



EA/2018/0133

ADRIAN GORDON FUDGE

and

THE INFORMATION COMMISSIONER

DECISION

Tribunal: Brian Kennedy QC Marion Saunders and Narnendra Makanji

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”) The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice dated 27 June 2018 (reference FS50700212) which is a matter of public record.

[2] The Tribunal Judge and lay members sat to consider this case on 27 February 2019.

Factual Background to this Appeal:

[3] Full details of the background to this appeal, Mr Fudge’s request for information and the Commissioner’s decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of

Chronology:

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| 12 July 2017 | Request for information re changes to senior management and associated savings |
| 9 Aug 2017 | Council responds over three emails. Appellant disputes accuracy and sufficiency of response |
| 10 Aug 2017 | Request for information about Chief Executive’s sick leave, suspension, redundancy and other financial information |
| 6 Sept 2017 | Council responds to Appellant’s 9 Aug email, stating it had fulfilled the request |

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| 11 Sept 2017 | Appellant first contacts Commissioner |
| 21 Sept 2017 | Council responds to Appellant's 10 Aug email answering the questions |
| 22 Sept 2017 | Further request for information by Appellant |
| 10 Jan 2018 | Council responds but withholds some information regarding redundancy of CEO citing s40(2) (third party personal data) |
| 14 March 2018 | Following Commissioner's initial investigations, Council releases more information about the redundancy but maintains reliance on s40(2) and adds reliance on s36 (prejudice to the conduct of public affairs) and s42 (legal professional privilege) |
| 14 March 2016 | Commissioner upholds the Council's refusal to disclose but criticises the breach of the time limits |

Relevant Legislation:

s36 Prejudice to the conduct of public affairs

(1) This section applies to—

- (a) information which is held by a government department or by [F1the Welsh Assembly Government] and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

(a) would, or would be likely to, prejudice—

- (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
- (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
- (iii) the work of the Cabinet of the Welsh Assembly Government.]

(b) would, or would be likely to, inhibit—

- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs

.... (5)(o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means—

- (I) a Minister of the Crown,
- (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or

(iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.

s40 Personal information

(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 [F1does] 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, or

(b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018

(manual unstructured data held by public authorities) were disregarded.

(3B) The second condition is that the disclosure of the information to a member of the public otherwise than under this Act would contravene Article 21 of the GDPR (general processing: right to object to processing).]

(4A) The third condition is that—

(a) on a request under Article 15(1) of the GDPR (general processing: right of access by the data subject) for access to personal data, the information would be withheld in reliance on provision made by or under section 15, 16 or 26 of, or Schedule 2, 3 or 4 to, the Data Protection Act 2018, or

(b) on a request under section 45(1)(b) of that Act (law enforcement processing: right of access by the data subject), the information would be withheld in reliance on subsection (4) of that section.

S42 Legal Professional Privilege

(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

Commissioner's Decision Notice:

[4] Dealing firstly with the personal data issue, the Commissioner was satisfied that the requested information related to a living individual and thus constituted personal data. She referred to her published guidance on requests relating to the personal information of public

sector employees. While the Council did not consider that the data was sensitive personal data, the Commissioner disagreed. The Commissioner accepted there was a legitimate interest in ensuring appropriate scrutiny of the decision to restructure the Council, and the most senior paid officer of the Council should expect a higher level of scrutiny and accountability than other members of staff. In this instance the withheld information related to personnel issues of the individual rather than the functions of his role. There would therefore be a strong and reasonable expectation by the individual that the information would not be disclosed. It would likely cause him distress and potentially adversely affect his position in the future.

[5] Turning then to the exemption of legal professional privilege, the Commissioner was satisfied that the information constitutes communications between a lawyer and their client relating to legal advice obtained regarding the redundancy arrangements. She found that disclosure of this material would not add to the principle of accountability nor would it further public debate around the decision, and so the public interest lay in upholding the exemption.

[6] As for the exemption to prevent prejudice to the effective conduct of public affairs, the Council had applied ss36(2)(b)(i), (ii) and 36(2)(c) to a significant proportion of the information but did not specifically identify which sub-section applied to each piece of information. The opinion of the Qualified Person (QP) was provided by the Council's Monitoring Officer to the Appellant on 14 March 2018 and separately to the Commissioner on 22 March. The QP's opinion raised concerns about the 'chilling effect' of the disclosure, stating that it would "*inhibit the free and frank provision of advice and exchange of views*". Having considered the information, the Commissioner considered that s36(2)(b)(i) and (ii) apply, and the opinion of the QP was reasonable as she had direct knowledge of the withheld information and the matters at hand (including the wider position of the Council and the local context of the merger of nine local councils into two unitary authorities).

[7] The Commissioner then turned to consider the public interest in upholding this exemption. She acknowledged that by not disclosing the information, the Council could be construed as secretive and this would give rise to suspicion and mistrust. There was a real and justifiable public interest in knowing more about what was a notably high financial package given to the Chief Executive. However, the Council had already provided financial information relating to the payment, along with the full business case, report to Council and reports to the Audit and Governance Committee. The issue of redundancy and senior management restructuring was live and highly sensitive at the time of the request, and she considered that the concerns about the 'chilling effect' were well founded. She therefore upheld the refusal to disclose the information.

[8] Finally, the Commissioner criticised the Council for failing to respond to the Appellant's request on 10 August 2017 within 20 working days.

Grounds for Appeal:

s40(2) personal data

[9] The Appellant denied that the information was personal data as it related to the post of Chief Executive and not the person appointed to the post. In any event, the information was not confidential as the identity of the Chief Executive and the amount of the severance pay was in the public domain. He also noted that s40 could not apply as it relates only to the living, and the individual died in March 2018.

s36 prejudice to the conduct of public affairs

[10] The Appellant claimed that there could be no 'chilling effect' spreading to other decisions, as this redundancy was the only one in the public domain owing to the seniority of the post. In taking the word of the QP, the Appellant accused the Commissioner of bias. He claimed that there was no formal decision on any pending merger of councils as stated, and in 2016 when the matter was considered there was no suggestion of making the post of Chief Executive redundant. He also accused the QP of failing "*to ensure that illegal activity [relating to the redundancy payment] did not take place*", and the Council of acting *ultra vires* and of manufacturing a redundancy to cover up the suspension of the Chief Executive and the appointment of a replacement to perform the same role but with a different job title.

S42 legal professional privilege

[11] The Appellant stated that this exemption did not apply because the requested information was financial and in any event was the "intellectual property" of the Council.

Commissioner's Response:

S40(2) personal data

[12] The Commissioner described the Appellant's arguments as "*contradictory*" because he appeared to argue both that the information was not personal data and that the personal data restrictions did not apply because the subject was deceased. The Commissioner reiterated her belief that the information was personal because it is biographical to the individual (in relation to his career) and related solely to that individual. As for the individual's passing, he was alive at the time of the request and that is the timescale that must be considered.

S36 prejudice to effective conduct of public affairs

[13] The fact that this was the only redundancy to be discussed in the public domain did not sway the Commissioner from her finding that the ‘chilling effect’ would be real and pressing given the period of change and reorganisation within the Council. As for the Appellant’s contention that the Council misled the Commissioner in regards to the pending merger, the Commissioner stated that she “*has no reason to believe that the Council intend to mislead the Commissioner or provide false information*”. She fervently denied any bias. Insofar as the Appellant alleged illegality or wrongdoing on the part of the Council in its conduct of its restructuring, the Commissioner denied that this was a factor that could properly be considered in this Tribunal.

S42 legal professional privilege

[14] The Commissioner believed that the Appellant had misunderstood the concept of legal professional privilege. She referred to the case of *Bellamy v ICO and DTA EA/2005/0023*, which she had also cited in her Decision Notice, and pointed out that the information need not be personal in order to attract the exemption.

Appellant’s Reply:

[15] The Appellant took issue with the Commissioner’s limiting of his appeal to the request of 22 September 2017. His intention was that the “*myriad of unanswered FOI requests*” would be considered holistically, and he accused the Commissioner of a “*total failure...to undertake a proper inquiry*”. He remarked that his allegations of illegality could not be underplayed or trivialised as mere ‘criticisms’, and they should have informed the Commissioner’s decision whether to accept the QP’s argument. He also outlined reasons why he believed that he could not seek redress from his MP or the Local Government Ombudsman.

The Tribunal’s Findings:

[16] The Tribunal finds no evidence of illegality as suggested by the Appellant.

[17] At Page 266 and 267 of our hearing Bundle (“the Bundle”) The Commissioner indicates in a letter dated 17 January 2018, that the Appellants Complaints were merged into one. At page 286 of the Bundle the Appellant confirms this: “*As requested I would confirm that the scope of the case as detailed on page 2 of your letter of the 17th January is correct.*” The Tribunal finds that any further requests by the Appellant were not to considered as part of this appeal. The Scope of the case was as set out at Page 267 of the Bundle.

[18] In the circumstances we accept and adopt the reasoning of the Commissioner as set out at Paragraphs {4} to {8} above and in her Response as set out at Paragraphs {11} to [14] above.

As explained at [16] & [17] above we do not accept the Appellant's submission in reply. Accordingly, the Tribunal refuse this Appeal.

Signed the Judge of the First Tier Tribunal

1 April 2019.

Promulgation date 3rd April 2019