ON APPEAL FROM
THE INFORMATION COMMISSIONER'S DECISION NOTICE
NO:FS50601069

Dated: 17th, December 2015

Appeal No. EA/2016/0003

Appellant: Anthony Gouldesborough (AG)

Respondent: The Information Commissioner

("the ICO")

Before

David Farrer Q.C.

Judge

and

Jean Nelson

and

Steve Shaw

Tribunal Members

Mr. Gouldesborough appeared in person.

The ICO did not appear but made written submissions.

Subject matter : FOIA s.40(2)

Whether provision of the requested information would breach the First Data Protection Principle ("the FDPP").

The Tribunal's decision

The appeal is dismissed. Disclosure of the requested information would constitute unfair and unlawful processing of personal data and would therefore breach the FDPP. The Tribunal does not require the ICO to take any further steps.

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Abbreviations additional to those indicated above.

The DN	Decision Notice.
FOIA	The Freedom of Information Act, 2000.
The DPA	Data Protection Act 1998
LBI	The London Borough of Islington

The Relevant Statutory Provisions

FOIA 2000

40.— 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,

(7) In this section—
"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
"*data subject*" has the same meaning as in section 1(1) of that Act;
"*personal data*" has the same meaning as in section 1(1) of that Act.

Data Protection Act 1998

1 Basic interpretative principles

"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.

Schedule 1 The data protection principles

Part I The principles
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,

Schedule 2 Conditions relevant for purposes of the first principle: processing of any personal data

6.
(1) 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.

The Reasons for the Tribunal's Decision

The Background

1. In 2007 LBI decided to sell off a large number of its commercial properties. It apparently gave leaseholders an option to purchase the freehold at a specified price, subject to exchanging contracts by 10th. August, 2007.

2. A number of leaseholders, including AG, sought and obtained extensions to that deadline to 15th. August. AG obtained a further extension to 11am. on 16th. August because of a delay by his bank in transferring funds for the deposit.

3. The bank failed to transfer the funds by 11am. on 16th. When the manager telephoned at about 1pm. to indicate that the transfer was imminent, he was told by LBI that it was too late. The sale fell through with grave financial consequences for AG and his wife, who had made significant improvements to their property. Regardless of the forensic merits of this appeal, they deserve great sympathy for this misfortune, for which they bore not the slightest responsibility, although, in making that observation, we are not presuming to criticise the other parties involved.

4. AG subsequently obtained from LBI a schedule of dates on which leaseholders exchanged in August, 2007. In about 2009 – 2010, he learned that a further extension of time to exchange beyond 16th. August had been granted to one other leaseholder ("L2").

The Requests

5. On 17th. and 18th. August, 2015 AG made two requests for information in very similar terms. It is sufficient to record here the first of them because the second did not alter the scope of the first request in any way.

"In 2007 (LBI) announced that it would sell off its commercial property portfolio. I understand the purchasers of (address redacted) was granted an extension to the deadline to buy the freehold. Please provide me with a copy of all recorded information held by (LBI) in relation to the reasons why the purchaser of (-) was granted an extension to complete the purchase. (My MP) was told that I got more time than anyone. My bank phoned on the 16th. to be told the money was to be by 11 o'clock. My bank could not guarantee the time but it would have been that day".

6. LBI refused both requests, citing s.40(2) and stating that the information held was the personal data of the leaseholder concerned. There was no internal review. AG complained to the ICO.

The DN

7. The ICO referred to the relevant legislative provisions, which are set out above. He concluded that disclosure would not be fair as L2 had had a reasonable expectation that his/her personal data relating to the purchase would remain confidential. He judged that the public interest in disclosure was slight, although he did not relate the issue of public interest to the test stipulated in condition 6 of Schedule 2 to the DPA. He upheld LBI's refusal to disclose the requested information. AG appealed

The Appeal

8. AG's grounds of appeal stated that he wanted to know why LBI had given three further days to exchange to L2 whereas he had been refused a few hours' grace. He relied on an earlier DN arising out of a complaint made by AG in October, 2014, following requests in June 2014, seeking (i) the reason why L2's leasehold had been omitted from a long list of properties purchased by leaseholders, which had been supplied to AG by LBI and (ii) the name of L2 and the exchange/ completion dates of his/her leasehold. The ICO had upheld LBI's reliance on s.40(2) in relation to the second request and rejected its claim that (i) was a repeat request to which FOIA s.14 applied.

9. He also attached a witness statement from a bank officer substantiating his account of the bank's delay in transferring funds. This was reinforced by documentary evidence which supported irrefutably his claim as to the reason for the failure to meet LBI's deadline. Following the hearing he sent the Tribunal a further letter, developing his argument that he had not been fairly treated and emphasising that, whilst there were serious reasons for granting a longer extension to L2, the same applied to his case.

10. By his response the ICO submitted that AG had failed to identify any error in the DN and invited the Tribunal to dismiss the appeal.

Our reasons for dismissing the appeal

11. The exemption from the duty to communicate information provided by s.40(2) is not straightforward and it is entirely understandable that unrepresented complainants and appellants often fail to present their cases by reference to the tests imposed by FOIA and, indirectly, the DPA.

12. That is the position on this appeal. AG approached and conducted it in the belief that it would be decided in accordance with the Tribunal's assessment of his treatment by LBI. The letter that he sent to the Tribunal after the hearing reflected that conviction. As the Tribunal explained at the hearing, that is not the case. It is concerned only with the questions whether the requested information was L2's personal data and, if it was, whether they should be protected from disclosure.

13. The identity of L2 could readily be ascertained by a member of the public by reference to the address of the property which was to be purchased. That address was eventually communicated to AG by LBI in about 2010. The particular circumstances of a purchaser which could persuade LBI to grant further time to exchange contracts are clearly data which "relate to a living individual." The requested information was, therefore, undoubtedly the personal data of a third party (i.e., somebody other than AG (see s.40(1)), hence protected by s.40(2).

14. Section 40(2) and (3)(b) prohibit disclosure if disclosure would contravene any of the data protection principles; the FDPP is the relevant principle here. The FDPP is that communication of the information to the public must be fair and lawful. Most importantly, as an indispensable element in the test of fairness, it also specifically requires that at least one condition set out in DPA Schedule 2 should be satisfied, if personal data are to be disclosed. As in most appeals in this jurisdiction, the only condition which could be relevant here is condition 6, since the leaseholder had not consented to disclosure of the requested information. It is often sensible to address at the outset the question whether the request satisfies the condition 6 tests.

15. The Tribunal is satisfied that it does not.

16. The first question relates to the "legitimate interest" of the "third party or parties" to whom the data would be disclosed. Whether it is the applicant or the general public whose interests require to be identified, is a question which has provoked debate. Clearly, in this case, the general public has no interest which could be served by disclosure of the circumstances of L2's purchase, as AG very fairly acknowledged in his oral submissions. AG's interest, which he identified when addressing the Tribunal, was the recovery of compensation from LBI in respect of its damaging refusal to extend further the time for exchange. Indeed, it is very hard to see what other interest AG could have in disclosure. The Tribunal proceeds on the footing that the relevant interest is that of the applicant, AG.

17. Assuming that an interest in compensation was legitimate in the context of this case – which is certainly debatable – the next question is whether disclosure of L2's personal data was "necessary" for such a purpose.

18. The Tribunal cannot identify any basis in law for a claim in damages against LBI for its refusal to defer exchange of contracts, whatever the factors which favoured L2. We do not, therefore, accept that disclosure of the requested information could assist, let alone be necessary to the pursuit of such a claim.

19. Judicial review of LBI's refusal would not be available, since LBI was acting as a vendor of a commercial asset, not as a public authority. Moreover, the time for any such application was long passed. The Tribunal has, furthermore, no doubt that a court would regard LBI's decision to distinguish between the cases of AG and L2 as rational and properly open to it, having regard to the undisclosed feature of L2's case which gave rise to the further extension.

20. So there was and is no claim for the pursuit of which disclosure could be necessary.

21. Those findings are enough to defeat this appeal, without the need to consider whether disclosure, though necessary to the pursuit of a legitimate interest, would nevertheless, be unwarranted by reason of prejudice to the legitimate interests of L2. LBI stated to the ICO that, as a result of his dealings with LBI, L2 would have expected confidentiality as to the reason for the extension of time for exchange. Disclosure would have caused L2 distress. Those are plausible conclusions which would have formed a further substantial obstacle to disclosure, had our prior findings required an assessment.

22. In the short closed annex we refer to the requested information and the relevance of its content to the potential issue identified in §19 above. However, it will be apparent that the content of the requested information is not decisive of our findings that the requests did not satisfy condition 6 of DPA Schedule 2.

23. We commend AG for his courteous and restrained conduct of the appeal. That cannot, however, affect our conclusion that disclosure would breach the FDPP.

24. This appeal is therefore dismissed.

25. This a unanimous decision.

David Farrer Q.C.

Tribunal Judge

27th. May, 2016