IN THE FIRST-TIER TRIBUNAL **Case No. EA/2014/0146**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50526241
Dated: 21 May 2014

Appellant: **Timothy Couzens**

Respondent: **The Information Commissioner**

On the papers

Date of decision: **31st October 2014**

Before
CHRIS RYAN
(Judge)
and
MALCOLM CLARKE
PAUL TAYLOR

Subject matter: Personal data s.40

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2014/0146**
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

Introduction

1. This appeal raises one narrow issue. Was the Care Quality Commission ("CQC") justified in providing the job title ("Legal Advisor" and "Principal Legal Advisor"), but not the names of the individuals who provided it with legal advice on the de-registration of a particular care agency under the Health and Social Care Act 2008. The Information Commissioner decided, in a Decision Notice dated 21 May 2014 that it had been justified and the Appellant has appealed to this Tribunal from that decision.

The Law

2. FOIA section 1 imposes on the public authorities to whom it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in Part II of the Act. Each exemption is categorised as either an absolute exemption or a qualified exemption. If an absolute exemption is found to be engaged then the information covered by it may not be disclosed. However, if a qualified exemption is found to be engaged then disclosure may still be required unless, pursuant to FOIA section 2(2)(b):

> *"in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information"*

3. FOIA section 40(2) provides that information is exempt information if it constitutes personal data of a third party, the disclosure of which would contravene any of the data protection principles. It is an absolute exemption.

4. Personal data is itself defined in section 1 of the Data Protection Act 1998 ("DPA") which provides:

> *"'personal data' 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"*

5. The data protection principles are set out in Part 1 of Schedule 1 to the DPA. The only one having application to the facts of this Appeal is the first data protection principle. It reads:

> *"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 …"*

Schedule 2 then sets out a number of conditions, but only one is relevant to the facts of this case. It is found in paragraph 6(1) and reads:

> *"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."*

The term "processing" has a wide meaning (DPA section 1(1)) and includes disclosure.

6. A broad concept of protecting individuals from unfair or unjustified disclosure (in the event that their personal data has been publicly requested) is a thread that runs through the data protection principles, including the determination of what is "necessary" for the purpose of identifying a legitimate interest. In order to qualify as being "necessary" there must be a pressing social need for it - C*orporate Officer of the House of Commons v Information Commissioner and others* [2008] EWHC 1084 (Admin).

7. In determining whether or not disclosure of the names would be contrary to the data protection principles we have adopted the following approach:
    i. would disclosure at the time of the information request have been necessary for a relevant legitimate purpose; without resulting in
    ii. an unwarranted interference with the rights and freedoms or legitimate interests of those affected.

And if our conclusion on those points would lead to a direction that the information should be disclosed we would then consider:

iii. whether disclosure would nevertheless have been unfair or unlawful for any other reason.

8. In respect to the issue of fair and lawful processing we have to bear in mind guidance provided in paragraph 1(1) of Part II of Schedule 1 to the DPA, which provides:

> *"In determining for the purposes of the* [first data protection principle] *whether personal date are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed."*

9. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.

The Parties' Arguments

10. The Appellant is concerned that CQC did not apply available regulatory controls over a particular organisation which had been treated as exempt from registration requirements because it operated solely as an "introductions" agency without any involvement in the direction or control of the activities of the introduced care worker. He argued in his Grounds of Appeal that the elements of legal advice on that issue, which had been disclosed to him, could not be fully assessed by considering its content and the job title of its author. The advice, he said, was "*inseparable and indivisible from the identity, legal credentials and expertise of the person giving it".* Later he said that it was not possible "...*to assess the weight and validity of the CQC 'legal advisor's' advice, without the ability to link the legal advice with the legal advisors' identities*".

11. The Information Commissioner accepted that there was a legitimate public interest in furthering openness and transparency in the CQC's decision-making process. Although the Appellant has made various

criticisms of the CQC's approach towards the agency in question and the legal advice on which it was based, he has provided no persuasive argument that disclosure of the names in question would contribute to transparency, given that the substance of the legal advice has been disclosed, as a result of the CQC waiving its right to rely upon the exemption provided by FOIA section 42 (legal professional privilege). The Appellant in fact provided an analysis of the advice in support of his appeal – a demonstration that the disclosure already made provided the public with sufficient material for an informed public debate on the issues which concerned him. The identity of the authors of the legal advice is therefore, self-evidently, not necessary for an evaluation of the advice they provided.

12. We conclude that there is no discernible public interest in disclosure of the names. By contrast we believe that there is some slight weight to be accorded to the counterbalancing factor of intrusion into the relevant individuals' privacy.

13. The Information Commissioner concluded in his Decision Notice that the position of Legal Advisors and Principal Legal Advisors were both relatively junior roles within the CQC, the individuals concerned did not perform public facing functions and they had a reasonable expectation that their anonymity would be maintained. The Appellant challenged that conclusion. He did not accept that the individuals' held such junior positions as the CQC had claimed and pointed out that some of the relevant identities could be accessed from social media sites.

14. Although the case for privacy is stronger in the case of the Legal Advisor than it is for the Principal Legal Advisor, the Appellant has not persuaded us that the level of intrusion would be so small that it may be disregarded. The effect of disclosure in response to the Appellant's information request would be more intrusive than publicity, through social media, of the position an individual held in the organisation. It would disclose both the position held and the individual's authorship of a particular legal opinion. The degree of intrusion, though slight, is still sufficient to outweigh the public interest in disclosure which, as we have said, is indiscernible.

15. We conclude that the Information Commissioner was right to conclude in his decision notice that the CQC had been justified in refusing the

request for disclosure of the names in question and that the appeal should therefore be dismissed.

16. Our decision is unanimous.

Chris Ryan
Judge
31st October 2014