



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2016/0291**

**Decided without a hearing**

**Before  
CHRIS RYAN  
JUDGE  
MICHAEL HAKE  
DAVE SIVERS  
TRIBUNAL MEMBERS**

**Between**

**GRAHAM LEGGETT**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

First Respondent

**and**

**BRITISH BROADCASTING CORPORATION**

Second Respondent

**DECISION AND REASONS**

GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

Introduction

1. This Appeal arises from a Decision Notice published by the Information Commissioner under reference FS50615738 on 10 November 2016 ("the Decision Notice"). The Information Commissioner rejected the Appellant's complaint about the way in which the Second Respondent ("BBC") had handled a request for information he had submitted to it on 3 December 2015 ("the Request").
2. The Request was in the following terms:

*"As evidenced by the attached document TRUST (13) 39 entitled "The BBC Whistleblowing policy and processes" under the section IV. Annex II Whistleblowing complaints - Dataset", the following statistics were reported by BBC HR to the BBC Trust.*

- There was one incident of whistleblowing with respect to the Data Protection Act ("dpa") in 2012.*
- There have been two incidences of whistleblowing with respect to the Data Protection Act between 2008 and 2012.*
- Neither instances of whistleblowing with respect to the Data Protection Act between 2008 and 2012 were 'Not upheld'*
- Both instances of whistleblowing with respect to the Data Protection Act between 2008 and 2012 resulted in "Disciplinary Action but no dismissal".*

*"From the above it can be concluded that the instance of whistleblowing with respect to the Data Protection Act in 2012 was upheld, and that disciplinary action was taken but no dismissal.*

*"Did the individual who requested the investigation into whistleblowing with respect to the Data Protection Act in 2012 received (sic) notification of the outcome of this investigation by the time the attached report was published? If so on what date did this occur? If not did the individual above receive notification of the outcome of this investigation after the attached report was published? If so, on what date did this occur? [We will refer to this as "First Request"]*

*Did the individual above claim they had suffered any form of detriment, bullying or harassment, and if so was an investigation made into such a claim, and in turn if so, on what date was the individual notified of the outcome ["Second Request"]*

*Has the individual above received any offer of compensation, and if so, on what date was this offer made? ["Third Request"]*

*Was this instance of whistleblowing in 2012 investigated by the Information Commissioner? If so, what was the outcome of the investigation, and was the individual who requested the investigation into whistleblowing notified of this outcome? ["Fourth Request"]*

3. Under section 1 of the Freedom of Information Act 2000 ("FOIA"), a public authority is obliged to disclose information it holds to anyone requesting it, provided the information is not exempt or other factors override the obligation. The BBC is treated as a public body in the context of this Appeal.
4. The grounds on which the BBC refused to comply with the Request were summarised in the Decision Notice at paragraphs 6-16. The evidential basis for the Information Commissioner's decision in favour of the BBC, and the reasoning she adopted, are clearly set out in the Decision Notice. The conclusion the Information Commissioner reached was that:

*"• On the balance of probabilities, the BBC does not hold information that falls within the scope of parts 1 and 4 of the request.  
• Under section 40(5)(b)(i), the BBC is correct to neither confirm nor deny it holds the information requested under parts 2 and 3 of the request as to do so would release the personal data of a third person."*

5. The BBC had, quite properly, treated the requested information as relating to a third party, even though it suspected that the Appellant was in fact "*the individual*" referred to in each part of the Request. The Information Commissioner adopted the same approach. However, in the Grounds of Appeal filed in support of the Appeal to this Tribunal the Appellant provided detailed background information that demonstrated that he was indeed "*the individual*" concerned.
6. The Grounds of Appeal disclose that it was the Appellant who, while working for the BBC on a temporary basis in 2011, had reported a perceived data security breach in the BBC's systems. He had subsequently escalated the notification to senior management because he felt that the manager to whom it had first been reported was taking no action. At around the same time he had complained to the BBC's Human Resource team that he had been bullied and harassed by the same manager and he subsequently instructed solicitors to seek compensation from the BBC for having terminated his engagement. In 2012, he reported his suspicions of a security breach to the Information Commissioner who had ultimately decided that the BBC had taken appropriate steps to deal with the security risk and that the investigation could therefore be closed.
7. The Appellant went on to explain in the Grounds of Appeal that in February 2015 he had come across the report referred to in the Request and this discovery led him to enquire into the outcome of his complaints about both data security and harassment. He did this by first utilising his rights under the Data Protection Act 1998 ("DPA") to access his own personal data and, subsequently, by submitting the Request.

8. The Grounds of Appeal therefore show that the Information Commissioner need not have considered the complex provisions of the FOIA that determine whether or not the protection of an individual's personal data justify a "neither confirm nor deny" response to an information request. In the case of an individual seeking his or her own information the relevant provisions are clear on this point. They read:

**"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.

...

(5) The duty to confirm or deny –

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

..."

9. The Grounds of Appeal do not challenge the Information Commissioner's conclusion that the information sought under the Second and Third Requests constituted personal data. And it certainly seems to us to fall within the definition of personal data set out in section 1 of the Data Protection Act 1998 ("DPA") which provides:

*"'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"*

10. It seems to us, also, that the information sought in the First Request – information about the outcome of an investigation into the Appellant/requester's own whistleblowing action – also constitutes his personal data. Similarly, in relation to the Fourth Request, information about communications between the Appellant and the BBC regarding the outcome of the Information Commissioner's investigation, instigated by his own original complaint, would also constitute his personal data. It follows that all of the First to Third Requests and part of the Fourth Request clearly falls within FOIA section 40(1). The result is that the BBC had no obligation to disclose that information or to give any indication as to whether or not it held it.
11. Because the rest of the information in the Fourth Request would not amount to personal data (and in case we were held to be wrong in categorising, as personal, the information sought under the rest of that Fourth Request and the whole of the First Request), it is necessary for us to consider whether the Information Commissioner was right in her conclusion that the information was not held by the BBC at the time of the Request.

12. Paragraphs 25 to 36 of the Decision Notice record the detailed enquiries made by the BBC and the outcome of those enquiries. At first sight, the searches carried out by the BBC appear to have been thorough. They appear to have been based on a careful analysis of the relevant Parts of the Request and to have been directed at the appropriate sections of the BBC's records. The fact that those efforts produced information that, while not falling within the scope of any part of the Request, did cover related subject matter, is further confirmation that the search efforts had been appropriately directed.
13. It is not possible to say, with absolute certainty, that a particular item of information is not held somewhere within an organisation of the size of the BBC. The most that can be done is to assess whether it is likely, on a balance of probabilities, to be so held. That assessment can only be made on the basis of the evidence provided about the targeting, scope and rigour of the searches that were made in response to the Request, which should be set against any criticisms of those efforts presented by the Appellant or arising from the Tribunal's own assessment of them.
14. The Grounds of Appeal contained no criticism of the BBC's search efforts or the Information Commissioner's decision in respect of the First Request. As to the Fourth Request they contain no more than an assertion, without evidential support, that the Information Commissioner was wrong to have concluded that it was not possible to link the incidence of whistleblowing in 2012 to the investigation carried out in 2013.
15. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.
16. In our view, the Grounds of Appeal identify no basis on which it can be said that the Information Commissioner fell into error in the fact-finding exercise that formed the basis of this part of the Decision Notice.
17. For the reasons set out above we have decided that the Appeal must be dismissed.
18. Our decision is unanimous.

Signed

Chris Ryan

Judge of the First-tier Tribunal

Date: 14 March 2018