



IN THE FIRST-TIER TRIBUNAL

Case No. Appeal No.EA/2015/0175

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice FS50577815

Dated 23rd July 2015

BETWEEN

Mr Steve Pritchard

Appellant

And

The Information Commissioner

Respondent

Determined at a paper hearing on 7th December 2015 and thereafter

Date of Decision 10th March 2016

Date of Promulgation 15th March 2016

BEFORE

Ms Fiona Henderson (Judge)

Ms Alison Lowton

And

Mr Malcolm Clarke

Subject: s40 FOIA personal data

Decision: The Appeal is refused

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision Notice FS50577815 dated 23rd July 2015 which held that the City and County of Swansea (the Council) correctly applied s40(2) FOIA to the request.

Background

2. The disputed information in this case relates to an incident where a Council officer [X] was parked on double yellow lines at a particular location and was not issued with a fixed penalty notice despite the presence of 2 Council parking attendants (CEOs). A member of the public present filmed the incident which includes images of X and of the CEOs present which has been placed onto the internet. There has been subsequent publicity in both the local and national press of this incident. The Council has commented publicly in the press on this incident and confirmed that there has been internal investigation of this incident but has refused to disclose the outcome.

Information Request

3. In an email dated 19th February 2015 the Appellant asked:
"I have also read that you have now completed your investigation as to why [named individual¹] did not get a parking ticket outside Swansea Museum in May 2014. As Swansea Council is a public body, what is the best way to get a report on the outcome of that investigation? Would it be via a Freedom of Information request...²?"
4. The Council refused to provide the information under FOIA on 24th February 2015:
*"With regard to your enquiry regarding to the findings of an investigation into the conduct of a council officer, I confirm that the information held by the Authority is personal data and is exempt from disclosure ...To provide this information would breach the first data protection principle of fair and lawful processing...
When considering fairness, the Authority has considered the expectation of the individual together with the likely consequences of processing the information on them. There is no overwhelming public interest in the disclosure given the nature of what has been requested".*

¹ The Tribunal shall henceforth refer to this individual as X

² P25 OB

5. The Appellant wrote challenging the refusal under FOIA stating:
“With regards to the enquiry of the conduct of [CEO number given³] I do believe there is a demand for the public to know...”
6. This triggered an internal review dated 27th March 2015, where the refusal was upheld and the information request is again cited as being *“The investigation report into [X] not being issued a ticket outside Swansea Museum”*.
7. The Appellant appealed to the Commissioner on 2nd April 2015 stating:
“I believe Swansea Council have not fully investigated when a Civil Enforcement Officer refused to place a ticket on a Senior Council Workers car, claiming he has discretion”.
8. The Appellant appealed to the First Tier Tribunal on 13th August 2015 on the grounds that:
 - i. There is considerable public interest in parking enforcement
 - ii. There is need for transparency and accountability,
 - iii. Disclosure is neither unfair nor unwarranted.

Procedural issues

9. This appeal was first considered on the papers on 7th December 2015. The Tribunal was in receipt of an open bundle of 54 pages with additional submissions and enclosures from the Appellant. The Tribunal also was in receipt of a closed bundle containing the disputed information and the unredacted version of the Council’s submissions to the Commissioner. The case was adjourned as the Tribunal was not satisfied that it has been provided with all the material within the scope of the information request. Pursuant to directions issued on 21st December 2015 the Commissioner clarified this with the public authority who provided:
 - i) Further information within the scope of the information request,

³ The Tribunal shall henceforth refer to this individual as Y

- ii) Submissions relating to the basis of the redaction of material from the open bundle.
10. The Commissioner provided closed submissions relating to this new material with a redacted version for the Appellant. The Tribunal is satisfied that it is appropriate to withhold the closed evidence and submissions of the Council and the parts of the Commissioner's submissions that have been redacted pursuant to rule 14 (6) The Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009 (The GRC rules) as to disclose it would be to defeat the purpose of the appeal.
11. The Tribunal considered whether to join the public authority and concluded that this was not in the interests of justice pursuant to rule 2 GRC rules which provides:
- 2.—(1) *The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.*
 - (2) *Dealing with a case fairly and justly includes—*
 - (a) *dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;*
 - (b) *avoiding unnecessary formality and seeking flexibility in the proceedings;*
 - (c) *ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;*
 - (d) *using any special expertise of the Tribunal effectively; and*
 - (e) *avoiding delay, so far as compatible with proper consideration of the issues.*
12. In applying rule 2 the Tribunal had regard to the following:
- a) The public authority had not applied to join,
 - b) Rule 5(1) enables the Tribunal to regulate its own procedure and rule 5(3)(d) does not require the public authority to become a party to enable it to provide evidence and submissions in a case as it enables the Tribunal to “*permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party*”;

- c) No party had asked for an oral hearing,
 - d) The Tribunal had sufficient information to determine the case without further information from the public authority who had co-operated with the Commissioner's enquiries as directed by the Tribunal.
 - e) Joining the public authority would add delay and expense to the hearing process and was not proportionate.
13. The Tribunal is satisfied that it now has sufficient information to determine the case upon the papers.

Scope

14. There was no recognition in the Council's response of the Appellant's explicit assertion that he included any enquiry into the conduct of Y within the terms of his request by the Council or the Commissioner. The Appellant made this plain in his additional written submissions.
15. The Tribunal is satisfied that any investigation report, disciplinary proceedings or the decision not to take disciplinary proceedings (and if applicable the reasons for this) of anybody in the context of X not receiving a fixed penalty, would form part of the investigation into why X did not get a fixed penalty and therefore fall within the scope of the information requested (in particularly as explicitly clarified by the Appellant prior to the internal review).
16. The Appellant has provided the Tribunal with the Council's civil parking enforcement strategy, policy and procedures in furtherance of his submissions that the decision not to issue a ticket was contrary to Council policy and consequently indicative of corruption or inconsistency in its application. The Appellant asks the Tribunal to watch the videos " *to determine if this car was parked correctly and to evaluate the situation leading to this complaint*". The remit of the Tribunal is not to determine whether a fixed penalty should have been issued but to determine whether the

information relating to the Council's internal investigations of the incident are disclosable.

Is the disputed information personal data?

17. Personal data is defined under s1 DPA as:

“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...

18. It is not disputed that the withheld information constitutes the personal data of the Council employees who were present at the incident. Insofar as it relates to each individual it relates to a living person as it is linked to them, has biographical significance to them and is used to inform decisions about them. The Appellant has questioned whether the information could be redacted so as to remove the name(s) of those involved:

*“I would say there is a strong case for the public to know what actions (rather than the persons involved) were taken. The Information Relating to section 40(2) is of little importance to your investigation and therefore can be omitted from any report, the essentials of the investigation are the procedure, actions and outcome. These are facts of an investigation and are not personal”.*⁴

19. He relies upon the fact that only X's name is mentioned in the video and the press reporting and maintains that any other Council employees present would be anonymous. The Tribunal has regard to “other information” that is likely to come into the possession of the data controller as set out in s1 DPA. We note that the Appellant has referred to Y by badge number which can be linked to an individual. The incident has been videoed and placed online thus rendering those present and filmed liable to be identified by anyone who recognises them. It is not material whether the Appellant can identify the data subjects but whether they can be

⁴ Application for internal review 24.2.15 P27 OB

identified. Friends, family, colleagues and any member of the public who recognise the data subjects from the video can thus identify them and consequently we agree that the data cannot be anonymised.

Would Disclosure breach any of the data protection principles?

20. The first data protection principle, as set out in Schedule 1, Part 1 paragraph 1 to the DPA, 1998 provides, that 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. ”*

Fairness

21. In assessing fairness we have considered each data subject separately as we acknowledge that the balancing act is fact specific. We first consider the reasonable expectation of the data subjects because Part II of Schedule 1 s1(1) provides:
In determining for the purposes of the first principle whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed.

22. The Council argued before the Commissioner that there is a strong expectation of confidence in internal investigatory processes and personnel related matters. We accept the Council’s evidence that this is their policy which is supported by the fact that documents within the closed material are explicitly marked “private and confidential” and that this would apply to all participants in the investigatory process be they the subject or a witness. Expectation is an important element of fairness as it can be expected to inform the way that a participant to a process conducts themselves including the extent to which they do or do not co-operate and publication contrary to expectation would fall within the data subject being misled as to the purposes for which they are to be processed.

23. The Council has commented upon the fact of the internal investigation and the Tribunal takes into consideration the impact of that disclosure upon the fairness of withholding the rest of the information. The Tribunal is satisfied that this does not “waive” the rest of the rights of the data subject. Some disclosure it is arguable was necessary for transparency but the details, the outcomes etc in our judgment are separate pieces of personal data and the expectation remains that this would not be circulated publicly.
24. In considering the nature of those expectations we have had regard to the seniority of those concerned. We accept that X is “middle management” with an operational facing role which includes contact with members of the public but does not have a high profile public facing role. X is responsible for making operational day to day decisions but no responsibility for major policy decisions and is not a budget holder.
25. In relation to Civil Enforcement Officers (CEOs) we are satisfied that they are not management and although they are public facing they are not policy makers, or budget holders. Whilst we accept that X would have a higher expectation of accountability than a CEO, we are satisfied that his seniority does not alter the expectation of confidentiality.
26. Consent has been sought and refused. The Appellant argues that in a case such as this where alleged wrong doing is investigated the consent of the data subject should be irrelevant because the public have a right to know. The Tribunal observes that the issue of consent is important as consent is one of the Schedule 2 reasons, however, consent is not determinative and indeed notwithstanding the refusal of consent in this case the fact of an internal investigation relating to the incident has been disclosed.

Consequences of disclosure to the individual

27. We have further considered the impact that disclosure would have on the data subjects. The Appellant argues that if the investigation showed correct process was followed there would be no distress, if the investigation showed the decision was

wrong the Council should show that corruption is unacceptable and the data subjects should be held to account for their actions. The Tribunal reminds itself in general terms and without reference to the contents of the disputed material that an investigation can be expected to be wide ranging and may at times include any or all of the following: a data subject's personal circumstances, their career history, training, thought processes and their feelings and reactions to an incident at the time. The result is only achieved in the context of all the information. Whilst it may be argued that the disclosure can be reduced to a synopsis of the outcome, the inability to explain the decision in the face of public comment without disclosing further personal data could itself be distressing.

28. On the facts of this case we are satisfied that their actions have already been subjected to public scrutiny through the posting of a video of the incident on the internet. X is already identified by name and as indicated above the CEOs are visually recognisable. We have taken into consideration the impact that the publicity surrounding the case has already had on those concerned and observe that the details of and outcome of an internal investigative process can be expected to impact upon relationship with co-workers, interaction with the public and that internal investigatory processes and personnel related matters have the potential to impact upon future career prospects and as a consequence finances. The procedure can therefore be expected to be stressful.

29. The Appellant takes issue with the Council's assertion that disclosure would damage the wellbeing of the data subjects or cause them significant harm on the basis that this is the consequence of their own actions and that they are not under threat from anyone. We have had regard to the contents of the closed material and the impact that identification in the context of this incident has already had and the personal circumstances of the data subjects insofar as it is material to the likely impact of disclosure of the disputed information. We set out our general observations below and have linked this to specific elements of the closed material in the closed annex where applicable.

30. From our understanding of their role and the context in which this incident came to arise we are satisfied that:

- CEOs are at risk of physical and verbal assault in carrying out their job. We take into account that X also meets members of the public in the context of parking enforcement and runs the same risks as CEOs in this role.
- The level of press and public interest and comment is such that regardless of the outcome, disclosure of the outcome of any investigation would be likely to reignite the debate and attract further comment, increasing the stress of the data subjects.
- In light of the fact of the online video, the data subjects were particularly vulnerable as they are recognisable by any member of the public.

31. Publication of the contents of and outcome of the internal investigatory processes and personnel related matters would be unusual, damaging professionally, damaging to their reputation, future employment prospects and consequently potentially financially. In light of the fact that publication is contrary to the Council's practice, the data subjects would be at a disadvantage compared to colleagues and peers.

Balanced against accountability, transparency and legitimate interests which arise

32. The Tribunal has balanced the public interests in disclosure. The Appellant argues that there is considerable public interest in parking enforcement because:

- Parking in Swansea has become a very heated debate recently,
- Swansea are inconsistent in their application of parking enforcement
- In the Appellant's experience there is a dispute between the Police and the Council as to who is responsible for certain types of parking enforcement,

33. The Tribunal nevertheless must consider to what extent these public interests would be furthered by disclosure of the disputed information. In terms of challenging Swansea's consistency the actual incident is online so the public are aware of the

details of the incident itself and are able to point out perceived inconsistencies to the Council. Complaints about their own parking matters can be directed to the Council via other means. Disclosure would not inform the debate as to the division of responsibilities between the Police and the Council.

34. The Appellant argues that there is a need for transparency and accountability because:

- There is a public perception that there is one rule for the public and another for council employees.
- It would reassure the public that allegations of corruption are investigated thoroughly and sanctioned if proven.

35. The Tribunal accepts that disclosure could meet these legitimate public interests, however, the Council has already made public statements in respect of there having been an internal investigatory process. Elements of this need for transparency and accountability can be met through disclosure of the Council's applicable policies and procedures e.g. disciplinary codes, guides for CEOs etc. The Appellant's arguments are based on the assumption that the incident has been "pushed under the carpet" when there is no evidence of this, it is just that the public does not know the outcome of the investigation. The Tribunal has considered whether in fact (having regard to the internal investigation) there is evidence that the Council's investigation into any aspect of the incident was deficient and has had sight of the withheld material. We are satisfied that there is no evidence that the investigation was insufficient or improper in any way.

36. In weighing where the balance lies we are satisfied that in light of the expectation of non disclosure and the consequences of disclosure as set out above that it would be disproportionate and unfair to disclose the outcome and details of the internal investigation. Having concluded that it would not be fair to disclose the information the appeal is refused and we have not gone on to consider whether any condition of Schedule 2 to the DPA is satisfied.

Conclusion

37. The information requested is personal data and we are satisfied that s40(2) FOIA was applicable as disclosure would breach the data protection principles. The appeal is therefore refused.
38. Our decision is unanimous.

Dated this 10th day of March 2016

Fiona Henderson
Tribunal Judge