



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

Case No. EA/2011/0195

ON APPEAL FROM:

The Information Commissioner's

Decision Notice No: FER0371913

Dated: 20 July 2011

Appellant: Mr Keith McGinley
First Respondent: Information Commissioner
Second Respondent : Blackpool Borough Council

Heard at: Field House, London

Date of consideration: 25 January 2012

Date of decision: 7 February 2012

Before
Christopher Hughes
Jean Nelson
Henry Fitzhugh

Appearances: This hearing was conducted on the papers.

Subject matter:
Environmental Information Regulations, Regulations 12, 13

Data Protection Act Schedules 1, 2

Cases:
The House of Commons v ICO & Leapman, Brooke, Thomas (EA/2007/0060 etc)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal rejects the appeal for the reasons stated.

Signed Christopher Hughes Judge

Dated this 7 February 2012

REASONS FOR DECISION

1. On 9 July 2010 the Appellant contacted the Second Respondent (“the Council”) to request information concerning a piece of land within the Council’s area:-
 - “all user evidence in accordance with section 31(1) of the HA (Highways Act) 1980”
 - “all documentary evidence relating the alleged public use” and
 - Copies of any complaints received by the Council relating to the alleged public right of way over the piece of land in question
2. On 5 November 2010 the Council confirmed that it did not hold information relating to the first two parts of the request but that it held four complaints relating to the land in question but that disclosure of the information was exempt by reason of S41 of FOIA which protects information obtained by a public authority in confidence and also be a breach of the Data Protection Act (and therefore exempt from disclosure under S40 of FOIA). At the Appellant’s request the council reviewed the matter and considered whether the material could be redacted so as to resolve these objections the council concluded that the extent of the redaction necessary would leave information which would “not be of any purposeful nature”.
3. The Appellant complained to the First Respondent (the Information Commissioner – “the Commissioner”) about the non-disclosure of the four complaints. The Commissioner approached the issue on the basis that the matter fell to be considered under the Environmental Information Regulations. These provide at Regulation 13:-
 - (1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either he first or second condition below is satisfied, a public authority shall not disclose the personal data.

- (2) The first condition is –
- (a) In a case where the information falls within any paragraphs (a) to (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 these Regulations would contravene –
 - (i) Any of the data protection principles; or
 - (ii) Section 10 of the Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and
 - (b) In any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relates to manual data held by public authorities) were disregarded.
4. The Commissioner concluded in his Decision Notice of 20 July 2011 that the disputed information was environmental information and was also personal data within the meaning of S1(1) of the Data Protection Act:-
- “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. To disclose the information would be unfair and so a breach of the first data protection principle. Accordingly he found that the Council was entitled to rely on Regulation 13 of the EIR for the nondisclosure of the withheld information in its entirety.
6. The Appellant submitted a detailed appeal to the Tribunal. However the detail of the appeal focusses on a discussion of the merits or otherwise of arguments with respect to the precise status of the land in question under the Highways Act and the alleged deficiencies of both the Council’s and the Commissioner’s officers in their handling of the question of the land and the disclosure of information.
7. In his Decision Notice the Commissioner noted that the Appellant raised issues with respect to the Highways Act 1980 which did not fall within his jurisdiction to consider. In his appeal to this Tribunal and in his submissions he has repeatedly explored a range of issues relating to the Highways Act and to court proceedings which have been commenced in the civil courts arising out of a dispute as to the status of the land in question. In the Directions Hearing the Tribunal reminded the appellant of the narrow and specific focus of the Tribunal; that it did not have jurisdiction to consider the merits of the dispute with respect to the land and only whether the Commissioner had made the correct decision with respect to disclosure of the four documents; however the Appellant throughout the proceedings has focussed on his concerns about the dispute with the Council concerning the land rather than the question which the Tribunal has to consider.
8. In his final submission of 9 January 2012 the Appellant gave his formulation of the issue;-

“The basis of the matter is to determine the environmental evidence that the council purport to be within the 4 complaints which must be of such quality that is capable of proving section 31 of the Highways Act 1980, either by a court or tribunal.”

He went on to state:-

“The Councils acquisition of the 4 complaints specifically for the purposes of proving section 31 of the Highways Act 1980 (regardless of whether the correct legal process has been endured) is substantiated in the following referenced documents.”

9. The Appellant considers that he has evidence (including Counsel’s advice obtained by the Council on this issue) that the complaints were obtained by the Council in order to prove:-

“public use of the passage for a period of 20 years, before such use was disputed by Mr McGinley in 1997”

He goes on to argue that: -

“ It is in the public interest to know the public user evidence details if it has been used to determine s31 of the Highways Act 1980, as it is for the benefit of the entire public of the UK in terms of a public right of way over private land.”

And also

“If the 4 complaints are produced I will make an application to make a definitive map modification order for an on behalf of the public in conjunction with Council in an unbiased manner. This will be undertaken in lieu of the council’s legal obligation under the WCA 1981 s53 as stated in the Act. It is important to note that if the council have proven s31 of the Highways Act 1980 since 1998 (as they purport) then the matter has not been registered for 14 years, and that has denied all parties concerned the right to defend their legal interests for the entire period. This includes the public interest of a potential public right of way.”

10. The Appellant, while not addressing the issue of whether the information requested is personal data, argues that its disclosure is in the public interest in that it may lead to a clarification of the rights of the public with respect to this land.
11. In resisting the appeal the Commissioner and the Council have maintained the position laid out in the Decision Notice.
12. Before proceeding to a consideration of the relative merits of the arguments the Tribunal would observe that it is arguable that the initial approach of the Council to this matter, considering it as an application for information that fell to be considered under FOIA rather than the EIR, was correct. The status under the Highways Act of a small area of urban land is a long way from the those issues listed in the definition of environmental information contained in Regulation 2(1) of the Regulations and Article 2(1) of the Directive 2003/4/EC on which it is based:-

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);”

However the point was not raised before us and given the similarities of treatment of the data protection issues in the two statutory frameworks makes no substantive difference to the analysis of the issues between the Appellant and the Respondents.

13. Regulation 13 provides:-

“(1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

(2) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (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 these Regulations would contravene—

(i) any of the data protection principles; or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(a) (which relate to manual data held by public authorities) were disregarded.

(3) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of that Act and, in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it. “

14. The Appellant in this case (the Applicant referred to in Regulation 13) is not the data subject and therefore the issue before the Tribunal is therefore whether either the first or second condition contained in Regulation 13 is met – if either is met then the material may not be disclosed.

15. Turning to the first condition. The first data protection principle is :-

“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

16. Are any of the conditions specified in Schedule 2 met? The Schedule provides:-

SCHEDULE 2

CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF ANY PERSONAL DATA

1 The data subject has given his consent to the processing.

2 The processing is necessary—

(a) for the performance of a contract to which the data subject is a party, or

(b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3 The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4 The processing is necessary in order to protect the vital interests of the data subject.

5 The processing is necessary—

(a) for the administration of justice,

[F149(aa) for the exercise of any functions of either House of Parliament,]

(b) for the exercise of any functions conferred on any person by or under any enactment,

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or

(d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

6 (1) 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.

17. The data subjects have not consented to the disclosure and indeed at least one has indicated that such a disclosure should not happen. The disclosure is not necessary for the interests of the data subjects as specified in (2) or (4). The disclosure is not necessary for the compliance by the Council with any of its legal obligations, for the administration of justice for the exercise of its functions or for the exercise of the functions of a public nature by any person. Although the Appellant has made much play of the dispute with respect to the status of the land, the simple facts are that his father has had two actions against the Council in relation to the land struck out, there is no indication that the administration of justice is obstructed by the non-disclosure and there is no evidence that it is necessary for the Council (the Data Controller for these purposes) to make the disclosure to comply with its legal obligations or to carry out its functions; nor has the Appellant demonstrated that he is seeking to exercise functions of a public nature in the public interest – rather it is clear at every stage that he is pursuing a private interest. In considering (6) the Tribunal is mindful of the decision in *the House of Commons v ICO & Leapman, Brooke, Thomas (EA/2007/0060 etc)*

where the Tribunal took the view that the first step when applying Schedule 2 Condition 6 DPA was to establish whether the disclosure was necessary for the legitimate purposes of the recipients (the public) and then to go on to consider whether, even if the disclosure was necessary, it would nevertheless cause unwarranted prejudice to the rights & freedoms of the data subject. In this case it has not been established that the disclosure is necessary in the legitimate interests of the public. The Tribunal is therefore satisfied that the disclosure would not be a fair and lawful processing of personal data since none of the conditions in Schedule 2 are met.

18. The Tribunal has considered and concurred with the extensive arguments contained in the Decision Notice, the reply to the appeal and subsequently submitted on behalf of the Commissioner and supported by the Council. In particular it concurred with the substantial public interest in public bodies being able to preserve the integrity and effectiveness of a complaints procedure, particularly in a dispute of this nature. Such complaints procedures depend for their integrity on an expectation of confidentiality on the part of those members of the public who choose to complain. Disclosure of the disputed information, which would of course be to the public generally, would diminish the likelihood of members of the public bringing their legitimate concerns to the notice of the relevant public body. In addition the Tribunal noted that Regulation 12(5)(f) provides that:-

“... a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

.....

(f) the interests of the person who provided the information where that person –

- (i) Was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
- (ii) Did not supply it in circumstances such that that or any other public authority is entitled apart from these regulations to disclose it; and
- (iii) Has not consented to its disclosure”

19. In this case there is ample evidence from the open bundle of the aggressive, insulting and bullying manner in which the Appellant has approached his correspondence with the Council. The disclosure of the personal data to the Appellant would on the balance of probabilities expose such individuals to similar conduct. Those individuals were not under an obligation to provide that information and have not consented to its disclosure. They would be significantly prejudiced by any such disclosure which would be unfair, would not significantly advance any public interest and would prejudice the public interest by weakening the effectiveness of the public authority’s investigation of complaints.

20. In the light of these considerations the Tribunal is satisfied that the decision of the Commissioner is correct in law and therefore dismisses the appeal.

Chris Hughes
Judge, First-tier Tribunal
7 February 2012