



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL UNDER  
SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

**Appeal No. EA/2013/0268**

**BETWEEN:**

**DAVID HICKS**

**Appellant**

**-and-**

**INFORMATION COMMISSIONER**

**Respondent**

**Before**

**Brian Kennedy QC**

**John Randall**

**Date of Hearing: 25 July 2016, at Peterborough Court House, Bridge Street,  
Peterborough.**

**N.B.:** In circumstances beyond our control the Tribunal met with only two members. The Appellant indicated his desire, and consent, to proceed with the Appeal to be decided by a two-member panel which constituted this Tribunal.

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**DECISION**

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**Subject matter:** Application of section 40(2) (personal information), of the Freedom of Information Act 2000 (“FOIA”).

The Tribunal dismisses the appeal.

## **REASONS**

### **Introduction:**

1. The decision concerns an appeal of a Decision of the respondent (“the Commissioner”) dated 20 November 2013, reference: FS50493950 (“the DN”).
2. In the DN the Commissioner held that the Public Authority, in this case the Peterborough Regional College (“the College”), had correctly withheld requested information from the appellant pursuant to s 40(2).
3. The Tribunal is provided with a bundle of documents referred to herein as the Open Bundle, (“OB”) pages 1 – 252.

### **Factual Background to this Appeal:**

4. Full details of the background to this appeal, Mr Hick’s request for information and the Commissioner’s decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of whether a request for information relating to a named individual’s employment details was correctly withheld under section 40(2) of the FOIA as it would breach one or more of the Data Protection Principles of the Data Protection Act 1998 (the “DPA”).

5. **History and Chronology:**

- 2003 Appellant on work placement as Administration Assistant.
- 2004 Appellant unsuccessfully applies for a post as part-time Administrative Assistant before launching Employment Tribunal Proceedings. The Tribunal proceedings were unsuccessful and a subsequent County Court action was struck out with a costs order against the Appellant. Permission for a JR was refused by the Divisional Court of the Court of Appeal.
- 2008 Similar request to Peterborough Regional College (“the College” herein) and a complaint to the Commissioner
- 24 Feb 2011 DN FS50239091 – College had provided the information requested
- 21 Mar 2011 Appeal EA/2011/0078 to the Information Tribunal. The Notice of Appeal showed evidence that the named individual’s job title is “Administration Assistant” and has been since 2004. It was emphasised in the appeal “the College does not hold [name withheld] job title before that date”. Appeal struck out as no evidence to dispute that the College did not hold further information and permission to appeal to UT refused.
- 7 Jan 2013 Request for details of named individual’s employment position prior to February 2004
- 24 Jan 2013 College withholds information under s40(2) personal data of a third party and provided guidance on s40 on the MoJ website.
- 30 Jan 2013 Request for an internal review.
- 18 Feb 2013 College upheld its original position
- 11 March 2013 Appellant sought to further appeal the decision.
- 19 March 2013 the College provided further information re corrected dates on the individual’s CV with that individual’s consent.
- 25 March 2013 Appellant confirmed he wished to continue with a further

appeal.

3 April 2013 College reviewed the decision and upheld refusal under s40(2).

11 April 2013 complaint to the Commissioner

17 July 2013 Commissioner confirmed that the scope of the case would be limited to information relating to the correct job title before February 2004 and the exact date her employment ended

7 Aug 2013 Commissioner closed the case.

20 Nov 2013 DN explaining refusal

6 Dec 2013 Notice of Appeal

17 Jan 2014 Response by Commissioner inviting appeal to be struck out

24 Jan 2014 Reply by Appellant

17 Feb 2014 Further submissions by Appellant

10 March 2014 Appeal struck out by first tier tribunal

27 March 2014 Notice of Appeal to UT

17 April 2014 Permission to Appeal granted on basis of the allegations of a different or “inconsistent” approach by the Commissioner, rather than an error of law,

6. **Relevant Law:**

***s1 FOIA General right of access to information held by public authorities.***

- (1) Any person making a request for information to a public authority is entitled –
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
  - (b) if that is the case, to have that information communicated to him.

**S40 Personal Information**

- (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), and
  - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).

7. It is perhaps helpful to set out a summary of the history of this appeal in some more detail.

8. **Respondents Decision Notice 20 November 2013:**

The College explained to the Commissioner during the course of his investigation, that it had searched the individual's personnel file which is held in its Human Resources department and had also conducted a search of records in the Finance department, but as it retains its accounting records for a period of six years it no longer held this information. The Tribunal notes that the significance of the accounting records is that the individual was an agency worker prior to her direct employment by the College. During the period in which the individual was an employee of the agency the only records the College would require would be of the contractual relationship between the College and the agency. The usual employee records would be the responsibility of the agency, as employer. The Commissioner was satisfied that no further information is held beyond that which the College has refused to disclose under s40(2).

The request relates to the individual's position prior to their employment by the College. The Commissioner found that the entirety of the withheld information constitutes personal data. The College informed the Commissioner that it discussed the request with the individual (who is a relatively junior member of staff) and they did not consent to the disclosure to the Appellant. The Appellant is known to the named individual and he had requested access to their personal data on previous occasions over many years. Disclosure would cause distress to the individual. In summary the DN found s40(2) had been correctly engaged.

9. **Grounds of Appeal 6 December 20113.**

- a) The College has not complied with section 1 as it has never communicated with the Appellant to confirm or deny that it holds the information;
- b) The Commissioner's Guidance on Personal Information states that information about an individual acting in a work or official capacity will normally be disclosed;
- c) The Commissioner has previously upheld previous similar requests by the Appellant;
- d) The correction of the individual's CV was not directly confirmed to the Appellant by that individual, nor did they confirm photocopies of their signature, nor did they appear at an Employment Tribunal hearing in person;
- e) The mistake on the CV [*there was a typo giving the date of a previous employment as 2004 when the correct date was 1994*] is of such magnitude that one cannot place any reliance on any information provided within that CV;
- f) It is inappropriate for the College to have destroyed any information, as the Code of Practice states that records should be kept for as long as needed by the authority, and this must include needed to satisfy any requests under FOIA, and they should have kept an audit trail of its destruction schedules;
- g) It is not reasonable to expect that something as innocuous as a job title should be withheld from disclosure;

- h) It is of considerable public interest to verify and authenticate documents [*i.e. the individual's CV*] used in legal proceedings, and to ensure that the College is abiding by its duties under the DPA;
- i) The Commissioner's decision to close the case was made without any explanation of what the College's response to the request had been

**10. The Commissioner's Response 17 January 2014:**

The Commissioner provided the background outlined in the chronology above. Numerous informal attempts were made by the Commissioner to resolve the complaint informally with the Appellant but he remained dissatisfied.

Regarding the typographical error in the CV, this was fully explained to the Appellant in a witness statement to the County Court, and furthermore it is obvious from the order in which the individual set out her career history that this was merely a typo. The full extent of the information was already disclosed to the Appellant in the County Court witness statement, but as FOIA disclosure is made to the public at large there is no legitimate interest in disclosing personal information of this individual. The individual explicitly refused consent to disclosure, has been distressed by the Appellant's "obsessive" interest in her and is clearly a very junior member of staff, so there is no public interest in disclosing this information.

For the Appellant to claim that the College has not responded to his request is patently untrue, and disclosure of any information by a public authority through the Commissioner suffices, as the Appellant was informed by the Upper Tribunal who described his appeal as having "no underlying merit...[and] at best seeks to take a point of extreme technicality".

Attempts to verify or authenticate a witness statement are not outcomes, which the Tribunal can deliver. The Commissioner applied to strike out the appeal.



10. **Appellant's Response 24 January 2014:**

The Appellant maintains that he was previously told by the Commissioner that one would expect the information requested to be disclosed, and that the College had not directly communicated to him that they do not hold the information. The individual has never provided an original signature, only photocopies and therefore it is reasonable to dispute any information provided in any of the documents.

11. **Further Submission by the Appellant 17 December 2014:**

The purpose of the request is to confirm whether or not the information in the witness statement and the CV is correct, as the discrepancies would suggest they may not be. This would provide a full picture of what has happened and confirmation of authenticity would be of considerable public interest.

12. **FTT Decision 10 March 2014:**

The Tribunal cannot conclude that the Appellant's stated purposes constitute a legitimate interest making necessary the disclosure of personal data. If anything, the argument is all the other way. Mr Hicks' dispute with the college has been taken to its limits through the Tribunals and the Courts. The appeal has no reasonable prospect of success and it would be unjust to the ICO to permit it to continue. The appeal was struck out by the FTT.

13. **Notice of Appeal to UT 27 March 2014:**

- a) The Commissioner has taken an entirely opposite approach to the earlier 2009 request. The appellant cites *South Lanarkshire Council v Scottish Information Commissioner* (2013) UKSC 55 which concerned a request

for the number of employees of a particular grade that were placed at a specific pay scale level. The Court found that the information could be released so long as no individual was identifiable. He again disputes the veracity of the CV and states that he never received any written confirmation from the College to show that the information was correct.

- b) Prior to the Employment Tribunal, the Appellant was unaware of the identity of the named individual until her name was released by the Human Resources Officer for the College. If her CV has in any way been altered, this is a breach of the fourth DPA principle (accuracy of personal data). The College cannot rely upon data protection whilst breaching those same principles. There is, the appellant argues, a great public interest in highlighting potential wrongdoing by public authorities.
- c) The ICO Guidance stresses that information about an employee's actions or decisions in the course of their job is personal data but given the need for accountability and transparency there must be some expectation of disclosure. Given that they approved of earlier disclosure regarding the named individual's employment status, it is inconsistent now to refuse the present request.
- d) The Appellant denies there has been any correspondence with the College in which the College either confirms or denies that it holds the information, and therefore the College is in breach of FOIA.

14. **The Commissioner's Response 29 July 2014:**

The College had previously agreed to disclose some information in 2011 about the individual's employment with the College from 2003/4-2009, and the Commissioner was satisfied that all information had been disclosed, but held that the College had breached s10 FOIA by not doing so within 20 working days. The Appellants attempts to appeal this decision were unsuccessful.

The present request addresses the individual's employment prior to 2004, when the individual worked in the College in a much more junior role but was in fact employed by an agency. There is no inconsistency in approach, as FOIA is fact specific. Furthermore the Commissioner is not bound by his previous decisions and any alleged inconsistency could not indicate an error of law on the First Tier Tribunal's decision. Given that there is no error of law identified in the FTT's decision, permission to appeal should not have been granted under s11(1) of the Tribunals, Courts and Enforcement Act 2007.

The Commissioner finally pointed out that the Appellant, having received the individual's CV in the course of the County Court proceedings, is actually already in possession of the information he seeks through this request. Given that FOIA disclosure is made to the world at large, this appeal is "entirely academic and without merit".

**15. Appellant's Reply:**

*His reply repeats largely his earlier submissions and does not address the Commissioner's last response save to state that he believes there to be an inconsistency in the approaches taken and that the earlier request was for more detailed information*

16. **UT Decision 7 March 2016:**

**Decision remitted to FTT for fresh hearing**

A grant of permission to appeal is no more than a judge saying that there is an arguable point of law, not that he accepts that he has erred in law.

The Commissioner justifies the difference in approach between the two requests by reference to the material difference in the individual's employment positions in the two time frames. This approach may be justified, but there is an arguable or triable issue and the FTT ought not to have struck the appeal out without hearing.

17. **The Appellant's Submissions 3 May 2016:**

*Again these are repeats of his previous submissions criticising errors in the CV and denying any supportive evidence of the Commissioner's claims that the inconsistency is justified.*

18. **Hearing before this FTT ON 25 July 2016.**

The Appellant repeated his submissions at length before this Tribunal and took us through his arguments in detail. He simply does not accept any distinction between the named persons' status as an employee of the College post 2004 and her earlier position pre 2004 as temporary administrative assistant employed by an agency supplying a service to the College. This Tribunal engaged with the Appellant in the arguments he presented, again, in detail and in particular with the specialist lay member of the panel who has in fact a great deal of experience of Human Resources issues such as pertained herein.

19. **Conclusions:**

- a) We are not satisfied that the requested information is information the Appellant should receive as of right. We accept and adopt the Commissioners' reasoning in that section 40(2) is engaged.
- b) Further we find a material difference in the status and role of the named person before and after 2004. These differences are the specific facts that justify the different approaches taken by the Commissioner in his two Decision Notices.
- c) First, prior to 2004 the named individual was an employee of an agency, not of the College. She became a direct employee of the College having successfully applied for an advertised vacancy. From that point the College would hold full details of her as an employee. Previously, details of her employment (as opposed to details of the duties she undertook for the College) would be held by the agency.
- d) Second, the nature of her duties changed when she became an employee of the College. Whilst her new duties were primarily the provision of clerical assistance, they included *'to liaise with parents and outside agencies regarding students issues'* (OB p. 41). To this extent, there was a public facing element to her role which could include, in the words of the Commissioner's guidance on requests for personal data about public authority employees, having *'some responsibility for explaining the policies or actions'* of the College.
- e) In her former role, when employed by the agency, her responsibilities were: *'To answer the phone, intercept and distribute mail, meet and greet visitors to the Department, to correspond with Day Centres, Parents, Employment Services, etc. Make sure the photocopier, water dispenser and stationary cupboard are both well stocked.'* (OB p.43) These responsibilities could not be regarded as public facing, and the Commissioner's guidance makes it clear that the greater expectation of

release of information concerning those in public facing roles *'would not apply simply because an employee deals with enquiries from the public'*.

- f) Accordingly, we find that, on the facts, the Commissioner was fully justified in reaching different conclusions in the two Decision Notices relating to the appellant's requests.
- g) Even if we are not correct in our finding that section 40(2) is engaged, we are firmly of the view that the Appellant has not established that there is any legitimate interest in the release to the world at large of the requested information. We have looked carefully at the Commissioner's investigation and are satisfied that there is no further information and no evidence of any wrongdoing or mal fides on the part of the College. We accept the Commissioners' underlying assertion that the interest in disclosure must be a public interest and not the interest of the individual requester. This is because, when information is disclosed under FOIA, it is effectively disclosed to the world at large, not only the requester.
- h) Further we accept the Commissioner's assertions that under DPA the exercise of balancing the rights and freedoms of the employees against the legitimate interest in disclosure is different to the public interest test that is required for the qualified exemptions listed in section 2(3) FOIA. In the public interest test, there is an assumption in favour of disclosure because the public authority must disclose the information unless the public interest in maintaining the exemption outweighs the public interest in disclosure. In the case of section 40(2) the interaction with the DPA means the assumption is reversed; a justification is needed for disclosure. The appellant argues that the errors in the requested information in question, on a CV, demonstrate a need to expose an underlying deficiency and perhaps worse, corruption within the Public Authority. This he maintains is necessary for the purpose of his legitimate interests. He has singularly failed to provide any evidence or to persuade us that this need arises on the facts of this case.

- i) In his written submissions, both to this Tribunal and in respect of the other proceedings set out in the chronology at paragraph 5 above, the appellant treats the typographical error on the CV as an unexplained and apparently sinister ten year gap in the employment record of the named individual. On any sensible reading of the CV the error is obvious, and the likely correct date can be deduced readily from the career history contained therein. The named individual provided a witness statement for earlier County Court proceedings in 2006 in which she said: *'I would like to point out that there is a typographical error on page 2 of my CV. I commenced working as a Customer Service Adviser for (name of company) in June 1994 and not June 2004 as stated in the CV. I understand that this information was confirmed by the College when they took up my references with (name of company).'* (OB p.39)
- j) In the course of the hearing, we asked the appellant what other concerns he had that would justify his view that reliance could not be placed on any information provided within the CV. The CV is based on a standard *pro forma*. The appellant pointed to the fact that, in relation to some of the previous employments listed, information was not provided under some of the standard headings. Further, he said that, in his opinion, the information provided under some headings might more appropriately have been placed under other headings. In the view of the lay member of the panel, who has extensive experience of recruitment, such partial completion of a *pro forma* CV is not unusual, and would not normally give rise to any suspicion of impropriety.
- k) Whilst no credible justification has been made of a need for disclosure, there is a substantial expectation on the part of the individual that the information in her CV should not be disclosed to the world at large. As is common in *pro forma* CVs, the candidate is invited to give information about his or her interests outside work. This enables an employer to make a wider assessment that can take account of skills or abilities demonstrated in a non-work context (for example, engagement in sporting

or cultural activities may demonstrate team working or leadership skills). In this case, the statement of wider interests (OB p.44) constitutes personal information in which there can be no conceivable public interest.

- l) Although not part of our reasoning, we note the following, obiter, that proportionality must always be considered in non-absolute rights, and there is nothing to be gained from the publication to the world at large of the CV of a junior employee of a public body, especially when the Appellant already has the information. Added to that, it is arguably impinging to a disproportionate extent upon the individual's Article 8 rights when she has in essence been hounded through three separate legal arenas and now faces her entire CV being disclosed to the general public for no discernable benefit. The Appellant has exhausted all legal avenues to challenge the decision not to employ him, and to carry on this campaign, in our view, serves no other purpose than to perpetuate the unjustifiable distress to this employee.

20. Accordingly we dismiss this appeal.

**Brian Kennedy QC**

**28<sup>th</sup> July 2016.**