IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2016/0111

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS 50611377
Dated: 29 March 2016

Appellant:	**JEFF LAMPERT**
Respondent:	**INFORMATION COMMISSIONER**
Heard at:	**FIELD HOUSE, LONDON**
Date:	**18 AUGUST 2016**
Date of decision:	**20 SEPTEMBER 2016**

Before

ROBIN CALLENDER SMITH
Judge

and

ROSALIND TATAM and ANDREW WHETNALL
Tribunal Members

Attendances:

For the Appellant: Mr J Lampert

For the Respondent: Mr E Metcalfe, Counsel instructed by the Information Commissioner

IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2016/0111

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

Subject matter:

FOIA 2000

Absolute Exemptions

- Prohibitions on disclosure s.44

DPA 1998

Confidentiality of information s.59

Cases: *Friends of the Earth v IC and DTI* (EA/2006/0039), *Cialfi v IC* (EA/2014/0167), *IC v Colenso-Dunne* GIA/702/2014, *Harries v IC* (EA/2014/0036), *Lamb v IC* (EA/2009/0108), *Ofcom v Morrissey and IC* GIA/605/2010, *Kennedy v Charity Commission* [2014] UKSC 20 and *Padfield & Ors v Minister of Agriculture, Fisheries & Food and Ors* [1968] AC 997.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 29 March 2016 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. Mr Jeff Lampert (the Appellant) provided a personal guarantee in respect of a company called Heritage plc which became insolvent in the mid-1990s.

2. Lloyds Bank "called in" the Appellant's guarantee for the debts of that company.

3. The Appellant has maintained, for a number of years and in different forums, his belief that Lloyds Bank over-recovered assets in an unlawful manner.

4. In successful litigation bought by Lloyds Bank against the Appellant, in relation to the Appellant's personal guarantee, the Bank maintained in court that there were insufficient funds available from Heritage plc to meet that company's borrowings before the call on the Appellant's personal guarantee.

5. The Appellant has made it clear – both to the Information Commissioner and to the Tribunal during his oral appeal in respect of this Freedom of Information Request – that he has complained to the Metropolitan Police about the alleged perjury of a Lloyds Bank employee in that litigation.

6. The Appellant's position is that the alleged perjured evidence resulted in the Bank succeeded in getting his defence struck out in respect of the call in relation to his personal guarantee. On that basis, he argues that Lloyds Bank misled the courts over the value of recoveries made against the debt that was the subject of his personal guarantee.

7. The Financial Services Authority (FSA), now renamed the Financial Conduct Authority (FCA), subsequently carried out an investigation into whether Lloyds Bank had operated correctly within insolvency law in relation to recoveries made from Heritage plc before the call on the Appellant's guarantee.

8. The Appellant believes that Lloyds Bank had little or no incentive to recover the funds owed from Heritage plc prior to the call on his guarantee.

9. The Appellant, with an obvious interest in the results of that investigation, wanted the briefing notes that were provided to Lord Adair Turner who was

then Chair of the FSA and which formed the basis of Lord Turner's letter written to the Appellant's MP.

10. On 20 December 2012 he asked the FSA for any information it held in relation to financial recoveries made by the receivers who had been appointed to Heritage plc. Following a complaint to the Information Commissioner, the Commissioner issued decision notice FS50488531 dated 8 October 2013 concluding that the request was vexatious under section 14 of FOIA.

11. On 14 October 2013, the Appellant wrote to the Information Commissioner's Office (ICO) and asked for the information the ICO had obtained from the FCA in these terms:

> As part of its submissions to the Commissioner the FSA [now the FCA] provided arguments encompassing aspects of the more recent guidance. May I please have copies of those arguments.

12. On 28 October 2013 he wrote:

> I request ALL information relied on by the ICO in arriving at the decision of 8 October 2013 in this case [FS50488531].

13. On 25 November 2013, the ICO released all the information requested to the Appellant except:

(1) The personal data of third parties; and

(2) A document supplied by the FCA to the ICO identified as "the briefing notes to Lord Turner" (the briefing notes).

14. The ICO's refusal to disclose this information in relation to (2) above relied on section 44 (1) (a) of FOIA by virtue of section 59 (1) of the Data Protection Act 1998 (DPA).

15. Following a complaint to the IC, the Commissioner concluded in Decision Notice FS50527606 dated 6 May 2014 that section 44 (1) (a) had been correctly applied to the nondisclosure of the briefing notes.

16. On 21 August 2015 the Appellant, arguing that there was now more public interest in the briefing notes, requested information from the ICO as follows:

> .... I now submit a further request for the information being concealed from me on the grounds that it is in the "public interest" for that information to now be revealed.

17. That request was initially refused because it was considered to be a repeated request under section 14 (2) FOIA.

18. Following an internal review, the ICO withdrew its reliance on section 14 (2). It confirmed, however, that the information would still be withheld under section 44 FOIA by virtue of the statutory prohibition in section 59 DPA.

19. The ICO also treated the request as the subject access request under the DPA and, that to the extent that any of the information was personal data, it was exempt from the Subject Access Provisions under section 31 DPA.

The law

20. Section 44 FOIA provides that

> (1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –
>
> (a) is prohibited by or under any enactment...

21. The "enactment" relied on in relation to this appeal is Section 59 DPA which provides:

59 Confidentiality of information

(1) No person who is or has been the Commissioner, a member of the Commissioner's staff or an agent of the Commissioner shall disclose any information which—

(a) has been obtained by, or furnished to, the Commissioner under or for the purposes of the information Acts,

(b) relates to an identified or identifiable individual or business, and

(c) is not at the time of the disclosure, and has not previously been, available to the public from other sources,

unless the disclosure is made with lawful authority.

(2) For the purposes of subsection (1) a disclosure of information is made with lawful authority only if, and to the extent that—

(a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business,

(b) the information was provided for the purpose of its being made available to the public (in whatever manner) under any provision of the information Acts,

(c) the disclosure is made for the purposes of, and is necessary for, the discharge of—

(i) any functions under the information Acts, or

(ii)any EU obligation,

(d) the disclosure is made for the purposes of any proceedings, whether criminal or civil and whether arising under, or by virtue of, the information Acts or otherwise, or

(e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest.

(3) Any person who knowingly or recklessly discloses information in contravention of subsection (1) is guilty of an offence.

(4) In this section "the information Acts" means this Act and the Freedom of Information Act 2000.

<u>The appeal to the Tribunal</u>

22. The Appellant maintains that the Commissioner was wrong to conclude that section 59 (1) DPA was engaged on the ground that the FCA was a "business" for the purposes of section 59 (1) (b) DPA.

23. If section 59 (1) DPA was engaged then the Commissioner had erred in failing to conclude that the "gateway" under section 59 (2) (c) was engaged because of the ICO's "community obligation to disclose the information".

24. On the basis that section 59 (1) DPA was engaged, the Commissioner had erred in failing to conclude that the "gateway" under section 59 (2) (d) DPA was engaged given that disclosure was required "for the purpose of criminal and civil proceedings".

25. Similarly, if section 59 (1) DPA was engaged then the Commissioner had erred in failing to conclude that the "gateway" under section 59 (2) (e) DPA was engaged.

26. In his oral evidence to the Tribunal in the appeal the Appellant structured his points around the skeleton argument he had already prepared and served on the Commissioner and the Tribunal dated 10 August 2016. He adopted this as his witness statement in the Appeal.

27. He explained that he was the co-founder of Help4Lips (H4L), a Community Interest Company representing the interests of Litigants in Person. The aim within that community was to settle litigation without going to court.

28. He believed that a section 47 Financial Services Act 1986 offence had been committed and that it was likely that Heritage plc had been closed as a direct result of perjured evidence which had also resulted in him and his family being evicted from their home.

29. The briefing notes and attachment to the briefing notes that he wished to see had been provided to Lord Adair Turner prior to his response to the Appellant's MP, the late Dr R Vis. He believed those notes would help him get to the truth of what had happened in the closure of Heritage plc and his loss of his family home.

30. He noted that the ICO had written on two occasions to the FCA seeking its permission to release the disputed information to him. On each occasion the FCA had refused. His argument was that the ICO must believe that he was entitled to the information otherwise they would not have asked for the FCA's permission to release it to him.

31. He believed that the "public interest" test could only be met by transparent regulation.

32. He submitted that the FCA was not a "business" and dismissed the ICO's reliance on the Oxford English Dictionary definition of a business. He believed the correct definition came from Stroud's *Judicial Dictionary of Words and Phrases* where there was the definition: "Business – Companies, for the acquisition of gain".[1]

33. Any "common sense" definition of the business had to include the words "profit" or "gain" and that, in effect, excluded the FCA from being a business.

34. He submitted that the Commissioner had a Community Obligation to release the withheld information.

35. Without knowing precisely what information the Commissioner was withholding, he believed it was connected with the FSA's original investigation into funds allegedly missing in the recovery process from

[1] This definition appears to come from a facsimile of the 1st edition, published in 1890.

Heritage plc. The value of those funds was at the heart of his perjury action against a named individual and that perjury allegation was currently being processed at Bristol Magistrates Court.

36. Disclosure of the information was necessary in the public interest. The operations of the FCA had attracted, and continued to attract, significant public scrutiny. Revealing the information would shed light on the FCA's regulation in respect of the banks' treatment of small and medium-sized enterprises at that time.

37. Revealing the briefing notes to him would advance the information available to the public in this area.

Evidence

38. The Tribunal heard submissions in open court and in closed session as well as considering open and closed material which included the withheld information itself.

39. The Tribunal adopted the guidance for the approach to be taken by courts and tribunals in respect of any closed material procedure set out immediately below.

40. In *Bank Mellat v HMT (no.1)* [2013] UKSC 38, which was not a case about FOIA, Lord Neuberger said at paragraphs 68-74 that:

i) If closed material is necessary, the parties should try to minimise the extent of any closed hearing.

ii) If there is a closed hearing, the lawyers representing the party relying on the closed material should give the excluded party as much information as possible about the closed documents relied on.

iii) Where open and closed judgments are given, it is highly desirable that in the open judgment the judge/Tribunal (i) identifies every conclusion in the open judgment reached in whole or in part in the light of points made or evidence referred to in the closed judgment and (ii) says that this is what they have done.

iv) A judge/Tribunal who has relied on closed material in a closed judgment should say in the open judgment as much as can properly be said about the closed material relied on. Any party excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and the arguments it has received.

41. In *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC) the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA cases, noting that such practices are likely to be unavoidable in resolving disputes in this context:

i) FOIA appeals are unlike criminal or other civil proceedings. The Tribunal's function is investigative, i.e. it is not concerned with the resolution of an adversarial civil case based on competing interests.

ii) Closed procedures may therefore be necessary, for consideration not only of the disputed material itself, but also of supporting evidence which itself attracts similar sensitivities.

iii) Parliament did not intend disproportionate satellite litigation to arise from the use of closed procedures in FOIA cases.

iv) Tribunals should take into account the Practice Note on Closed Material in Information Rights Cases (issued in May 2012). They should follow it or explain why they have decided not to do so.

v) Throughout the proceedings, the Tribunal must keep under review whether information about closed material should be provided to an excluded party.

42. The closed bundle in this appeal contained the disputed information. It was necessary for the Tribunal to see this and consider the redacted elements of it when set against the Open material before reaching its conclusions.

43. The Tribunal has considered carefully and rigorously the material in the light of the Appellant's points and concerns already expressed in the notice of appeal and in his other representations and submissions.

44. Consideration of the Closed Material, however, while helpful and informative, has not materially influenced the Tribunal's decision.

Conclusion and remedy

45. Considering the Appellant's points in his appeal sequentially, it is necessary for the Tribunal **first** to determine whether the FCA is a "business" within section 59 (1) (b) of the DPA.

46. This is because that section provides that the Commissioner (or his staff) shall not disclose information which "(b) relates to an identified or identifiable individual or business....".

47. Section 70 (1) DPA states – in relation to the Act – that unless the context otherwise requires that "business" includes any "trade or profession".

48. It might have been thought that, when the Data Protection Bill was going through its Parliamentary process, more attention might have been given to this particular and perhaps crucial definition but that was not the case. The Statute states what the statute states.

49. There is nothing in the statutory language of either section 59 (1) (b) or section 70 (1) to indicate that a public body like the FCA cannot be a "business" for the purpose of those sections. The Oxford English Dictionary defines "business" as denoting "a person's regular occupation, profession, or trade" and only in a secondary sense does it involve "commercial activity".

50. The Tribunal is unimpressed with the Appellant's attempt to use and rely on a late 19th century definition of "business" in this context.

51. The Tribunal has adopted the purposive approach to statutory interpretation in respect of this definition and finds that Parliament intended the broader definition of "business" to cover not merely entities engaged in commercial activity but also anybody engaged in its regular professional duties.

52. It agrees with the submission from Mr Metcalfe, Counsel for the Commissioner, that to the extent that there is any ambiguity concerning the scope of "business" then it must be considered in the light of the purpose of section 59 as a whole.

53. That purpose was to prevent the Commissioner from disclosing information provided in confidence save where certain specific conditions were met. To determine otherwise would mean that the Commissioner's powers would be severely reduced if "business" were to be interpreted as excluding public bodies engaged in their regular activities.

54. The **second** point raised by the Appellant is whether disclosure is necessary for the discharge of certain functions under the information Acts pursuant to section 59 (2) (c) DPA.

55. The Tribunal dealt with this as a preliminary point at the oral appeal hearing.

56. The Appellant had argued that the ICO had "a community obligation to disclose" the requested information "bearing in mind the public interest in the unlawful action of banks". He did not identify the specific EU law obligation he was relying on and had made no obvious attempt to particularise this element of his claim.

57. The Tribunal strikes out this ground of appeal under Rule 8 (3) (c) of the Tribunal's Procedure Rules on the basis that it is manifestly without foundation.

58. **Thirdly**, there is the issue of whether disclosure was made for the purpose of civil and criminal proceedings pursuant to section 59 (2) (d) DPA.

59. The Tribunal explored this area with the Appellant asking him to specify the existence of any particular proceedings by reference to claim form, references or appeal numbers, the court in which they had been commenced and/or the current status.

60. The best the Appellant could do was to say that he had a barrister working on the issue of whether a witness had committed perjury and that there were proceedings currently being processed through Bristol Magistrates Court.

61. He mentioned that matters had been before District Judge Cooper there. He was unable to provide any detailed or substantial information about exactly what was going on with these proceedings.

62. By section 1(1) of the Perjury Act 1911, perjury is committed when a lawfully sworn witness or interpreter in judicial proceedings wilfully makes a false statement which he knows to be false or does not believe to be true, and which is material in the proceedings.

63. The offence is triable only on indictment and carries a maximum penalty of seven years' imprisonment and/or a fine.

64. A conviction cannot be obtained solely on the evidence of a single witness as to the falsity of any statement.

65. There must, by virtue of section 13 Perjury Act 1991, be some other evidence of the falsity of the statement, for example, a letter or account written by the defendant contradicting his sworn evidence is sufficient if supported by a single witness.

66. The Appellant's lack of knowledge or up-to-date information about the perjury prosecution that he was apparently promoting at Bristol Magistrates Court which, in itself, could never be the trial court because the offence is triable only on indictment leads the Tribunal to give little weight to this ground of appeal.

67. In any event, if the withheld information – the briefing notes – was relevant to any perjury prosecution then the proper course would be for the Appellant first to seek disclosure of them under the provisions of the Civil Procedure Rule 31.

68. It is only when a court has directed disclosure of such material in some other proceedings under the provisions of CPR 31 that section 59 (2) (d) would then be engaged.

69. That is not the case in this appeal.

70. **Fourthly** and finally there is the issue of whether disclosure is necessary in the public interest under section 59 (2) (e) DPA.

71. The Tribunal finds as a fact that the requested information was provided by the FCA to ICO in confidence.

72. If the ICO is not able to receive such information in confidence from public bodies like the FCA then, in fact, the public interest is damaged and the FOIA regime diminished. It would, in effect, circumvent the purpose of the Act and that, in itself, would not be in the public interest.

73. For all these reasons the Tribunal finds that the Appellant's appeal fails.

74. Our decision is unanimous.

75. There is no order as to costs.

Robin Callender Smith
Judge
20 September 2016