



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

Information Tribunal Appeal Number: EA/2015/0104
Information Commissioner's Decision Notice Ref: FS50563030

Date Promulgated: 26th October 2015

DR PEARL HETTIARATCHY

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

Hearing

Held at Fox Court, London on 17 September 2015 on the papers
Before: Anne Chafer, Paul Taylor and Judge Claire Taylor

Decision

The appeal is upheld in part for the reasons set out below, such that we find partially in favour of the Appellant.

Steps to be taken

We find that the Ministry of Justice must within 20 working days disclose the data described in the Open Appendix to this Decision. (These disclosures are described as Category B in paragraph 22 and 24 of this Decision.)

Our Reasons

Background

1. The Mental Health Review Tribunal ('MHRT') hears appeals from individuals detained as patients in psychiatric hospitals. The panel comprising a tribunal consists of judges, specialist lay members, and medical members.
2. The retirement age for medical members is 70. However, service may be extended for up to one year at a time until the age of 75. This requires the Lord Chief Justice, Senior President or other appropriate person, with the concurrence of the Lord Chancellor, to consider it in the public interest to do so. The Information Commissioner ('Commissioner') has explained that he understands that it is the Ministry of Justice's policy that a business case for such extension is prepared whenever a member requests their service be extended beyond age 70. A business need will be established if there is a significant shortage of the particular type of judicial office holder in a specific geographical area.
3. On 22 August 2014 the Appellant requested from the Ministry of Justice ('MoJ'):

"I would like to have the following information under the freedom of information act. Public bodies have to be open & transparent about their appointments and reappointments.

 1. *How many MHRT medical members applied for extensions & how many were granted this past 12 months. A break down by gender, ethnicity, age, length of service.*
 2. *How many were declined & again a similar break down to above.*
 3. *In particular this batch in which I was declined – how many were granted/declined & a similar breakdown."*
4. (For the purpose of this appeal, we understand that the Appellant no longer seeks a response to her question 3 in paragraph 3 above.)
5. The MoJ subsequently confirmed that it held the requested information and relied on s.40(2) Freedom of Information Act 2000 ('FOIA'), to withhold its disclosure, on the basis that the requested information was personal information which, if released, could lead to the identification of the individuals concerned.
6. Following an internal review, the MoJ provided the Appellant with the number of MHRT medical members who had applied for extensions in the preceding 12 months, broken down by gender as a partial response to the Appellant's first

question. It maintained its position that the other requested figures were exempt from disclosure pursuant to s.40(2) FOIA, explaining that these were low such that the requested breakdowns could potentially lead to the identification of the individuals involved.

7. The Appellant complained to the Commissioner who investigated the matter and decided that the requested information was exempt from disclosure under s.40(2) FOIA. The Appellant now appeals the Commissioner's decision.

The Task of the Tribunal

8. The Tribunal's remit is governed by s.58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The Tribunal is independent of the Commissioner, and considers afresh the Appellant's complaint. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner. *(See also paragraph 17 below.)*
9. We have received a bundle of documents including submissions and a copy of the requested information. We have reviewed all material presented to us even if not specifically referred to below.

The Law

10. A person making a request of a public authority for information is generally entitled to be informed in writing whether it holds the information requested and have the information communicated to them. *(See S.1(1)FOIA).*
11. However, the authority is not required to disclose the information to the extent that an exemption applies.

Personal data Exemption

12. So far as is relevant to this appeal, section 40(2) FOIA provides:

"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...

13. 'Personal data' is defined under Section 1(1) DPA as:-
"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,
and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual

Where 'data' is defined as,

"data" means information which—
(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
(b) is recorded with the intention that it should be processed by means of such equipment,
(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, ...
(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68; or
(e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d).

14. 'Sensitive personal data' is defined in section 2 of the DPA to include
"(a) the racial or ethnic origin of the data subject".
15. The implication from the submissions is that the Appellant is not seeking the information of which she is the data subject. Accordingly, s40(1)FOIA is not relevant here, but s40(2) FOIA is. The first data protection principle has been identified in this appeal as of relevance. This provides that:

"1. 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." (See paragraph 1 of Schedule 1 of the Data Protection Act 1998 ('DPA').

16. In summary, for our purposes, personal data may not be disclosed if doing so would contravene the first data protection principle. This requires it to be 'processed' fairly and lawfully and not to be processed unless one of the schedule 2 conditions is met. The Upper Tribunal construed paragraph 1 of Schedule 1 DPA to mean that the conditions arise independently of the general issue of fairness and considered that the question of fairness may be assessed first. (See

Farrand v Information Commissioner [2014] UKUT 310 (AAC) paragraph 20. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions or, where relevant, one of the Schedule 3 conditions.

Evidence and Submissions

17. The Appellant appeals the Decision. For the purposes of this case, the Tribunal's remit is limited to deciding whether information requested has been correctly withheld on the basis of whether an exemption has been correctly relied on and applied to the information requested. We cannot rule on other matters such as whether the Appellant has been fairly treated by the public authority, unless they are relevant factors to consider when applying the exemption. She has not presented her full arguments in a submission. However, we have looked at the different letters to find the relevant arguments and any points that might favour her case. On this basis, the Appellant's grounds or issues for the Tribunal might be summarised as:

1. The requested material was wrongly withheld because it is not personal data or sensitive personal data.
2. To the extent that the requested information is personal data or sensitive personal data, it should still be disclosed because the Commissioner failed to give proper, full and weighty consideration to (a) the interrelationship between FOIA and the Equality Act 2010; (b) the fact that the requested information is crucial to enable the Appellant to understand the true reason why her MHRT service was not extended, and (c) other factors.

Issue 1. Is the requested material personal data/sensitive personal data?

18. The arguments before us on whether the requested material constitutes personal data, focus on whether living individuals would be identifiable from that data and information which is in the possession of, or is likely to come into the possession of anyone in the public. (*See paragraph 13 above*). It is the Commissioner's view that the number of medical members whose contracts were extended or terminated would have needed to be greater than five, so as not to be identifiable. The Commissioner has argued that in respect of a number of the requested breakdowns, the relevant figures are five or below and it may be possible for individuals to be identified from the requested information, particularly where the relevant numbers are very low. (*As explained further in paragraph 29 of the Decision Notice*¹.)

¹ This stated: '*The Commissioner considers that the chances of any member of the public being able to cross-reference this information to identify specific individuals is not high but given the low numbers involved there is a risk that specific individuals could be identified by a person with knowledge of MHRT matters. For example, it is possible that a MHRT member who applied for extension, or other MHRT applicants may potentially use any*

19. The Appellant contends that certain of the requested information would consist of figures that exceeded five individuals, and that accordingly the information does not engage s.40(2) FOIA and should be disclosed.
20. She questioned why the disputed information would risk identification of individuals. She explained that she worked in Hampshire and the Tribunal covers the whole country, so that she would not know every doctor working for the MHRT throughout the country.
21. The Commissioner responds that even where some numbers are greater than five, they may allow for “*identification of individuals by extension; that is, by allowing for deduction as to the figures in other categories*”, so that the individuals involved may be identified from the data, such that the information would constitute personal data for the purposes of the DPA and s.40(2) FOIA.

Our Finding

22. Part of the undisclosed or disputed information relates to the breakdown by gender, ethnicity, age, length of service of the MHRT medical members who were either granted or refused an extension in the 12 month period (‘category A’). The rest relates to a similar breakdown for the total numbers of applicants, to the extent not already disclosed (‘category B’).
23. In relation to category A, the MoJ has already disclosed total numbers of MHRT medical members who applied for extensions and the breakdown by gender. As a result, disclosing one category (whether those accepted or rejected) would consequentially mean disclosing sufficient information to ascertain the other. Therefore, even if those figures that were greater than five were now disclosed, it would be possible to deduct them from the totals provided and work out the remaining figures which would not be greater than five. Accordingly, we find that disclosing figures of five or under would constitute disclosing personal data and in some cases sensitive personal data² such that s40(2) FOIA would be engaged by doing so, such that Issue 2 would need to be considered in relation to this material.

information disclosed to identify other individuals’ rejection status, length of service and age. Therefore, on the balance of probabilities, the Commissioner accepts the information is personal data.’

² See paragraph 31 of the Decision Notice, which has not been disputed. (This stated: ‘*With respect to that part of the complainant’s request relating to a breakdown by ethnicity of the medical members who applied for an extension, MoJ said: “We consider the ethnicity of a subject to be sensitive personal information as defined in Section 2(a) of the DPA.”*’)

24. In relation to category B, the data that has been presented to us has been grouped in such a way that if it were disclosed in its present arrangement figures of five or under would be disclosed or able to be deduced. However, we do not consider that in all cases it needs to be grouped in this way. Consequently the breakdown of figures could have been arranged such that totals over five could have been disclosed, either simply in compliance with the request or, if appropriate, after having clarified the matter with the Appellant under s16 FOIA (which sets out the public authority's duty to advise and assist). We have set out in the Closed Appendix to this decision, how the data should be regrouped so as to provide this disclosure without disclosing figures of five or below.
25. As regards the risk of identification, we accept and adopt the Commissioner's reasoning in paragraph 29 of the Decision Notice. This is particularly given that we have reviewed the disputed information and that a disclosure made under the FOIA is deemed to be a disclosure to the world at large; therefore it is conceivable that there will be those who could identify an individual on the basis of the breakdown of gender, ethnicity, age, length of service and other information within their possession.

Issue 2. Did the Commissioner properly consider all relevant factors in deciding fairness of disclosing relevant factors?

26. The arguments we have deduced from reading the Appellant's documents as relevant to whether the Commissioner properly considered the relevant factors are:
 1. **Discrimination and equality:** The Appellant feels she was discriminated against by the public authority and wants to understand the reason. She considers there to be an interrelationship between FOIA and the Equality Act 2010 asserting that the general and specific duty on all public bodies to be open and transparent in the processes and procedures are necessary so that it can be seen whether there is discrimination on the basis of age, gender, sexuality, disability, ethnicity and this can then be addressed.
 2. **Transparency and real reason for rejection:** She considered there was particular reason in her case to have the requested information as she saw it as crucial to understand the 'true reason' why her contract was not extended on first attempt. This was because (a) the reason she had been given was that there were sufficient medical members already sitting in her area. She stated that she knew this not to be the case and that when, within a week of her contract being terminated, the Deputy Chamber President had requested all members that were still in the tribunal to extend their 'sittings' from 108 to 140 a year and subsequently requested a higher figure; and (b) she was aware that her husband and other colleagues had repeatedly been successful in applying for

extensions each year, and she had been refused on her first attempt.

3. **Unfair decision:** The Appellant's letter to HHJ Sycamore of 17 July 2014 indicated various factors in favour of her extension such that the decision may have appeared to be unfair. For instance, she had explained that she brought extensive relevant specialist knowledge and experience to the post. Her impression was that the disproportionate number of Black and Ethnic Minority patients before the Tribunal appeared to cooperate, relate and participate more fully when she was on the panel as a female from an Ethnic Minority. She regarded having a diverse panel of tribunal Members as enhancing the tribunal process and the patient's experience of it and she had expertise in diversity and equality and was very flexible in her sittings.

27. The Commissioner's position is that disclosure of this information would be unfair and in breach of the first data protection principle. As such section 40(2) FOIA is engaged and the further information relating to the exact figures should be withheld. His reasoning included that the requirement pursuant to this first data protection principle that data must be processed fairly was a general one, independent of the specific conditions. Accordingly, he considered that if the requirement for fairness was not met, there was no need to consider the specific conditions. He focused arguments on considerations of fairness, based on whether the information was sensitive personal data; the potential consequences of disclosure on the individual whose data was requested and their reasonable expectations; and any legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the individuals who are the data subjects³:

1. **Disclosure would cause distress:** The requested information, if disclosed, would reveal information about individuals who applied to extend their appointment as a medical member of the MHRT and the outcomes. Releasing this information would not be fair and may cause distress to the individuals involved.
2. **The individuals would reasonably have had no expectation of disclosure:** The individuals who could be identified are, or were, MHRT members who would not have any expectation of this information being disclosed. These individuals would not have expected that information about their age, length of service or ethnicity would be disclosed to a third party as a result of an application to extend their membership of the Tribunal. There was likely to be an implied confidentiality in the process to request to

³ See paragraph 23 of Commissioner's Response of 28 May for more detail.

extend such an appointment and therefore there would be no expectation of disclosure.

legitimate interests of the public

3. The Commissioner recognised that the need to balance the rights and freedoms of the data subject (ie the medical members) and the legitimate interests of the public (to whom the information would be deemed to be disclosed to under the FOIA). In particular, despite the reasonable expectations of the members and the fact that damage or distress may result from disclosure, it may still be fair to disclose the requested information if it could be argued that there is a more compelling public interest in its disclosure.

4. The Commissioner recognised a legitimate public interest in the release of information that increased transparency and accountability about the way in which public authorities operate, particularly with respect to judicial office holders. In that respect he noted that MoJ had disclosed the total number of members applying for extension, broken down by gender. However, he did not consider that disclosure of the remaining information potentially identifying individuals would provide greater understanding and it would prejudice the rights and freedoms of those individuals. The Commissioner therefore considered that the rights and freedoms of the data subjects outweighed the public's legitimate interest in disclosure of this information.

5. The Commissioner accepted that the Appellant had a real interest in the requested information, namely as it might relate to the reasons why her service as a MHRT medical member was not extended.

Sensitive Personal Data

6. The Commissioner did not consider that a schedule 3 condition of the DPA was met to allow the fair processing of the sensitive personal data within the scope of the request.

Equality Act

7. The Commissioner argued that the interaction between FOIA and other legislation (ie the Equality Act 2010) was not relevant to ascertaining whether a request for information has been dealt with by the relevant public authority in accordance with the FOIA. He argued that the disclosure of the information must be fair to the data subject, but assessing fairness involved balancing their rights and freedoms against the legitimate interest in disclosure to the public.

Our Finding

28. We have accepted that individuals may be identifiable from disclosure of this information. Therefore, depending on the information already available to the public about that individual, the disclosure could reveal potentially, an individual's ethnic background, age and rejection/acceptance status in the application for extension. We accept that some of this information could potentially cause distress and that in making the application the individual would legitimately expect that elements of their identity and outcome of application would not be made known under an FOIA request. We consider these to be strong arguments in favour of disclosure being unfair.
29. We consider the Appellant's strongest argument for disclosure to be to the extent that disclosure would assist the interest in transparency, and assist in ensuring accountability by an authority in complying with the Equality Act and not discriminating against individuals. (See paragraph 26(1) above). We recognise this to be a weighty consideration, and general public interest over and above the Appellant's personal interest.
30. We understand that the Appellant would want to know the true reason why she was rejected, particularly where she considers the decision to be unfair. However, we are not convinced that disclosing the information would necessarily assist her in this or that her personal interest would be weightier than another's rights to expect their personal information not to be disclosed to the public at large.
31. On balance, we consider that the disclosure of personal and sensitive personal data would nevertheless be unfair to the individuals who could be identified. This is based on the particular facts of this case, and should not be considered to create any form of precedent.

Conclusion

32. In conclusion, we find that MoJ should disclose certain data in line with the Open Appendix.

Other

33. We note that we have produced a confidential or Closed Appendix to this decision because it discloses part of the disputed information, and as such has an extra sentence that is not in the Open Appendix.

Judge Taylor, 7 October 2015

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OPEN APPENDIX TO THE DECISION

In partial answer to the Appellant's question - "*How many MHRT medical members applied for extensions & how many were granted this past 12 months. A breakdown by gender, ethnicity, age, length of service*" - and further to paragraphs 22 and 24 of our decision, we consider the following should be disclosed:

The breakdown by ethnicity, age, length of service of the members who applied for extensions:

- Length of service: to be grouped so as to exceed five: in groupings of (a) 6-11 years; (b) 12-14 years; and (c) 15 to 20 years.
- Ages: to be grouped (a) 70; (b) 71-72; (c) 73-74
- Ethnicity: to be grouped: (a) Asian background; (b) Asian Indian; (c) Asian Bangladeshi/Asian Pakistani/Mixed White and Asian/Asian or Asian British/Other Ethnic Group; (d) British; (e) not stated.

[Following sentence redacted from open Appendix.]