



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

Appeal Reference: EA/2017/0271

**Decided without a hearing
On 11 March 2019**

Before

JUDGE BUCKLEY

MELANIE HOWARD

MARION SAUNDERS

Between

EWA SYGULSKA

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

MINISTRY OF DEFENCE

Second Respondent

OPEN DECISION

1. For the reasons set out below the Tribunal dismisses the appeal against Decision Notice FS50695574.

2. All parties consented to the matter being determined on the papers and the Tribunal considered that it was appropriate to determine the appeal without an oral hearing.

SUBSTITUTE DECISION NOTICE

REASONS

Introduction and procedural background

1. This is an appeal against the Commissioner's decision notice FS50695574 of 19 October 2017 which held that the request was for a third party's personal data and that the MoD had correctly applied the exemption under s 40(2) of the Freedom of Information Act (FOIA). The MoD was not required to take any steps.

The June Tribunal

2. This claim was heard by a differently constituted first tier tribunal on 2 June 2018. Its decision was promulgated on 5 June 2018. That tribunal is referred to in this decision as 'the June tribunal' and its decision is referred to as 'the June decision'. In the June decision the June tribunal held that decision notice FS50695574 was not fully in accordance with the law and substituted a decision that:

I Other than as specified in paragraph II, the MOD has correctly applied section 40(2) to the information in the service record of the individual to whom the request for information applied.

II Section 40(2) of FOIA does not apply to the following information:

1. The information in the communication dated 14 July 1947 at page 3 of the closed bundle of documents (other than all information relating to the recipient of that communication, which must be redacted).
2. The information in the communication dated 20 September 1948 a page 5 of the close bundle (other than the two words immediately following the word "commission" [sic] in the first paragraph of that communication, which must be redacted).

That information must be disclosed to the Appellant within 35 days.

3. In accordance with the June decision, the MoD supplied two redacted documents to the appellant on 2 July 2018.
4. The appellant applied for permission to appeal the June decision to the Upper Tribunal on 3 July 2018. Her grounds of appeal were that the tribunal had failed to consider all the relevant information and in particular that they had not taken

account of (i) information before 1 January 1947 and (ii) information provided by the MoD to the tribunal in Polish ('the material').

5. In accordance with rule 43 of the procedural rules the June tribunal decided to review the June decision on the basis that it was an error of law not to order the MoD to provide the tribunal with English translations of the material. The June tribunal set aside the June decision under rule 41 and ordered that it be heard afresh by a new panel. That is our role.

Factual background to the appeal

6. The Appellant is looking for information about what happened to her uncle, JB, who is of Polish nationality and served under British Command, ultimately in the Polish Resettlement Corps until 16 August 1948.
7. In 1947 JB crossed the Polish/German border near Szczecin illegally. He has not been in contact with his family since. The appellant believes that her uncle died in 1947 and that he was killed either in Berlin, Eastern Germany or Poland. She does not know the date and place of his death.
8. On 24 August 2016 the MoD's Army Personnel Centre Disclosures department sent an email to the appellant's son-in-law which stated that JB 'finally relinquished his commission on 16/08/1948 and gave the interpretation that '[JB] must have lived on 16.08.1948 when he was released from the Polish Resettlement Corps PKPR)''.
9. This was contrary to the appellant's belief that her uncle had died in 1947.
10. The MoD has since confirmed that the inference that JB 'must have lived' at that date was incorrect. "Relinquishing commission" does not mean that the service person voluntarily and proactively resigned his or her commission.
11. The British Red Cross confirmed by letter to the Polish Red Cross dated 25 July 2017 that JB was living in Scotland before he went on leave in May 1947 to travel to Germany and on 1 June 1947 he failed to return from leave in Germany and no other information is recorded about his whereabouts after that date. They stated that there is no indication that he returned to the UK after that date. The British Red Cross said that they presumed that the documents obtained from the Polish Ministry of Internal Affairs confirming the arrest of JB in 1947 are correct.

Request, Decision Notice and appeal

12. The Appellant made the request which is the subject of this appeal under the FOIA on 24 April 2017. It is a 4 page letter, but the Decision Notice extracts the following requests:

I am looking for information about what has happened with my uncle captain [name redacted], of Polish nationality, born on 9.11.1915 in Drawcze near Villinius, son of [name redacted] and [name redacted] family name [name redacted]...

What I need is the application for the final termination of service in the Polish Resettlement Corps of [name redacted], produced in August 1948, with his personal signature or any other document showing that he really lived at the time.

...I need the personal files of captain [name redacted] from MoD only to confirm, if he really came back to the UK after May 1947 and was still alive in August 1948, when he - according to [name redacted] - finally relinquished his commission on 16.08.1948.

13. This was a follow up to a previous request to which the MoD had responded by email to appellant's son-in-law on 24 August 2016.
14. The MoD replied on 28 July 2017. It refused to provide the information, which it classed as personal data, under s 40 (2) FOIA. There was no further internal review.
15. In her decision notice dated 19 October 2017 the Commissioner concluded that s 40(2) FOIA only applies where the information relates to a living individual. She accepted as reasonable the MoD's approach of assuming that an individual under the age of 116 was alive in the absence of a death certificate. She decided that the information was personal data.
16. The Commissioner accepted that the appellant had a legitimate interest in disclosure, but that disclosure would be an unfair intrusion into the individual's private life. She concluded that disclosure would breach the first data protection principle and upheld the MoD's application of the s 40(2) exemption.

Grounds of Appeal

17. The Grounds of Appeal are:
 - a. The MoD probably holds the records of Polish soldiers illegally.
 - b. The Commissioner ignored the evidence produced by the appellant that shows that JB was probably killed in 1947. The Commissioner decide on the facts of the case not on the basis of a general MoD presumption.
 - c. The Commissioner failed to appreciate the importance of the question of what happened to JB: this is the possible murder of a Polish soldier.
 - d. The MoD produced false information in their email of 24 August 2016 stating that JB must have lived on 16 August 1948 which has wasted a lot of the family's time.

- e. The question of what happened to JB is not just of importance to his family. It is in the public interest to clarify what happened to him.
- f. There is evidence that JB was last seen with soldiers wearing British uniforms. The MoD should disclose the information to show that the British Army had no connection with his arrest in 1947.
- g. The appellant already knows intimate details of her uncle's life and therefore it would not be an unfair intrusion to disclose the information to her.
- h. The Commissioner should not have placed weight on the MoD's assertion that it had released data of a 100 year old only to find out that the individual was alive.

Commissioner's response

18. The Commissioner's response states:
- a. The MoD has no substantive evidence to suggest whether the individual is alive or not. It is therefore reasonable for the MoD to err on the side of caution.
 - b. Disclosure under FOIA is to the world at large. The data subject would not reasonably expect the contents of his service record to be disclosed under FOIA to the world at large. It would likely be distressing to the data subject.
 - c. In relation to condition 6 the Commissioner recognises the appellant's legitimate interest in disclosure, but this is outweighed by the data subject's right to privacy.

Appellant's response dated 19 December 2017

19. The Commissioner has not given any grounds for the MoD holding the records of Polish soldiers. The reason why the MoD has given false information needs to be clarified. The Commissioner has not seen the withheld information. Some of the withheld information is in Polish. This leads to the mistaken conclusion that it contains sensitive personal data. The records do not contain sensitive information. The appellant has provided the sources for all the information she has provided. The withheld material is likely to contain the answer to the question: what did the MoD do to help JB in 1947? The MoD does not want to disclose the information for this reason.
20. The appellant summarises her arguments as follows: the evidence shows that JB was probably killed in 1947. His record does not include sensitive information. It would not be unfair to disclose the record because JB would consent if he was alive. The MoD is probably refusing to disclose the record because it would be embarrassing for the MoD and that is why they instead produce false information.

Submissions filed since the June decision was set aside

Appellant's submissions dated 6 October 2018

21. The appellant has not translated the Polish documents labelled [A18] and [A19] which she produced to show (i) MoD records do not contain top secret information and (ii) is easy to obtain a soldier's personal records from the MoD if he died more than 25 years ago.
22. The appellant has provided translations of letters as evidence that JB was arrested in Berlin and probably secretly killed.
23. The appellant is nearly sure that the British Army were informed that JB was arrested by communists. Therefore even small and apparently trifling pieces of information can be very important to clarify what happened to him.

Appellant's final submissions dated 17 November 2018

24. All British agencies in Poland and the Polish Resettlement Corps in London were informed about JB's arrest in the British Zone of Berlin on 23 May 1947. The MoD is obliged to help JB's family find out what happened to him after his arrest by disclosing all Polish and English language information related to JB after 1 January 1947. There is sufficient evidence to rebut the assumption that JB remains alive until he is 116 years old. The information disclosed as a result of the June decision does not provide new information: the appellant knows that JB did not return to the UK. The arrest of an officer under British Command in a British territory needs to be explained.

MoD's submissions dated 19 November 2018

25. The MoD's position is set out in the letter dated 28 July 2017. The MoD's submissions relate to the remainder of the withheld information.
26. The requested information is personal data of a third party. In the absence of a death certificate it was reasonable to apply the MoD's policy of assuming that individuals are alive until they reach 116 years of age. The legitimate reasons put forward by the appellant do not outweigh the unfair intrusion into the individual's private life if disclosure was to take place.
27. The MoD's policy of assuming, absent a death certificate, that a person is alive until they reach 116 years of age is reasonable. JB's family have been informed that the MoD would accept a formal legal document stating that JB had legally been declared dead. JB's reasonable expectation would be that his personal data, including sensitive personal data, would not be disclosed in effect to the world at large. Having regard to that correction of the misinterpretation and the documents already disclosed, there are no longer any exceptional circumstances

to justify a 'fair' disclosure of JB's personal data, nor is the necessity element of condition 6 made out.

Legal framework

S 40 – Personal Information

28. The relevant parts of s 40 of FOIA provide:

(2) Any information to which a request for information relates is also exempt information if-

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

(3) The first condition is-

(a) in a case where the information falls within any of paragraphs (a)-(d) of the definition of 'data' in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene –

(i) any of the data protection principles...

29. Personal data is defined in s1(1) Data Protection Act 1998 ('DPA') as:

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.

30. The first data protection principle is the one of relevance in this appeal. This provides that:

1. 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..." (See para.1 Sch 1 DPA).

31. The only potentially relevant condition in Schedule 2 DPA is section 6(1) which provides that the disclosure 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.' (See para.s 6 Sch. 2 DPA)

32. The case law on section 6(1) has established that it requires the following three questions to be answered:

1. Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?

2. Is the processing involved necessary for the purposes of those interests?

3. Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

33. The definition of "personal data" consists of two limbs:

- i) Whether the data in question "relate to" a living individual and
- ii) Whether the individual is identifiable from those data.

The Task of the Tribunal

34. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

Issues

35. The issues we have to determine are:

- a. Was the information requested personal data?
- b. Would disclosing the information be fair?
- c. If so, are the conditions in schedule 6(1) met i.e.
 - 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?

Evidence

36. We have read and were referred to an open and a closed bundle of documents, which we have taken account of where relevant. This included translations of the documents previously before the June Tribunal in Polish.

37. It is not necessary for us to make determinations in relation to information that has already been disclosed. We have therefore limited our deliberations and judgment to material that has been withheld. This includes the redacted parts of the disclosed information and the remainder of the information.

38. It is not within our remit to determine whether or not the MoD is legally entitled to hold the service records of JB.

39. We accept that the MoD is entitled to require the provision either of a death certificate or other formal legal document stating that the individual has been legally declared dead before supplying service records. We have not been informed by any of the parties whether there is an equivalent procedure in Poland for declaring death in absentia, but we think that this is likely to exist.
40. In the absence of a death certificate or other legal declaration of death, the MoD adopts a policy of assuming that a person is alive until the age of 116. We find that this is an acceptable approach. Although the appellant has produced evidence which suggests that JB is unlikely to be alive, we accept that it is appropriate for the MoD to err on the side of caution in the absence of a death certificate/legal declaration. The appellant must follow the appropriate procedure in Poland to have JB legally declared dead. In the absence of that declaration it is not for the MoD, or for this tribunal, to make a finding based on the evidence produced by the appellant as to whether or not, on the balance of probabilities, JB is still alive.
41. We therefore find that the data is personal data because it is plainly about and identifies a living individual. In the light of our conclusions below, we do not find it necessary to decide whether or not the data is sensitive personal data.
42. We conclude that JB would have a strong expectation that his service record would not be released to the world at large without his consent, and that this would cause distress. Because disclosure is to the world at large, it is irrelevant that the appellant is a member of JB's family and knows intimate details of his life. Further the tribunal cannot infer that JB would consent to disclosure were he alive.
43. We accept that the appellant is pursuing a legitimate interest: finding out what happened to JB in 1947. Having reviewed all the withheld information, including the information translated from Polish, we conclude that there is nothing in the withheld information which supports the appellant's belief that the MoD is refusing to disclose the service records because it would be embarrassing for the MoD to disclose that information either because it revealed what they knew about JB's arrest in 1947 or for any other reason. The MoD did provide misleading information to the appellant. That has now been corrected. There is nothing in the remaining withheld information which is necessary to disclose to correct that misinformation. Further there is nothing in there which is necessary to disclose for the purpose of the appellant's wish to find out more than she already knows about the circumstances and place of JB's death.
44. For the reasons set out above we find that disclosure would be unfair and that condition 6 is not satisfied.

45. In relation to the remaining withheld information, the tribunal concludes that the Commissioner's decision was correct and we dismiss the appeal. Our decision is unanimous.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 3 April 2019

Promulgation date: 5 April 2019