



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

Appeal No: EA/2012/0264

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50438500
Dated: 29 November 2012

Appellant: Paul Cardin

Respondent: The Information Commissioner

Heard on the papers: Field House

Date of Hearing: 25 March 2013

Before

Chris Hughes

Judge

and

Narendra Makanji and Mike Jones

Tribunal Members

Date of Decision: 2 May 2013

Subject matter:

Freedom of Information Act 2000

Data Protection Act 1998

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 29 November 2012 and dismisses the appeal.

Dated this 2nd day of May 2013

Judge C Hughes

[Signed on original]

REASONS FOR DECISION

Introduction

1. This request for information is out of events in Wirral Metropolitan Borough Council. In autumn 2011 a draft report (the AKA report) was submitted to the Council in connection with concerns raised around the provision of social service support to learning disabled clients. This was a lengthy document covering a period of 14 years. The report was published in an anonymised fashion, however information is widely available which enabled individuals in the report to be identified.
2. In response to a news story appearing in January 2012 in a local newspaper about the departure from the Council's employment of two senior officers: Mr Cardin made a detailed request for information:-

“Above is a link to a news story published this week in the Wirral Globe, which reports the departure "by mutual consent" of two senior officers, presumably involved at the very least, in disabled abuse.

This story relates to the findings within the report, and the learning disabled abuse which was admitted to by the Council in this document (see 7.1):

<http://democracy.wirral.gov.uk/mgConvert...>

Please provide all information you have which is connected to the departure of the above two senior members of staff. This will relate to meetings, hearings, discussions, and may be stored in the form of recorded minutes, verbatim and non-verbatim notes, e-mails, letters, memos, aide memoirs, whether electronically or manually.

Please confirm and provide details of the existence of any payments made to the two members of staff in relation to their departure, collectively or individually. This will include precise amounts, the method of payment under budget from which the payment was July.

Please confirm details of the existence of any "compromise agreement" signed by the two members of staff. This will include confirmation of any "gagging clauses" and whether a positive/neutral/negative reference was provided regarding potential future employment.

Please provide the names and addresses of organisations/bodies involved in providing legal advice to the two departing officers. Please also provide details of meetings which occurred including times, dates and matters discussed.

Please confirm the details of any disciplinary charges either planned or levelled against the two officers in relation to the failures which brought about their departure from the Council.

If either or both of the two officers were provided with a "clean bill of health" regarding their time served at the Council, please provide a copy of this/these document(s).

Please redact documents as you see fit, and remove the names of two departing officers in accordance with the requirements of the data protection act."

3. The Council replied on 8 February 2012 and indicated that it considered that the information would be exempt from disclosure under section 40(2) FOIA since it was the personal data of third parties. However the Council did not provide a refusal notice until 26 June 2012.
4. Further information was disclosed following an internal review including some salary and job title details and details of the severance packages.
5. Mr Cardin originally approached the Commissioner in March 2012. In his decision notice the Commissioner noted the Council's breaches of the Act occasioned by its delays however he upheld the Council's view that section 40(2) applied to the information withheld.
6. He found that the material was personal data within S.1 of the DPA and that even if names were removed the individuals would be identifiable from the data (indeed Mr Cardin confirmed he knew the identities of the individuals). S.1 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,

7. He then considered whether disclosure of the data would breach any of the data protection principles – would such a disclosure therefore be “fair and lawful”. The first data protection principle provides:-

“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, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

8. The Commissioner considered the arguments put forward by Mr Cardin which were effectively that he believed that the officers concerned left the Council's employment because of the findings in the report and that if that were the case the public had a legitimate interest in knowing this, there was a public safety argument that the individuals might make the same mistakes in future employment.

9. The Commissioner noted that the Council had made no statement as to whether or not the departure of the officers was related to the report. In his reasoning the Commissioner considered and rejected the arguments of Mr Cardin:-

“the withheld information does not address or mention the AKA report in any way. The Commissioner considers therefore that whilst the arguments might hold greater weight if the information would aid the public in clarifying whether the complainant's assumptions are correct, the withheld information does not in fact do so.

The Commissioner also does not consider that the disclosure of this information would meet any pressing social need of establishing what active action had been taken to respond to the findings of the AKA report. If the individuals did leave as a result of the imminent publication of the AKA report that would not be made clear by disclosure of this information.

The Commissioner also does not consider that the public risk arguments raised by the complainant holds sufficient weight in this instance to require the disclosure of any references provided to the individuals.

The information which the complainant has asked for is detailed information on personnel matters relating to the individuals concerned. This goes much further than

a request to detail of any severance payments made to the individuals. it is also about the terms under which they left the authority.

...

The public interest in knowing whether appropriate policies and procedures were followed or whether the council acted inappropriately in terms of the events outlined in the report has been served by the disclosure of the report. The individuals identified with in the report had not been convicted of any crime. public accountability for failing is within the Council's practices rests with the Council as a whole rather than with individual officers.

....

However it should also be borne in mind that severance package are often in the public interest. They allow individuals and organisations to reach a mutual agreement without long drawn out legal processes which could ultimately cost the taxpayer more than the severance package itself would cost (and which may not succeed in any event).

The Commissioner further notes that in some cases an individual's actions may not amount to conduct for which they can be legally dismissed. However where senior figures are concerned it may be advantageous for an authority to allow such individuals to leave the organisation to such an agreement in order to allow a "fresh start" within the organisation.

a disclosure of such information on a regular basis would act against the public interest if it prevents such agreement being reached in the future."

10. He concluded by finding that while there was a legitimate public interest in understanding how the Council had reacted to the report; this information would not help with that process and a balance had to be struck with respect to the rights of the individuals concerned. He found that :-

"Any pressing social need for greater transparency on the Council's reaction to the report would not be met by a disclosure of this information. He therefore considers that it would be unfair (and given the implied confidentiality of the employer/employee information, unlawful) for the purposes of the first data protection principle for that information to be disclosed."

The appeal to the Tribunal

11. In his appeal Mr Cardin did not dispute that the information was personal data but argued very strongly that disclosure was justified by:-

"the future welfare and well-being of any number of learning disabled, disabled or similarly vulnerable people.

...

The only thing preventing the situation from travelling its full course is the whim of one or two employers, who will not be made aware of any historical abuse issue because the full details have been concealed and their existence embargoed within the compromise agreement with gagging clauses.

the actions of both the authority concerned and the Commissioner amounts of failure to alert the necessary authorities to dangers, criminal conduct and enabling further abuses to occur""

12. In his response the Commissioner affirmed the position set out in the decision notice that the individuals concerned had a reasonable expectation that the information would remain confidential and considered Mr Cardin's arguments with respect to a "pressing social need". He reaffirmed the point that the Council had not confirmed whether there was any association between the officers' departure and the publication of the report, that the information did not address the report in any way and that the public funds involved in the departure of the staff was disclosed in the accounts of the Council which meant that any social need with respect to the use of public money had been appropriately met by such publication.

The question for the Tribunal

13. The issue the tribunal had to resolve was how the balance should be struck between the expectation of the individuals concerned that their employment details should not be disclosed and the arguments as to pressing social need which Mr Cardin advanced should be weighed.

Conclusion and remedy

14. In this case the arguments by Mr Cardin as to why the information should be disclosed were fully and correctly analysed and dismissed by the Information Commissioner in his original decision. As the Commissioner observed; from a consideration of the material there is no discussion of the AKA report and no linkage to it in the material. The material relates to the departure from the Council's employment of two members of staff. As the Commissioner correctly identified this is personal information relating to those individuals. Details of any compromise agreements which were entered into and the legal representatives concerned would be likely to attract legal professional privilege and not be disclosable on that basis because of the prejudice that such routine disclosures could do to the administration of justice. The Commissioner amply considered the additional costs and disruption which could be caused by the inability of an organisation to deal with sensitive personnel issues such as the departure of senior staff with a degree of confidentiality. The tribunal concurs with that view.
15. The tribunal is satisfied that Mr Cardin's speculation has failed to demonstrate any pressing social need which would justify over-reaching the rights of the individuals concerned to confidentiality of their personal data and upholds the decision of the Commissioner.
16. Our decision is unanimous

Judge C Hughes

[Signed on original]

Date: 2 May 2013