



IN THE FIRST-TIER TRIBUNAL

Case No. Appeal No. EA/2014/0235

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice FS50532420

Dated 25th June 2014

BETWEEN

Ms Janaki Vijayakumar

Appellant

And

The Information Commissioner

1st Respondent

And

The Department for Work and Pensions

2nd Respondent

Determined on the papers at Field House on 17th March 2015

Date of Decision 31st March 2015

BEFORE

Fiona Henderson (Judge)

Anne Chafer

And

Gareth Jones

Subject matter: s 44 FOIA prohibition of disclosure by or under any enactment

(S123(1) Social Security Administration Act 1992 and S50 Child Support Act 1991)

Decision: The Appeal is Refused

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision Notice dated 25th June 2014 which held that the Department for Work and Pensions correctly applied s44 FOIA¹.
2. The Child Support Agency (the Agency) is the operating arm of the DWP that deals with calculation and in some cases collection and enforcement of child support maintenance. Where the non-resident parent (NRP) fails to make the required child support maintenance payments the Agency has collection and enforcement powers. One such method of enforcement is a charging order over the property of the NRP which may be enforced by an order for sale. The Appellant made a complaint that the CSA had mishandled her claim for child support resulting in the NRP escaping the consequences of a charging order and an order for sale relating to his property. The Appellant's information request related to the sale by the NRP of this property.

Information Request

3. The Appellant wrote to the DWP on 6th September 2014 asking for:
 - i) *Copies of the letters sent to the [Agency] by the purchasers' solicitors relating to the sale/removal of the restriction.*
 - ii) *Copies of the letters sent to the [Agency] by the vendor's solicitors regarding the sale/restriction.*
 - iii) *Details of the solicitors employed by the [Agency] in relation to the Order for Sale Application*
 - iv) *Copies of the letters sent by the [Agency] to the vendor's and purchasers' solicitors*
 - v) *Copies of any correspondence sent by the [Agency] to the Land Registry regarding the Order for Sale/removal of the restriction.*
 - vi) *Copies of the documents on my file relating to the steps taken by the [Agency] to enforce the order for sale after it was granted.*

¹ prohibition of disclosure by or under any enactment

vii) Contact details for both the vendor's and purchasers' solicitors.

4. The DWP responded on 28th November 2013 answering request iii) but withholding the remainder of the information under s40 FOIA (personal data) this was upheld on internal review.

Complaint to the Commissioner

5. The Appellant complained to the Commissioner who conducted an investigation, the information requested in (iii) having been provided, the Commissioner's decision related to the remaining requests (i)-(ii) and (iv)-(vii). In their letter of 9th May 2014 to the Commissioner provided during the investigation, the DWP indicated that the details of and correspondence with the purchaser's solicitors were not held. They were also relying upon s44 FOIA (prohibition of disclosure by or under any enactment in reliance upon s123(1) Social Security Administration Act 1992) (SSAA). The Commissioner upheld the refusal to provide the information on that basis.

The Appeal

6. The Appellant appealed on 22nd September on the grounds that:
 - i. The Commissioner's decision does not pinpoint why the disclosing party would not possess "lawful authority".
 - ii. She has already been provided with some of the information.
 - iii. The decision is contrary to the purpose of s123(1) SSAA and
 - iv. Non disclosure is contrary to the overriding objective behind CPR part 31.Additional grounds were argued in the Appellant's response to the Respondent's replies:
 - v. the public interest favours disclosure
 - vi. the information is not "acquired" as it is generated by the DWP or supplied by the Appellant,
 - vii. disclosure to her would be lawful because she is an interested party.

- viii. she has had insufficient information given to her under the CSIR 2008.
 - ix. lawful authority is provided for under s 123(9) SSAA.
 - x. SSAA does not apply as she is not asking for social security information
 - xi. disclosure under FOIA would provide lawful authority
 - xii. the appellant is not asking for personal information, and it could be redacted
 - xiii a public interest test is imported through the law of confidence.
7. The DWP were joined by the Tribunal and opposed the appeal relying upon s40 and s44 FOIA. In addition to the absolute prohibition of s123(1) SSAA they further rely upon s50 of the Child Support Act 1991 (CSA) which includes a similar prohibition applicable to those employed as a civil servant in connection with the carrying out of any functions under this Act. The Tribunal is satisfied that the arguments relating to the CSA are identical to those relating to SSAA and does not deal with them separately in light of its findings relating to SSAA.
8. All parties indicated that they were content for the case to be determined upon the papers. The Tribunal is satisfied under rule 32(1)(b) of the GRC rules that it can properly determine the issues without a hearing. A bundle has been provided and all parties have had the opportunity to make submissions in writing. The Tribunal was not provided with a closed bundle and does not consider it necessary to view the withheld material in order to determine this appeal.

Scope

9. The Appellant complains that the DWP's reply is factually inaccurate in that it suggests that the Independent Case Examiner (ICE) investigation is concluded, whereas the Appellant has not accepted the ICE's findings and the matter is still under investigation. The Tribunal is satisfied that this is not material to the decision as it does not impact upon whether s44 FOIA is engaged or not, it is not a basis to overturn the decision under s58 FOIA. Additionally the Appellant has raised the Commissioner's Mission statement to "*uphold information rights in the public interest*" and she details numerous public interest arguments relating to transparency and accountability however, there is no opportunity for the Tribunal to take these into

consideration because pursuant to s2(a) FOIA there is no public interest test for absolute exemptions and s2(3)(h) FOIA designates s44 FOIA as absolute.

10. S44 FOIA is the primary argument which we are satisfied applies to all the requested information, consequently there is no need for us to consider s40 FOIA separately and we therefore do not.

Prohibition of disclosure by or under any enactment

11. S44 states:

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

(a) is prohibited by or under any enactment...”.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within ... [paragraph] (a)...

12. The prohibition relied upon is found at s123 SSAA 1992 which states:

*(1) A person who is or has been employed in social security administration or adjudication is guilty of an offence if he discloses without lawful authority any information which he **acquired**² in the course of his employment and which **relates** to a particular person...*

s123(5) sets the penalties of imprisonment, a fine or both following conviction.

Neither Confirm nor deny

13. The Commissioner in his decision notice held that the proper application of s44 would be neither to confirm nor to deny that the information was held pursuant to s44(2) FOIA because confirming that information is or is not held would confirm whether certain types of information exist and this is itself information acquired in the course of the employment and in the context of the terms of the information request it would relate to a particular person. For the reasons set out below we agree that this section is engaged and that the appropriate response would be to have relied upon s44(2) FOIA.

² Emphasis added

14. We make the observation that the original response in which s40 FOIA was relied upon and the provision of the summary at p73-77 of the open bundle would appear therefore to be contrary to the neither confirm nor deny response, however, as set out below this is not a basis for holding that further information should be disclosed pursuant to FOIA.

Is s123 SSAA engaged?

15. The DWP argues and the Tribunal accepts:
 - i. That the Agency is part of the DWP and the DWP's employees are "*employed in social security administration or adjudication*" by virtue of Part 1 of Schedule 4 to the SSAA.
 - ii. The information requested would be information acquired in the course of employment.
16. It is argued by the Appellant that some of the information is not acquired as it has been generated by the DWP (e.g. letters written in pursuit of the Appellant's claim for child support) however, the right to disclosure under FOIA relates to information not documents. We are satisfied that the information contained within the documents (whether generated or received) has been acquired by the employees in the course of the exercise of the Agency's functions otherwise they would not know to whom to write and about what (e.g. who are the parties and their representatives, the address of the property, the sums involved, the timescales involved and the legal parameters applicable). Consequently we are satisfied that the information is acquired.
17. We are also satisfied that it relates to a particular person (namely the NRP) as it arises out of the sale of his property and his associated CSA liabilities.

Lawful Authority

18. The Tribunal has gone on to consider whether there is lawful authority for disclosure under FOIA. The Appellant argues that disclosure to her would be lawful because she is an interested party. Disclosure is to the world at large (i.e. any or all members of the public) and not specifically the Appellant as an interested party consequently the fact that she is an interested party is immaterial under FOIA.

19. The Appellant's arguments rely upon the information with which she has already been supplied in support of her contention that it would be lawful to provide the information in response to her request (if not the existing disclosure would be unlawful). The Tribunal observes that even if she had had information disclosed to her in breach of the prohibition that would not provide a basis in law for an additional breach by disclosure of further information contrary to the prohibition.

20. The DWP point to the Child Support Information Regulations (CSIR 2008) which allow for disclosure of information relating to one party to a maintenance calculation to another party to that calculation where in the opinion of the Secretary of State such information is essential to inform the party to whom it would be given as to specified factors relating to the calculation³ and its application including:

Regulation 13(1)(g) - why a decision has been made not to enforce, or to cease to enforce, under the 1991 Act the amount due under a maintenance calculation.

21. The Appellant argues that she has not been provided with sufficient information to pursue her complaint, and she sets out her dissatisfaction with the conduct and investigation of the Agency. Whilst we share her concerns about the apparent inaction of the Agency when notified of the impending sale prior to completion, we have no jurisdiction to adjudicate on this point and it being limited to her personal interest it is not a factor we can take into consideration under FOIA.

22. She argues that she has supplied some of the information to the Agency, so how can it be unlawful to disclose it to her. The Tribunal notes that s123 SSAA does not specify how the information should be acquired and we are satisfied that it would include information supplied as well as information generated e.g. by calculation. The fact that the information was supplied by the information requestor does not make it lawful to then disclose the information to the general public under FOIA.

23. The Appellant maintains that lawful authority is provided by s 123(9) SSAA which provides;

... disclosure is to be regarded as made with lawful authority if... made

(a) in accordance with his official duty –

(ii) by a person employed in... the investigation of complaints...

³ Regulation 13

The Tribunal does not comment on whether the information requested might be disclosable to the Appellant pursuant to the provision above, because that would be the enforcement of an individual right concerning disclosure to the Appellant alone. This Tribunal only has jurisdiction to consider disclosure to the public under FOIA and s123(9)(ii) does not provide lawful authority to disclose the information to the public.

24. The Appellant argues that she is not asking for social security information so s123 SSAA ought not to be applicable. As set out above the prohibition is wide and not limited to social security information, it applies to all information acquired by a relevant employee in the course of their employment.
25. The Appellant suggests that disclosure under FOIA would provide lawful authority to enable disclosure notwithstanding s123 SSAA. She states that if the Tribunal made an order that the Agency is obliged to disclose copies of its correspondence, there could be no question of them being guilty of an offence as the order itself would provide "lawful authority". We are satisfied that disclosure under FOIA cannot trump a prohibition in another enactment and this is specified in the terms of s44 FOIA which specifically refers to the exemption applying if there is a prohibition on disclosure "*otherwise than under this Act*".
26. The Appellant states that she is not asking for personal information. The terms of s123 SSAA do not limit the information to personal information as long as it "relates" to a particular person, as set out above we are satisfied that it does since the subject matter is the NRP's sale of the property. She suggests that disclosure could be made in redacted format. The terms of s123 SSAA do not require the person to whom the information relates to be identifiable by others, merely that the information disclosed must relate to a particular person. The information would still relate to that person even if they weren't named in the disclosure.
27. Disclosure under FOIA is a different process to disclosure pursuant to other legal procedures e.g. the CPR. The Tribunal would be exceeding its remit if it were to determine what disclosure would be appropriate in other jurisdictions.
28. The Appellant maintains that a public interest test is imported into consideration of this exemption because "*the law of confidence recognises that a breach of confidence may not be actionable when there is an overriding public interest in disclosure*". The law of confidence is a common law right which exists separately

from a statutory prohibition. The DWP are not relying upon the law of confidence but a statutory prohibition to which the case law on confidence does not apply.

The Appellant's Own Personal Data

27. The DWP originally relied upon s40(1) FOIA⁴ (personal data of which the requestor is the data subject) in relation to request (vi), in so doing they ignored the fact that the original request was made under FOIA and the DPA. Although the internal review of 1st April 2014 told the Appellant that she was entitled to make a SAR upon payment of £10, it was not acknowledged then or before that the terms of her original request were under the Data Protection Act. We understand that the Appellant's motives for making the FOIA request were to obtain information to enable her to understand the situation better and to inform her complaint. We cannot comment upon what disclosure she might get pursuant to a SAR since this appeal is under FOIA and we have no jurisdiction to consider what should have been provided under DPA.

Conclusion

28. For the reasons set out above we refuse the appeal and uphold the decision notice. Our decision is unanimous.

Dated this 31st day of March 2015

Fiona Henderson
Tribunal Judge

⁴ Before the Commissioner the DWP relooked at this element of the request and determined that it fell under s40(2) as it related to the NRP's personal information.