



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

EA/2014/0181

BETWEEN:

MR. JOSEPH RUSTON

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

Hearing

Held on 28 November 2014

Before Gareth Jones, Dave Sivers and Judge Taylor.

Decision

The appeal is unanimously upheld for the reasons set out below. This decision is to be treated as a substituted Decision Notice.

Steps to be taken

Within twenty working days of the date of promulgation of this decision, the London Borough of Merton is required to provide the Appellant (whose address is set out in the Decision Notice Ref FS50530093), with the requested information with the names of those in the 'To' and "cc" redacted, as well as the name of the person who is not a councillor.

Reasons For the Decision

Background

1. In September 2013, the Appellant contacted the London Borough of Merton ('the Council') about proposals to change the parking arrangements in his road. He was sent a copy of an email from an official to Stephen Hammond MP, which stated 'You also agreed to write to the Cabinet Member on this issue'. On 2 October 2013, the Appellant requested from the Council a copy of what Mr Hammond wrote to the Cabinet Member on the subject.
2. The Council initially refused to provide the requested information citing exemptions under sections 34 and 41 of the Freedom of Information Act 2000 ('FOIA')¹. After an internal review, the Council changed its position and instead claimed that s.40 FOIA (*personal information*) applied.
3. The Appellant proceeded with a complaint, and the Commissioner² found that s.40 FOIA applied to the entire text requested as being Mr Hammond MP's personal data; and that on balance, the interest in withholding the information outweighed the interest in disclosure.
4. The Appellant appealed to this Tribunal, initially disputing both that the requested information was personal data, and that the interest in withholding the information outweighed that of disclosing it. In his 'Further Submission By The Appellant', (undated), the Appellant conceded that the requested information was Mr Hammond's personal data.

The Law

5. Under the FOIA, a public authority is required to communicate information requested of it in certain circumstances and unless an exemption applies.³ Section 40(2) FOIA provides an exemption for personal data where disclosure of the information would contravene one of the data protection principles set out in the Data Protection Act 1998 ("DPA").
6. Of relevance here is the first data protection principle, which states:
'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 s.4(1) and Part 1 of Sched. 1 DPA)
7. Therefore, disclosure of data under the DPA must be done (1) fairly; (2) lawfully; and (3) meet at least one of the conditions in Schedule 2. In assessing what is 'fair', we are guided to *AB v A Chief Constable* [2014] EWHC 1965 (QB). This explains that disclosure of data under the DPA assess *fairness as a balancing of interests as follows:*

"... There is no definition of fairness in the 1998 Act. The Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, to which the 1998 Act gives effect, contains a reference to protecting privacy rights, as recognised in article 8 of the European Convention on Human Rights and in general principles of EU law: recital 10. However, I cannot accept Mr Lock QC's

¹ These exemptions concern parliamentary privilege and information provided in confidence.

² See Decision Notice of 24 June 2014 Ref FS50530093.

³ See in particular s1(1) and s.2(2) FOIA.

submission that the duty of fairness under the Directive and the 1998 Act is a duty to be fair primarily to the data subject. The rights to private and family life in Article 8 are subject to the countervailing public interests set out in Article 8(2). So it is here: assessing fairness involves a balancing of the interests of the data subject in non-disclosure against the public interest in disclosure.”
(Para 75 of *AB v A Chief Constable* [2014] EWHC 1965 (QB))

8. For a disclosure of personal information to be fair one of the conditions in Schedule 2 of the DPA must also be satisfied. The Appellant has pointed us to a condition set out in paragraph 6(1) of Schedule 2, which states:

“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.”

9. In this case, the ‘processing’ would mean the disclosure, the legitimate interests of the third party would be the public interests, and the data subjects would be Mr Hammond and any other person who is referred to in the requested information.

The Task of the Tribunal

10. The Tribunal’s remit is governed by section 58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or whether he should have exercised any discretion he had differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.
11. The issues for this Tribunal to decide are whether disclosing (or ‘processing’) the requested information would (A) be fair and (B) meet the condition set out in paragraph 6(1) of Schedule 2. Additionally, we need to consider the personal data of other persons named in the requested information. It is not disputed by the parties that disclosure would otherwise not be lawful or that the requested information is not personal data.

Evidence and Submissions

12. The Tribunal has had the benefit of submissions from the parties, a bundle of documents and a ‘closed’ bundle submitted on a confidential basis containing the requested information. We have considered all of this material, even if not specifically referred to below, and have not found it necessary to issue any part of this decision on a closed basis.

A. Would Disclosure be Fair?

13. The Commissioner’s arguments as to why disclosure would be unfair include that the
 - a. Mr Hammond has objected to disclosure;
 - b. Mr Hammond had a reasonable expectation of non-disclosure of this correspondence expressing his personal views, because MPs generally expect that their correspondence in relation to their official work to remain confidential unless they take steps to make it public;

- c. These interests in non-disclosure outweighed the public interest in parking in Wimbledon Village, and providing an example of how Mr Hammond MP was engaging with the Council on this topic.

14. The Appellant's arguments in relation to assessing fairness include that:

- a. There is no indication that disclosure would cause damage or distress, or that the comments by the MP are unprofessional or inappropriate.
- b. There is no suggestion that the disputed letter contains any information about Mr Hammond's private life. The "personal" element of the letter is merely that he has written it and it contains his views.
- c. **Unreasonable Expectation to withhold**

In relation to the Commissioner's arguments, no authority had been given for the statement that MPs expect that all correspondence to remain confidential. Where the correspondence contained no confidential, genuinely personal or otherwise exempt information, it was not reasonable to expect the information to be withheld. (He thought that MPs may expect their correspondence on behalf of individual constituents to remain confidential, because such correspondence was likely to contain the constituent's personal or confidential information which would be protected by the corresponding FOI exemptions.) He showed how the published guidance from the House of Commons of April 2010 entitled "*Freedom of Information and Members' correspondence with Public Authorities*" supported his argument.⁴

d. **Openness and Accountability**

He argued that the withholding of the requested information was not compatible with the principles of accountability and openness, whereby MPs should subject themselves to public scrutiny, and only withhold information when the wider public interest requires it. In support of this, he referred us to paragraph 8 of the *Code of Conduct for Members of Parliament* dated April 2012, which states:

"In carrying out their parliamentary and public duties, Members will be expected to observe the following general principles of conduct identified by the Committee on Standards in Public Life in its First Report as applying to holders of public office..."

Accountability *Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.*

Openness *Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands."*

I regard the ICO's decision as fundamentally incompatible with the principle that a Member of Parliament is accountable to his or her electorate."

e. **Public Interest in Disclosure**

He argued that the particular circumstances of this case made any expectation of confidentiality unreasonable and strongly indicated that disclosure would be fair. This was because:-

⁴ <http://www.parliament.uk/documents/foi/foimemberscorrespondence.pdf>

- i. *Election statements:* (a) He sought information on the policy that his MP had urged on the local authority affecting the Appellant and that of other residents in the borough and may also be of legitimate interest to those outside the area. (b) It would not be reasonable for Mr Hammond MP to have urged voters at the local elections to vote Conservative partly for its policy on parking, and then keep confidential details of the action he takes to further that policy. Withholding the requested text in order to protect Mr Hammond's privacy was incomprehensible and incompatible with the principle of accountability.
- ii. *Ministerial position:* Mr Hammond was a transport minister at the time of the request. There is public interest in knowing what a transport minister says to a local authority in his area about transport matters, and whether the Council gives greater weight to his views because of his ministerial position, or if the minister was urging this local authority to do something which did or did not comply with his own department's policy.
- iii. *Previous public statements:* Mr Hammond had publicly shared his views on parking and had been quoted in the press. If the MP did not regard his views on parking in Wimbledon Village as too personal to reveal, the Appellant questioned why it would be a valid reason to withhold the information under a freedom of information request.
- iv. *Seniority:* He argued that the Commissioner should have given substantial weight to the seniority of Mr Hammond as an elected representative with a public facing role and as a transport minister, and that it was well established that the seniority of public officials acting in that capacity is a factor strongly favouring disclosure under the s40 exemption. He referred us to paragraph 33 of the decision of *Kenneth Blake v Information Commissioner & Wiltshire County Council* (EA/2009/0026) to support this. Additionally, he quoted paragraph 18 of the decision of a First-Tier Tribunal in the *Department of Health & Information Commissioner* (EA/2013/0087), that stated:

"18...The Commissioner contends that the expectation of privacy when meeting the Secretary of State was lower for MPs than for others, and that any detrimental consequences of intrusion on privacy attracted less weight in their case... We accept the Commissioner's contention."
- f. *Lobbying:* He cited previous first-tier tribunal cases which had recognised the strong public interest in knowing about the involvement of privileged lobbyists and how they were seeking to influence government. He argued that Mr Hammond's letter constituted the lobbying of the local authority, having been informed by the MP that he asked for parking restrictions be reconsidered and removed, in the interests of local traders. He asserted that seeking to influence the Council's policy should be done openly particularly where in benefitting local traders, it disadvantaged local residents. The public were entitled to know what arguments or evidence were submitted so they could if they wished submit counter arguments; and be entitled to judge how their MP had gone about representing the potentially conflicting interests of different stakeholders. As the MP had promoted greater openness in lobbying, he

ought reasonably to expect his own lobbying activity not to be treated as confidential.

Our Finding

15. We do not need to decide whether the disputed information constitutes personal data because both parties accept that it does. If it does, we accept the Appellant's arguments that disclosing the information would be fair, having *balanced the interests of Mr Hammond as the data subject in non-disclosure against the public interest in disclosure*. This is because:

Mr Hammond's interests:

- a. In taking into account the rights to privacy of Mr Hammond, we do not consider anything in the requested information to be particularly private or personal and that this substantially weakens the weight of interest in non-disclosure. It has been accepted that the information contains Mr Hammond's views, but this is not the same thing as containing an opinion or view about Mr Hammond, such that in this case the views do not seem to us to have a strong sense of anything personal. Additionally, we have not been given any suggestion that their disclosure could cause damage or distress on any personal or professional basis.
- b. We accept that Mr Hammond has objected to the disclosure, which in itself carries some weight as representing his interests. However, besides from an expectation of a general principle of non-disclosure of MP correspondence, we have not been given any reason for this. We have been given very little from the Commissioner to substantiate why Members of Parliament would have an expectation that all their correspondence in relation to official work remain confidential, and are more persuaded by the Appellant's arguments in paragraph 14(c) in this regard.

The Public Interest

- c. We accept all the Appellant's arguments set out above in paragraph 14, and regard the weight of interest to be strongly in favour of disclosure.

B. Is condition 6(1) of Schedule 2 DPA met?

16. The Commissioner's submissions have not addressed this point. The Appellant asserts that disclosure is necessary to meet the public interest in making public what Mr Hammond has said to the Council on the subject of parking in Wimbledon Village, and that as an elected MP, accountable to his constituents, disclosure of such correspondence cannot constitute unwarranted prejudice to his interests.

Our Finding

17. For condition 6(1) to be met the processing (in this case the disclosure) must be 'necessary for the purposes of legitimate interests pursued by the Appellant as a member of the public, except where disclosure 'is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests' of Mr Hammond. The interests of the Appellant are summarised in paragraphs 14(d), 14(e) and 16. Whilst we recognise that Mr Hammond has objected to disclosure, we have not been given any strong reasons as to why this is legitimate and do not consider the requested material to be particularly personal. In short,

in the absence of arguments from the Commissioner on this point, we accept that this condition is met and the arguments set out in paragraph 16 above.

C. Other Personal Data

18. The Appellant has accepted that names of recipients of the requested correspondence may be redacted from disclosure. Given that the Appellant has not seen the requested information, it seems clear to us that the Appellant must mean names in the addressee list either after the 'To' or "CC' of the email.
19. Additionally, there are three names of individuals identified in the requested material (two of whom are also recipients). We have not received any submissions in relation to whether these should be redacted. It is clear that personal names are the personal data of these individuals, and this has not been disputed. Two individuals are councillors, and the other does not appear to be. From reading the material, it would not seem to us to be necessary under condition 6(1) in pursuing the legitimate interests described above to disclose the name of the person who is not a councillor. However, we consider the names of the two councillors in the body of the email should be disclosed to pursue interests in accountability, openness, understanding about lobbying and to better understand the material within the email. In the absence of arguments on the subject, it would not seem unfair to disclose their names given their seniority and public facing roles.

Conclusion

20. We conclude that the requested correspondence from Stephen Hammond MP should be disclosed with redactions described in paragraphs 18 and 19.
21. Our decision is unanimous.

Judge Taylor

Promulgated 15th December 2014