



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

EA/2015/0194

**ON APPEAL FROM
The Information Commissioner's Decision
No FS50560132 dated 17 August 2015**

Appellant: Mr Gabriel Webber

Respondent: The Information Commissioner

Date and place of hearing: On the papers

Date of decision: 22 February 2016

Date of Promulgation: 22 March 2016

Before

**Anisa Dhanji
Judge**

and

**Narendra Makanji and David Wilkinson
Panel Members**

Subject matter

FOIA section 40(2) - whether disclosure of personal data would breach the first data protection principle.

FOIA section 41(1) - whether exemption is engaged.

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

Case No EA/2015/0194

SUBSTITUTED DECISION NOTICE

Dated: 22 February 2016
Public Authority: Cabinet Office
Address of Public Authority: 70 Whitehall, London, SW1A 2AS
Name of complainant: Mr Gabriel Webber

The Tribunal finds that the Disputed Information (as defined in paragraph 20 of the decision), is not exempt under section 41(2) of the Freedom of Information Act 2000, but that certain parts of it are exempt under section 40(1).

Within 28 days of the Tribunal's decision being promulgated, the Public Authority must disclose the Disputed Information to the Complainant, subject to:

- (1) anonymising and redacting the personal data of individuals other than the former Prime Ministers; and
- (2) the further directions set out in the Confidential Annex.

The Public Authority must also disclose to the appellant the un-redacted letter from Roger Smethurst, dated 18 March 2015.

If further directions are needed, an application may be made to the Tribunal.

Except as set out above, the Information Commissioner's Decision Notice dated 17 August 2015, shall remain in effect.

The Confidential Annex will not be provided to the Complainant, nor to any party other than the Information Commissioner and the Public Authority, without leave of the Tribunal.

Signed

Tribunal Judge

**IN THE FIRST-TIER TRIBUNAL
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REASONS FOR DECISION

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the “Commissioner”), on 17 August 2015.
2. It arises from a request for information made to the Cabinet Office under the Freedom of Information Act 2000 (“FOIA”), by Mr. Gabriel Webber (the “Appellant”), a freelance journalist. The request concerned information about the Public Duty Cost Allowance (“PDCA”) which provides an allowance to former Prime Ministers, for office and secretarial expenses, incurred in connection with their public duties. The allowance is currently set at a maximum of £115,000 per year for each former Prime Minister.

The Request

3. The Appellant’s request was made on 29 June 2014, on the following terms:

“According to a PQ [Parliamentary Question] answered by Lord Wallace of Saltaire, former Prime Ministers can claim an allowance if they provide receipts or other supporting documentation.

Please could you release the amount claimed by each former Prime Minister in each calendar year 2005-2013 inclusive, and also provide a copy of all receipts or other supporting documentation submitted in respect of this allowance since January 2012.

If the cost threshold obstructs this then please provide ONLY copies of receipts and supporting documentation since June 2013.”

4. The Cabinet Office replied on 21 July 2014. It treated the request as consisting of two parts: (i) the total amount claimed by each former Prime Minister in the years 2005 to 2013; and (ii) copies of each former Prime Minister’s receipts and other supporting documentation.
5. It refused disclosure of the information within the scope of (i) on the basis of sections 21(1) and 22(1) of FOIA (information accessible by other means, and information intended for future publication). It refused to

disclose the information within the scope of (ii) on the basis of section 40(2) of FOIA (third party personal data).

6. The Appellant requested an internal review of the Cabinet Office's decision in respect of (ii). The Cabinet Office conducted a review, but maintained its refusal.

Complaint to the Commissioner

7. On 30 October 2014, the Appellant complained to the Commissioner. He said that he accepted the Cabinet Office's response in respect of part (i) of his request, but did not accept its refusal under section 40(2) of FOIA to disclose the information sought in part (ii).
8. During the course of the Commissioner's investigation, the Cabinet Office maintained its reliance on section 40(2), but sought additionally to rely on section 41(1) (information provided in confidence), to refuse part (ii) of the request.

The Commissioner's Decision

9. For the reasons set out in his Decision Notice, the Commissioner made the following findings.
10. First, the Commissioner found that the information was exempt from disclosure under section 41(1).
11. In relation to the exemption in section 41(1), it was necessary to consider whether the information was obtained by the Cabinet Office from a third party, and clearly it was. As to whether disclosure would constitute an actionable breach of confidence, the Commissioner applied the test in **Coco v A. N. Clark (Engineers) Limited [1968] FSR 415**, and found that the test was met. In particular (a) the information had the necessary quality of confidence; (b) the information was imparted in circumstances importing an obligation of confidence; and (c) the unauthorised use of the information would be of detriment to the confider.
12. As to whether the Cabinet Office would have a public interest defence were it to disclose the information, the Commissioner acknowledged that there was a public interest in being able to see how former Prime Ministers justify the allowances they claim. However, the Commissioner considered that this public interest was met by disclosure, to the public, of the total amounts claimed by former Prime Ministers under the PDCA. Knowing the minutiae of such claims would not add much of significance to the public's understanding of this element of government spending. The Commissioner concluded that the Cabinet Office would not have a public interest defence were it to disclose the information.
13. Having reached the decision that the information was exempt from disclosure under section 41(1), the Commissioner did not consider it necessary to go on to determine whether the information was also exempt under section 40(2). However, the Commissioner considered it

likely that the information relating to those individuals alive at the time of the request would also be exempt under section 40(2).

14. The Commissioner also found that because of its late reliance on section 41(1), the Cabinet Office had breached section 17(1).

The Appeal to the Tribunal

15. The Appellant has appealed to the First-tier Tribunal in relation to the information coming within the scope of part (ii) of his request.
16. The Appellant has requested that the appeal be determined on the papers without an oral hearing, and the Commissioner has concurred. Having regard to the nature of the issues raised, and the nature of the evidence, we have been satisfied that the appeal can properly be determined without an oral hearing.
17. We have received an open and closed bundle of documents. The closed bundle has been prepared by the Commissioner, and the Appellant has not had sight of it. We have considered all the documents received, even if not specifically referred to in this decision.
18. There has been no cross-appeal by the Cabinet Office, and it has not applied to be joined as party to this appeal.
19. Certain parts of our decision are set out in a separate Confidential Annex in order to avoid defeating the purpose of any onward appeal there might be.

Issues

20. This appeal only concerns the information coming within the scope of part (ii) of the Appellant's request (for copies of each former Prime Minister's receipts and other supporting documentation). We will refer to this information as the Disputed Information.
21. The first issue before us is whether the Cabinet Office was entitled to withhold the Disputed Information under section 41(1) of FOIA. If it was, then that determines the appeal.
22. If it was not, then we must go on to consider whether the Cabinet Office was entitled to withhold the Disputed Information under section 40(2).

The Tribunal's Jurisdiction

23. The scope of the Tribunal's jurisdiction in dealing with an appeal against the Commissioner's Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the Commissioner's Decision Notice is not in accordance with the law, or to the extent that it involved an exercise of discretion by the Commissioner, he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute

such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.

24. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, the Tribunal will often receive evidence that was not before the Commissioner.

Findings

25. Under section 1(1)(a) of FOIA, a person who has made a request for information to a public authority is entitled to be informed, in writing, whether the public authority holds that information. Under section 1(1)(b), he is entitled to have that information communicated to him.

26. The duty under section 1 does not arise if any of the exemptions set out in FOIA apply. The first exemption being relied on in the present case is that contained in section 41 (information provided in confidence).

27. Section 41(1) provides as follows:

“(1) Information is exempt information if -

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

28. We agree with the Commissioner that the requirement of section 41(1)(a) is met because the information was clearly obtained from another person, namely from former Prime Ministers or from their staff on their behalf. We also agree that the test to be applied in relation to whether disclosure would constitute an actionable breach of confidence, is that set out in **Coco v Clark**. However, we do not agree that that test is met on the facts of this case.

29. We find that the information was not provided in circumstances importing an obligation of confidence. The Appellant says, and we agree, that in a post FOIA era, a former Prime Minister cannot reasonably have expected that he or she could claim up to £115,000 per annum, for life, from the public purse, without the public expecting there to be transparency as to what the money is being spent on.

30. In finding otherwise, the Commissioner seems to have relied on the Cabinet Office’s assertion that the information was provided to it in strict confidence and on the understanding that it would not be disclosed. The Commissioner has said, in his Response dated 29 September 2015, that he has no reason to doubt the Cabinet Office’s explanation in this regard. The Commissioner noted that the understanding that the information

would be kept confidential, was evidenced, in some cases, by the inclusion of the words 'Private and Confidential', on the documents supplied, although the Commissioner acknowledged that this was not determinative. The Commissioner, noted however, that it is the practice for the total amounts claimed under the PDCA to be published, while a breakdown of the information is not. The Commissioner says that this supports the conclusion that the information was provided to the Cabinet Office on the understanding that it would not be disclosed.

31. In our view, no evidence has been provided to support the Cabinet Office's assertion that the information was provided to it in confidence. There is no correspondence, protocol, memorandum of understanding or evidence of any other communication before us between the Cabinet Office and any former Prime Ministers in which the confidentiality of the information has been discussed, much less agreed. The fact that a breakdown has not previously been disclosed does not mean that the information was provided in confidence. As the Commissioner has acknowledged, the words 'Private and Confidential' cannot be determinative. In any event, these words appear on only one invoice, and that is for the full amount of £115,000. That amount has been disclosed, so clearly the Cabinet Office has not itself treated those words as importing an obligation of confidence.
32. Even if we are wrong about this, we find that the public interest would constitute a defence to an action for breach of confidence. The Commissioner acknowledged that there is a public interest in being able to see how former Prime Ministers use the allowances they claim. However, in the Commissioner's view, this public interest is met by disclosure of the total amounts claimed by former Prime Ministers under the PDCA. The Commissioner considered that knowing the minutia of such claims would not add much of significance to the public's understanding of this element of government spending. We do not agree. It is the breakdown of the expenditure that tells the public how the money is being spent, and allows them to form a view as to whether it is being spent responsibly, and in a manner that is commensurate with the public benefit, or perceived public benefit, derived from it.
33. The Commissioner has sought to distinguish the present case from **Corporate Officer of the House of Commons v Information Commissioner & Others [2008] EWHC 1084**, concerning a request under FOIA for a full breakdown and supporting documents of expense claims submitted by MPs under the Parliamentary Additional Costs Allowance scheme. The Commissioner noted that a particular factor taken into account by the Tribunal in that case was that the accountability of MPs is ultimately determined by public vote at the ballot box, for which purpose electors need to be able to make informed choices. We recognise that an assessment of the public interest is of course always fact specific. However, it is self-evident that many of the public interest considerations identified in that case apply in the present case as well. We will not reiterate them all here, but would highlight that just as there is a public interest in understanding the way in which MPs' allowances are

claimed, there is also a public interest in knowing what specific expenditure a former Prime Minister claims from the public purse. Just as with MPs' expenses, the importance of transparency and accountability is heightened where, as here, the system involves self certification by the persons claiming public money. We do not agree with the Commissioner that the public interest is any the lesser because the information is not needed for the public to exercise a decision at the ballot box. On the contrary, because the allowance is claimed by those no longer holding elected office, and because the allowance can be claimed for the rest of the former Prime Ministers' lives, whether or not they are engaged in activities that may be perceived to be of public benefit, we consider that the public interest in seeing that the use of public money is appropriate and is properly accounted for, is arguably even greater.

34. For all these reasons, we find that the Disputed Information is not exempt under section 41(1). Having reached this finding, we must go on to consider whether the Disputed Information is exempt under section 40(2). The Commissioner has addressed this in the Decision Notice only in passing (stating that it was likely that the information relating to those individuals alive at the time of the request would also be exempt under section 40(2), and that the legitimate interest in disclosure has largely been met by the publication of the overall figure claimed). The Commissioner has not applied for leave to make further submissions in the event that the Tribunal finds, as we have done, that the Disputed Information is not exempt under section 41(1). Having regard to the overriding objective in rule 2 of the The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, and given that we have the benefit of the Cabinet Office's arguments as they were made to the Commissioner in relation to section 40(2), we consider that we can deal with the issue fairly and justly without having to adjourn to seek the Commissioner's further submissions, and the Appellant's further reply.
35. Under section 40(2), personal data of third parties is exempt if disclosure would breach any of the data protection principles set out in Part 1 of Schedule 1 of the Data Protection Act 1998 ("DPA"). The exemption is absolute.
36. The Disputed Information clearly constitutes the personal data of the claimants, (the former Prime Ministers). It also contains the personal data of individuals other than the claimants.
37. The question is whether disclosure of this personal data would breach any of the data protection principles. Only the first data protection principle is relevant. This provides that personal data shall be processed fairly and lawfully, and in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met. On the facts of this case, the only relevant condition in Schedule 2 is condition 6(1).
38. Condition 6(1) provides as follows:

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.

39. The key issues that arises from the first data protection principle, and condition 6(1), is whether disclosure would be fair, whether it is necessary for the purposes of a legitimate interest that is being pursued, and whether it is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects. The first and last of these considerations are closely related.
40. In order to address these issues, we need briefly to describe the Disputed Information, which we consider we can do without trespassing on any content that could be said to engage either of the exemptions relied upon.
41. The Disputed Information relates to 4 former Prime Ministers, namely, Tony Blair, the late Margaret Thatcher, John Major, and Gordon Brown. The quantity of information in respect of each former Prime Minister ranges from 3 to 27 pages. The information includes one former Prime Minister's bank account details and a personal address. It also includes (though not in all cases), the names of staff who have received payments from the former Prime Ministers' offices, and the names of some individuals who may have been involved in preparing or submitting the claims on behalf of the former Prime Ministers, as well as individuals at the Cabinet Office who may have been involved in receiving or processing the claims.
42. In addition, there is also an item of personal data in relation to one former Prime Minister's claim which it will be necessary to describe and deal with in the closed Annex, since to do so in the open part of this decision would effectively involve disclosing that information.
43. To summarise, the personal data in issue is that of the claimants (i.e. the former Prime Ministers), and of certain non-claimants (i.e. staff involved in making or processing the claims, as well as the individuals to whom specific payments have been made).
44. Would disclosure of this personal data be fair? When assessing fairness, the interests of the data subject as well as the data user, and where relevant, the interests of the wider public, must be taken into account in a balancing exercise. This wide approach to fairness is endorsed by the observations of Arden LJ in **Johnson v Medical Defence Union [2007] EWCA Civ 262** at paragraph 141:

"Recital (28) [of Directive 95/46] states that "any processing of personal data must be lawful and fair to the individuals concerned". I do not consider that this excludes from

consideration the interests of the data user. Indeed the very word "fairness" suggests a balancing of interests. In this case the interests to be taken into account would be those of the data subject and the data user, and perhaps, in an appropriate case, any other data subject affected by the operation in question."

Although that case concerned the provisions of the Freedom of Information (Scotland) Act 2002, the principles apply equally in relation to FOIA.

45. The following passage in **Corporate Officer of the House of Commons v IC and Norman Baker MP [2011] 1 Info LR 935** at paragraph 28, also offers guidance about the balancing exercise to be undertaken:

"If A makes a request under FOIA for personal data about B, and the disclosure of that personal data would breach any of the data protection principles, then the information is exempt from disclosure under the Act: this follows from section 40(2) read in conjunction with section 40(3)(a)(i), or (when applicable) section 40(3)(b) which does not apply in these appeals. This is an absolute exemption - section 2(3)(f)(ii) FOIA. Hence the Tribunal is not required to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure under section 2(2). However... the application of the data protection principles does involve striking a balance between competing interests, similar to (though not identical with) the balancing exercise that must be carried out in applying the public interest test where a qualified exemption is being considered."

46. This does not mean, however, that one starts with the scales evenly balanced. The continued primacy of the DPA, notwithstanding freedom of information legislation, and the high degree of protection it affords data subjects has been strongly emphasised by Lord Hope in **Common Services Agency v Scottish Information Commissioner [2008] 1 WLR 1550** where he states (at paragraph 7):

"In my opinion there is no presumption in favour of the release of personal data under the general obligation that [FOIA] lays down. The references which that Act makes to provisions of DPA 1998 must be understood in the light of the legislative purpose of that Act The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data."

47. Where public officials are involved and where the purpose for which the data is processed arises through the performance of a public function, the following passage in **Corporate Officer of the House of Commons** offers helpful guidance:

"...when assessing the fair processing requirements under the DPA ... the consideration given to the interests of data subjects, who are public officials where data are processed for a public

function, is no longer first or paramount. Their interests are still important, but where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would the case in respect of their private lives. This principle still applies even where a few aspects of their private lives are intertwined with their public lives but where the vast majority of processing of personal data relates to the data subject's private life.” (paragraph 77):

51. As to whether disclosure is necessary for the purposes of a legitimate interest, “necessary”, in this context, has been held to reflect the meaning attributed to it by the European Court of Human Rights when justifying an interference with a recognised right, namely that there should be a pressing social need and that interference must be both proportionate as to the means, and fairly balanced as to ends. See **Corporate Officer of the House of Commons**. More recently, in **Farrand v Information Commissioner and the London Fire and Emergency Planning Authority [2014] UKUT 0310 (AAC)**, the Upper Tribunal stressed that “necessary” does not mean essential or indispensable. That is too strict a test. Rather, the word connotes a degree of importance or urgency that is lower than absolute necessity, but greater than a mere desire or wish.
48. We return now to the facts of the present case. In our view, different considerations arise when dealing with the personal data of claimants as opposed to the personal data of non-claimants.
49. In relation to the former, apart from the bank account details (the disclosure of which the Appellant accepts would breach the first data protection principle), the Cabinet Office has not given any reason as to why disclosure would be unfair or would otherwise breach the first data protection principle. The total amounts claimed by the former Prime Ministers in any year, is already disclosed. We see no unfairness in disclosure of the breakdown of the claims. We consider that the Appellant is pursuing a legitimate interest (and we note that it has not been argued otherwise), and that disclosure is necessary for the purposes of that legitimate interest. We have already discussed the wider public interest at paragraphs 32 and 33, above. We do not find that disclosure is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects. There has been no evidence or arguments put forward by the Cabinet Office in this regard.
50. We consider that the position is quite different, however, in relation to the personal data of non-claimants, namely, the members of staff involved in an administrative capacity in making or processing the claims, as well as the individuals to whom specific payments have been made. We find that disclosure of this personal data would not be fair. We do not find it likely that it would have been in the reasonable expectation of these individuals, that their personal data would be disclosed. We also consider that any legitimate interest in their personal data is tenuous. The Appellant has argued, and persuasively in our view, as to the public

interest in the breakdown of the expenditure. While we consider that for that information to be meaningful, the breakdown should be disclosed by reference to what the expenditure was for, and that there is a legitimate interest in knowing the total amount paid to any individual, in the absence of any suggestion of impropriety, we do not consider that there is a legitimate interest in disclosure of the identity of the individuals to whom payment has been made. While it may be fair to say that anyone paid from the public purse should expect some information about such payments to be public, there is no suggestion that these are individuals holding any positions of responsibility or seniority such that any legitimate interest there may be, would outweigh the prejudice to their rights and freedoms that would arise if their identities were to be disclosed. There is even less legitimate interest in disclosing the identity of the staff involved in making or processing the claims.

51. For all these reasons, we find that:

(1) that part of the Disputed Information which comprises the personal data of the four former Prime Ministers is not exempt under section 40(2), and must be disclosed, except for any bank account details; and

(2) that part of the Disputed Information which comprises the personal data of other individuals (including their names, personal addresses, and personal email addresses) should be anonymised and/or redacted as further specified in the Confidential Annex, before the Disputed Information is disclosed to the Appellant.

52. The Public Authority must also disclose to the Appellant the unredacted letter from Roger Smethurst dated 18 March 2015, which appears as the first item in the closed bundle. The redacted portions of that letter do not disclose any personal data which we find to be exempt. Indeed, it simply describes the Disputed Information in general terms. We see no reason why that information should have been redacted from that letter at all.

Decision

53. The Appellant's appeal is allowed in part.

54. Our decision is unanimous.

Signed
Tribunal Judge

Date: 22 February 2016

Note: certain changes were made to the decision before promulgation in order to take account of concerns raised by the Cabinet Office that the open part of the decision disclosed some Disputed Information. 21 March 2016