being an absolute exemption, it should not be disclosed. To do so would be a breach of the relevant data subjects' data protection rights. However, the Tribunal had not had sight of the withheld information and had received almost no evidence (despite asking) as to the position of the particular named individuals either with regard to their roles, positions of responsibility or indeed as to their particular expectations as to privacy. The Tribunal had also found it extremely difficult to access the organisation chart said to be available online.
10. In these circumstances, it was exceptionally difficult for the Tribunal to assess who was who, their positions within the organisation (said to be relevant to whether they were junior/senior) and therefore their expectations as to privacy. In terms of evidence all there was, was the one extremely brief statement provided by Ms Levy, Head of Community & Stakeholder Engagement which recorded that the role of the individuals who attended the meetings were explained to the public at the meetings and that these were confirmed in the minutes. The only other evidence provided was with regard to the section 38 exemption (see below).

11. The Tribunal agreed that in determining whether a disclosure is fair under the First Data Protection Principle, for the purposes of assessing whether the absolute exemption at section 40(2) applied, it was appropriate to balance the consequences of any disclosure and the reasonable expectation as to the privacy of the data subject with the general principles of accountability and transparency, as well as any legitimate interests which arise in the specific circumstances of the case.
12. This therefore called for an examination of the reasonable expectation as to privacy of the data subjects involved. As explained above the Tribunal were seriously hampered in this regard by the lack of explanation of the particular individuals named in the withheld information and any evidence (as opposed to submissions) as to what they may have expected would follow from being named at public meetings and thereafter on the website in the minutes.
13. In the event, the Tribunal did not consider it necessary to determine this as, in addition to the requirement of fairness, in order to comply with the First Data Protection Principle, it was necessary to consider whether a condition in Schedule 2 of the Data Protection Act 1998 was satisfied. The relevant condition is paragraph 6 of Schedule 2 which provides:

“The processing is necessary for the purposes of the legitimate interests pursued by the data controller or by a 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.”
14. The Tribunal noted that the legitimate interest in question was that asserted by Mr Chapman, that is to assess the relative weight of the contributions of the individuals of HS2 attending the Community Forum meetings, by reference to their position within the organisation. The Tribunal was of the view that provided there was disclosure of their positions within the organisation, there was no necessity to knowing their actual names or indeed the names of their line managers. Thus, paragraph 6 was not met and the Tribunal being unable to identify any other condition within Schedule 2 which might be satisfied, it concluded that disclosure of particular names would be a breach of the First Data Protection Principle, such that the exemption at 40(2) did in this regard apply.
15. The Tribunal did not however consider there could be any justification for not disclosing the job titles of the line managers of those who had attended the meetings and how the reporting lines fitted into the organisation chart. The Tribunal could not work out the lines of reporting from the names mentioned by Mr Chapman as against the organisation chart available online (insofar as it could be accessed by the Tribunal). It was moreover of the view, from what it could work out, that there was likely to be a line of reporting undisclosed between some of those individuals named or identified by job title in the minutes and the lowest tier visible in the published organisation chart. As explained, the chart online was difficult to access and/or relate to the information provided to Mr Chapman and referred to in the extensive submissions provided by HS2.

16. Job titles and lines of reporting which did not disclose names, obviously, would not amount to personal data (it not identifying living individuals), such that the exemption at section 40(2) could not apply to this information.
17. Finally under this exemption, the issue of the appropriate cut-off for the purposes of which staff are considered junior/senior and thereby whether their data may be disclosed, did not in the event need to be decided. The Tribunal was however far from convinced that HS2 had made out a case for not disclosing personal data with regard to those staff who earned less than £58,200 per year. It needed to explain to the Tribunal in detail the nature of the staff who were identified in the withheld information and their responsibilities. Suffice to say the Tribunal noted that at least one of the job titles contained within the organisation chart, albeit under the 'junior' category as it appeared online, was in fact (or so the website revealed if you double clicked the particular post) entitled "senior manager" and received a salary many times the national, let alone the average for the region in which they were working. Assuming this person had attended the Community Forum meeting, the Tribunal would have doubted an assertion that someone working at this level, with that salary, appearing at a public meeting and whose name then appeared thereafter on the website, could reasonably have a general expectation of privacy as to their position within the organisation as claimed.

Section 21

18. The question then was whether the section 21 exemption properly applied on the basis that the job title/reporting line information was available elsewhere, namely from the online organisation chart. As explained, the Tribunal could not work out how the roles of the individuals named in the minutes pieced together such as to give a management line up the organisation chart. It was not enough that HS2 and the Information Commissioner merely asserted that the information was available online. Clearly Mr Chapman did not agree and the Tribunal's own attempts to see if this was the case failed.
19. On the assumption that this information is held (and it is noted that the Information Commissioner said he had a full copy of the organisation chart for the entire organisation), the Tribunal found that the Decision Notice was not in accordance with law insofar as this information was not disclosed. The Tribunal was not able to ascertain the extent to which the information requested was indeed available online but concluded, given its failures to access the information that section 21 did not apply with regard to all the job title and reporting line information requested and not previously disclosed. The Tribunal thus orders that there be substituted a Decision Notice which requires disclosure of this information within 28 days of the date of this decision.
20. It is noted that what is strictly required to be disclosed may now be historical information as there may have been a reorganisation of posts at HS2 since the date upon which the information should have been disclosed. It may not be possible to recreate the organisation chart as it applied in November 2012. However, if this is the case, HS2 is strongly encouraged, given its failure to provide this information in a readily accessible form previously to Mr Chapman, that at the very least he is

provided with an up to date organisation chart insofar as relevant to his request in a hard copy form.

Section 38

21. As the Tribunal had decided that no names should be disclosed on account of section 40(2), the section 38 exemption claimed was in all likelihood no longer relevant. It was not clear whether HS2 would still wish to claim this exemption applied with regard to just the job titles/reporting lines. For completeness however, in case this was still claimed, the Tribunal considered whether this remaining information would be exempt from disclosure on the basis of section 38. Section 38 provides a qualified exemption where “*disclosure under this Act would, or would be likely to—*”
- (a) *endanger the physical or mental health of any individual, or*
- (b) *endanger the safety of any individual.”*
22. The Tribunal noted that the actual evidence provided were incident reports essentially amounting to vandalism in the cutting of cables in late June/early July 2012, one letter from a landowner with regard to the putting up of a notice and threat of setting his dogs on someone putting up another, and an incident involving presumably protesters throwing water at field surveyors and acting aggressively. Certain other evidence post-dated the refusal of request (23 January 2013) the date at which the engagement of section 38 and the public interest balancing test fell to be considered. HS2 put forward submissions (as opposed to evidence) as to the fears of staff etc., however the Tribunal was unconvinced on the basis of the evidence that there was a likelihood of any endangerment to the physical or mental health or safety of any individual if the job title/reporting line information (as opposed to names) were to be disclosed.

Conclusion

23. The Tribunal partially upheld the appeal and ordered within 28 days of this Decision the disclosure of the job titles and reporting lines of those named or identified by job title, in the minutes of the Community Forum, insofar as not already disclosed.

[Signed on original]

Melanie Carter
Judge

27 November 2013