



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

**Appeal No: EA/2012/0035**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50373466**

**Dated: 30 January 2012**

**Appellant: The Plain Language Commission**

**Respondent: The Information Commissioner**

**Heard on the papers at: Field House**

**Date of Hearing: 8 May 2012**

**Date of Decision: 22 June 2012**

**Before**

**Chris Hughes**

**Judge**

**and**

**Henry Fitzhugh and Narendra Makanji**

**Tribunal Members**

**Subject matter:**

s.40 (2) Freedom of Information Act 2000

Data Protection Act 1998

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal upholds the decision notice dated 30 January 2012 and dismisses the appeal.

## **REASONS FOR DECISION**

### Introduction

1. The Appellant asked a University for information concerning the award of an honorary fellowship to a specific individual. The request was for:-  
  
“All the facts, recommendations, reports and considerations that led to the University awarding a fellowship to [a named individual] and to the drafting of the orator’s remarks.”
2. The University provided some information but withheld the name of the nominator relying on the exemption relating to personal information concerning third parties.
3. The Appellant complained to the Commissioner who on 30 January 2012 in his decision notice upheld the University in applying the exemption in s40 FOIA and withholding the information.

### The complaint to the Information Commissioner

4. The Commissioner accepted the University’s argument that the withheld information was the personal data of third persons. He concluded that the nominations process was confidential and that even the nominees were not informed of the identities of the nominators, the nominator had a reasonable expectation of confidentiality and there was concern that the release of the data would cause unnecessary or unjustified damage or distress to the data subject. While recognising the public interest in openness about the nomination process he concluded that the arguments for non-disclosure were particularly weighty and concluded that the University had been entitled not to release the information.

### The appeal to the Tribunal

5. On 12 February 2012 the Appellant lodged an appeal with the First-tier Tribunal.
6. He argued that the reliance of the Commissioner on “distress” indicated by the “tone and content of [his] correspondence” was unfair since he had not had a chance to

argue the issue with the Commissioner. He was of good character “I am not going to cause the nominator “distress” I do not want to “discuss” their nomination. I merely want to find out who they are so it will be clear whether they have a business or personal relationship with the nominee or the university”.

7. He specifically challenged the Commissioner’s findings that the nomination process was confidential “there is no evidence that the university would have given this impression to a nominator who used the nomination route they did”.
8. He indicated that he did not wish to have any information about the nominee and that he was not concerned with other aspects of the DN – merely securing the information as to the identity of the nominator.
9. In his response the Commissioner maintained the position set out in his DN.
10. He submitted that he had correctly weighed the right of the nominator not to have his personal details disclosed and the likelihood that this would be distressing against the legitimate interest in the transparency of the nominations process.
11. The Commissioner further sought to demonstrate that (contrary to the Appellant’s submission) the nominations process was confidential. He submitted that in the light of Schedule 2 condition 6 of DPA he needed to take into account distress which would be occasioned to the nominator.

#### The legal framework

12. While the Appellant made a request for information under FOIA, the nature of his request – for personal information - means that by s.40 FOIA the key issues determining whether the information should be disclosed are governed by data protection principles.
13. Section 40 provides (so far as is relevant):-
  - 40.—(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 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) 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 this Act 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),

14. In this case it is accepted that the information is the name of the nominator and this is personal data for the purposes of DPA.

15. For it to be lawful for the information to be processed the first data protection principle requires it to be “processed” fairly and lawfully and that one of conditions of schedule 2 to the DPA is met. The DPA provides that:-

“In determining for the purposes of the first principle whether personal data 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.”

16. The conditions in Schedule 2 are:-

“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,

(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.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.

#### The questions for the Tribunal

17. The first substantive issue for the Tribunal is whether the nominations process for Fellows of the University is confidential and the nominator is entitled to expect that his name will not be revealed.
18. The second issue is, in the light of all the circumstances how the balance of public interest be assessed.

#### Consideration of the evidence relevant to the appeal

19. The evidence from the University clearly set out how the nominations process was conducted and it was clear to the Tribunal that at every stage care is taken to ensure that the nominee does not know who has nominated, and the fact of the nomination is not public until the award of fellowship is formally announced:-

“Nominations for Honorary fellows are invited each year, in confidence, from members of the {University} community..

Nominees are not contacted in advance and the nominations process is conducted in the strictest secrecy...

In many instances, individuals have been nominated by more than one person. Once a nomination has been made, the nominator’s name is then taken out of the process and

the Honorary Fellow is not aware of how the nomination came to the attention of the Committee.

The process remains private and confidential until each of the Honorary Fellows has confirmed their acceptance.”

20. The University website in drawing attention to the process for nomination of Honorary fellows states:-

“A confidential on-line form can be accessed via the Vice-Chancellor’s website”

21. This process is clearly similar to other such processes such as the process by which Her Majesty awards honours. Such processes are known to operate with a degree of secrecy to protect the process and the sensibilities of those involved as nominees or nominators. The Tribunal is therefore satisfied that the process was confidential and the nominator would have expected not to be publicly identified during it.

22. The Tribunal is also satisfied that the Commissioner was right to place some reliance on the “tone and content” of the Appellant’s correspondence. It is apparent that there has for some time been an animus from the Appellant towards the nominee. Whether that is either justified or reciprocated is not a matter on which the Tribunal can comment, however from the correspondence it clearly exists and is deep-seated. Furthermore this feeling extends beyond the nominee so that, for example, in one letter he stated:-

“Your public orator’s claim (as stated in your letter of 14 September) to have known of my involvement in {details redacted} makes it hard for me not to regard his speech at the ceremony as artful deception instead of artless blundering as I had thought.”

he then asked the University to:-

“Remove the public orator from his position, which in my view he has abused by making serious errors in this matter.”

In another he states:-

“The salutation is “Dear [name redacted]”. This suggests that the author knows the Vice Chancellor well. This is presumably why the Vice-Chancellor’s replies to me have been so peevish and why he has failed to take proper action against the Public Orator or to correct all but one of the lies on your website about the fellowship.”



23. The Tribunal is satisfied that there is a significant possibility of this animus being directed towards the nominator should the identity be revealed.
24. In his appeal the Appellant argues that there is a significant interest in whether there is a connection between the nominator and the nominee. He has been supplied with a redacted version of the letter of nomination which states that these two people have not met. His concern in this respect has been answered.

Analysis and conclusion

25. The Appellant has sought disclosure of the identity of the nominator. He has argued that there is a legitimate public interest in that such a disclosure would make more transparent the process the University uses to award honorary fellowships. The Tribunal is not satisfied that such a disclosure is necessary to secure that public benefit. Furthermore to do so would undoubtedly prejudice the rights, freedoms and legitimate interests of the nominator who is entitled to have privacy respected and, if it were not would, in addition to that infraction of those rights the nominator would also be exposed to the ire of the Appellant. The Tribunal is satisfied that to release the identity would not be a fair processing of that person's data and therefore the absolute exemption contained in s.40(2) FOIA is engaged and the University was correct not to disclose the name.
26. The Tribunal therefore upholds the Commissioner's decision notice.
27. Our decision is unanimous

[Signed on original]

**Judge Chris Hughes**

22 June 2012