



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

Appeal Reference: EA/2017/0189

**Decided without a hearing
On 22 March 2018**

Before

**Karen Booth
JUDGE**

**Mike Jones and John Randall
TRIBUNAL MEMBERS**

Between

MICHAEL O'CONNOR

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE CHARITY COMMISSION FOR ENGLAND AND WALES

Second Respondent

DECISION AND REASONS

DECISION

1. For the reasons set out below, the First Respondent's decision notice dated 22/8/2017 is not fully in accordance with the law. The Tribunal allows the appeal in part and substitutes the following decision notice:

The withheld information was correctly withheld in reliance on section 31(1)(g) (read with section 31(2)(f)) of the Freedom of Information Act 2000, other than in relation to the information comprising the names and job titles of the officers of the Second Respondent who were corresponding with the trustees of the charity concerned. That information was correctly withheld in reliance on section 40(2). The Second Respondent is not required to take any steps.

REASONS

Background

2. The Appellant was a member of a Society, with charitable status ("the Charity") since the 1970s and was actively involved in its running since the early 2000s. In December 2014, some allegations of misconduct were made about one of the Charity's committee members. According to the Appellant, he resigned from his roles within the Charity after the committee decided to take no action in respect of those allegations. The Appellant was subsequently expelled as a member of the Charity.
3. The Appellant wrote to the second Respondent ("the Commission") in March 2015, raising a number of concerns about the running of the Charity. On 30/7/2015 the Commission advised the Appellant that the matters he had complained about were for the Charity's membership to resolve and that they were outside the Commission's remit. The Appellant disagreed. After further exchanges of correspondence, the Commission decided to treat the Appellant's objections as a complaint to be dealt with under its formal complaints processes. On 15/9/2015 the Commission completed stage 1 of its review procedure and rejected the complaint. The decision was further reviewed under stage 2 of the Commission's procedures and the Appellant was informed on 20/10/2015 that: (a) the Commission had contacted the Charity about two matters (a potential safeguarding issue and issues relating to the charity's accounts and governance), was satisfied with the trustees' response, and would be taking no further action; and (b) the Commission had determined that the Appellants' other concerns were essentially internal matters relating to the management and administration of the charity and were matters for the trustees.
4. The Appellant continued to dispute the Commission's decision. On 6/1/16, the Commission informed him that they had decided to write further to the trustees for the purposes of establishing how they were managing the reputational risks in relation to the safeguarding concerns raised by the Appellant.

5. In the meantime (October 2015), the Appellant pursued his complaint with the Parliamentary and Health Service Ombudsman. In a report dated 6/9/2016, the PHSO dismissed the complaint, concluding that “ ...the Commission has dealt with the Appellant’s enquires in a reasonable manner, and in ways that accorded with both the law and the Commission’s policies and procedures The Commission has considered the information that [the Appellant] provided but has decided this does not warrant the use of its formal enforcement powers. That decision appears in line with the Commission’s published risk framework for taking regulatory action.”
6. The Appellant raised further concerns about the Charity with the Commission in December 2016. At that point, the Commission confirmed that they were satisfied with the response from the trustees of the Charity regarding the management of the reputational risk issue and had concluded that there was no regulatory role for the Commission in that regard.

The request for information

7. On 23/12/2016 the Appellant sent a further email to the Commission in the following terms: “Can you explain to me why you told [the PHSO] that you would be writing to me with an explanation of all your decisions if you now say that you cannot do so? And can you tell me how the charity said they were going to ‘manage the reputational risks’ as that is clearly a matter of immense importance to the membership.”
8. The Commission treated the second question as a request for information under the Freedom of Information Act (“FOIA”). On 25/1/2017 the Commission refused the request in reliance on section 31(1)(g) of FOIA. They subsequently reviewed their decision but did not change it.

The complaint to the Information Commissioner

9. In February 2017, the Appellant complained to the First Respondent (“the IC”) about the refusal to provide the requested information. During the IC’s investigation, the Commission reconsidered their position. On 13/7/2017 they provided the IC with four sets of documents: (a1) correspondence between the Commission and the Charity that fell within the scope of the request (comprising 10 redacted emails which were sent in the period 15/9/2015 to 21/1/2016 inclusive); (a2) the unredacted versions of those emails; (b) correspondence between the PHSO and the Commission, all of which they considered to be outside the scope of the FOIA request, other than the PHSO Report referred to above (which the Appellant had seen); and (c) an email dated 21/12/2016 from the Commission to the Appellant (which answered the first part of the FOIA request).

On the same date, the Commission provided the Appellant with copies of the redacted emails and explained that the redacted information was being withheld in reliance on sections 40(1) and (2), 31 and 41.

10. In her decision notice dated 22/8/2017, the IC decided that the Commission had correctly applied section 31(1)(g) with subsection (2)(f) to the withheld information and was not required to take any steps.

The appeal to the First-tier Tribunal

11. On 30/8/2017, the Appellant exercised his right of appeal under section 57 of FOIA against the IC's decision notice. On 6/9/2017, the Tribunal gave a direction adding the Commission as a Second Respondent under powers contained in rule 9 of its procedural rules (the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009). All three parties elected to have the decision made on the papers. After reading the bundle of evidence, we were satisfied that we could properly determine the issues without a hearing.

The law

12. Our task is set out in section 58 of FOIA:

58 Determination of appeals

- (1) If on an appeal under section 57 the Tribunal considers—
 - (a) that the notice against which the appeal is brought is not in accordance with the law, or
 - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
- (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

In practical terms, that meant that we had to (a) decide whether the IC had correctly determined the scope of the request for information and (b) consider the information that had been redacted from the 10 emails referred to above and decide whether the Commission was entitled to withhold that information in reliance on section 31(1)(g), read with 31(2)(f), (law enforcement) (or, to the extent that those provisions did not apply, in reliance on: one or more of the other section 31(2) purposes referred to by the Commission; section 40 (personal information); and/or section 41 (information provided in confidence)). The text of those sections is set out in full in the Annex to this decision.

The evidence

13. The evidence before us consisted of: the paper evidence in the open hearing bundle; the additional open documents; and the unredacted copies of the ten emails referred to in paragraph 9 above.

The appeal grounds

14. The Appellant's appeal grounds are set out in the documents at pages 14 and 18-21 of the open hearing bundle (and elaborated on in his subsequent responses at pages 70 and 80-84 of that bundle and in his final submissions dated 29/1/2018).
15. The Appellant raised many points that were outside our remit or which were not material to the issues we had to decide. He also made a number of unsubstantiated allegations. He appeared to be challenging the IC's interpretation of the *scope* of his request for information.

He objected to the Commission "bundling together" their public interest test arguments to section 31 and section 41 of FOIA. However, we considered that the IC had resolved that issue by finding that section 31 applied to all of the withheld information, clarifying the public interest arguments relevant to that exemption and clearly setting out why she decided that the balance was in favour of withholding the information.

16. The Appellant objected to the Commission adding themselves as a Respondent without his agreement. That objection is misconceived, however, as rule 9(1) of the procedural rules referred to above permits the Tribunal to give a direction adding a party as a respondent and rule 9(3) permits any person who is not a party to apply to the Tribunal to be added as a party. The Appellant's agreement is not required. We also disregarded his objection to the Commission introducing further exemptions at the appeal stage, as it is now well established in case law that a public authority is entitled to raise a new ground of exemption at any stage.
17. The Appellant asked us to consider "...the wider implications and precedent of accepting and thus condoning the .. Commission's hugely contentious claim that they must be allowed to evade the FOIA because they are wholly unable to operate "openly and accountably" and should thus be exempted from the provisions of the Act."

Our decision and the reasons for it

18. We were satisfied that the IC had correctly determined the scope of the request in relation to which the complaint was made by interpreting it as a request for information held by the Commission about *how the Charity said* they were going to manage the "reputational risks" referred to above. The wording of that part of the request was, in our view, clear and unambiguous. And in our judgement there was also only one objective reading of the *first* part of his request ("Can

you explain to me why you told [the PHSO] that you would be writing to me with an explanation of all your decisions if you now say that you cannot do so?); that is, it was a request for an explanation and not a request for recorded information held by the Charity and that it had been answered in the Charity's email of 21/12/2016.

In his appeal grounds, the Appellant appeared to be suggesting that the Commission and the IC should have interpreted the request much more widely so as to include, for example, information about how the Commission had verified the information it had received from the Charity (see page 18 of the bundle). In his reply at page 80 of the bundle, he said: "In reality, my request was simply to see the internal and other Charity Commission documents and correspondence relating to my complaints against the ... trustees so that I could ascertain whether or not those complaints had been fully understood and properly considered.". We did not accept that that was a reasonable interpretation of the request.

19. We reviewed the withheld information. It consisted of the following information: (a) the questions being raised with the trustees in connection with the alleged safeguarding issue and the responses to those questions; (b) name, title and email address of the trustee with whom the Commission was corresponding; and (c) names and job titles of the Commission officers who were corresponding with that trustee.
20. As regards (a) and (b), we had little difficulty in finding that section 31(1)(g), read with 31(2)(f), was engaged, given that the protection of charities against misconduct/mismanagement is one of the Commission's statutory functions. We agreed that the disclosure of the information would be likely to prejudice the exercise of those functions by impeding the voluntary and candid dialogue between the Commission, trustees and others.

We reviewed the public interest test arguments in favour of/against disclosure. We agreed with the IC's decision that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption. We attached particular weight to the strong public interest in not disclosing information which would be likely to impede the Commission's ability to carry out its functions effectively.

21. We rejected the Appellant's assertion that the Commission was claiming that they must be allowed to evade the FOIA because they are wholly unable to operate openly and accountably and should thus be exempted from the provisions of the Act. The Commission had not made any such claim. In the experience of the Tribunal, it is common practice for regulators whose attention has been drawn to alleged malpractice to use informal methods of investigation in the first instance. This is generally the most sensible, cost effective and proportionate way to proceed. It would be wholly disproportionate in our

judgement to expect a regulator to launch a formal investigation (except in the most extreme cases) without first attempting to ascertain, by means of quick and informal enquiries, whether the allegations have any sound basis which might then necessitate a different approach. This is supported, in our judgement, by the quick and helpful responses that the Commission received from the trustees of the Charity. We considered that there is a very strong public interest in allowing a regulator the freedom to exercise its statutory functions in an appropriate and proportionate manner and that this tipped the scales in favour of withholding the information.

22. As regards (c), it was clear to us that the disclosure of that information could not prejudice the exercise by the Commission of its relevant functions, given that they had informed the Appellant that they had written to the trustees. However, the Commission had also claimed that section 40(2) (personal information) applied to that information and we agreed.

That information *is* clearly “personal data” (within the meaning of the section 1(1) of the Data Protection Act 1998 (“the DPA”)) to which section 40(2) of FOIA potentially applies. Such information is subject to an absolute exemption from disclosure under FOIA in specified circumstances, including where section 40(3)(a)(i) applies.

In summary, we were satisfied that section 40(3)(a)(i) applies to the names and titles of the Commission officers who were corresponding with the Trustees because the information is clearly “data” to which section 40(3)(a) applies and its disclosure would contravene the first data protection principle (“Personal data must be processed fairly and lawfully andmust not be processed unless: (a) at least one of the conditions in Schedule 2 [of the DPA] is also met”). The Schedule 2 condition that is of relevance here is in paragraph 6(1): “The processing is necessary for the purposes of legitimate interests pursued 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”.

Notwithstanding that the key information that the Appellant is seeking (i.e. what the Commission asked the Trustees and how they responded) is exempt from disclosure under section 31, we were satisfied that the Appellant was pursuing a legitimate interest. The disclosure of the personal data relating to the relevant Commission officers is *not, however, necessary* in our judgement for the purposes of those interests and the Commission is entitled to withhold it in reliance on section 40(2).

Other exemptions cited by the Commission in relation to (a) and (b)

23. As regards (a) and (b), the Commission had also cited the exemptions in section 40(1) (personal data relating to the Appellant) and section 40(2) (personal data,

including some “sensitive personal data”, relating to other individuals) and section 41 (information provided in confidence).

We agreed that the relevant parts of that withheld information could have been withheld in reliance on sections 40(1) and (2) and that section 41 was also potentially applicable.

However, as the IC had concluded that all of that withheld information could properly be withheld in reliance on section 31 (and as we agreed with that conclusion) it was unnecessary for her to reach any conclusions about the application of section 40 or section 41 and the fact that she did not do so did not mean that her decision notice was not in accordance with the law.

Inadvertent disclosure

24. We noted that on page 1 of the disclosed information (email dated 15/9/2015) the Commission had disclosed the name of the recipient and the name and job title of the sender (information which they redacted from the subsequent emails). We assumed that this was an oversight on the Commission’s part. It did not affect their ability to rely on the exemptions referred to above in relation to the other recipient/sender details that had been redacted.

Conclusion

25. The withheld information was correctly withheld in reliance on section 31(1)(g) (read with section 31(2)(f)) of FOIA, other than in relation to the information comprising the names and job titles of the Commission officers who were corresponding with the trustees. That information was correctly withheld in reliance on section 40(2). The IC’s decision notice dated 22/8/2017 is not in accordance with the law insofar as it fails to refer to section 40(2) in that respect. However, the Commission is not required to take any steps.

Signed: Karen Booth
Judge of the First-tier Tribunal

Date: 11 May 2018

Date Promulgated: 14 May 2018

ANNEX

31 Law enforcement

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the [\[Inquiries into Fatal Accidents and Sudden Deaths etc \(Scotland\) Act 2016\]](#) to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

(2) The purposes referred to in subsection (1)(g) to (i) are—

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,

- (i) the purpose of securing the health, safety and welfare of persons at work, and
 - (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

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, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in [section 33A\(1\)](#) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of [Part IV](#) of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).
- (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
 - (b) does not arise in relation to other information if or to the extent that either—
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or [section 10](#) of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of [Part IV](#) of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).
- (6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of [Schedule 8](#) to the Data Protection Act 1998 shall be disregarded.
- (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.

41 Information provided in confidence

(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.

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.