



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

Appeal Reference: EA/2017/0271

Decided without a hearing on 2nd June 2018

**Before
KAREN BOOTH
JUDGE**

**PAUL TAYLOR and JEAN NELSON
TRIBUNAL MEMBER(S)**

Between

EWA SYGULSKA

and

THE INFORMATION COMMISSIONER

Appellant

Respondent

DECISION AND REASONS

DECISION

1. The appeal is allowed in part. The Respondent's decision notice dated 19 October 2017 is not fully in accordance with the law. The Tribunal substitutes the following decision notice in its place:

- I. Other than as specified in paragraph II, the MOD has correctly applied section 40(2) to the information in the service record of the individual to whom the request for information applied.*
- II. Section 40(2) of FOIA does not apply to the following information:*
 - i. The information in the communication dated 14 July 1947 at page 3 of the closed bundle of documents (other than all information relating to the recipient of that communication, which must be redacted).*
 - ii. The information in the communication dated 20 September 1948 at page 5 of the closed bundle (other than the two words immediately following the word "commission" [sic] in the first paragraph of that communication, which must be redacted).*

That information must be disclosed to the Appellant within 35 days.

2. For the avoidance of doubt, the information to be disclosed (with the required redactions) is appended to Annex 2 to this decision, which is closed (pursuant to rule 14(6) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009) pending any application for permission to appeal and, if such application is received, until any application and resultant proceedings have concluded.

REASONS

The background

3. The Appellant is the niece of a Polish national ("JB"), who was commissioned in the Polish Resettlement Corps and served as a Captain in the British army from 1943. The Appellant has produced evidence that indicates that JB took leave of absence from the army in May 1947, when he returned to Poland with the intention of rescuing his fiancée and cousin from Poland and bringing them to the West. The plan went awry and JB was arrested close to the Polish/German border. The Polish authorities maintain that he was released from temporary arrest in August 1947. The family maintain that he was not heard from again and they believe that he was either unlawfully killed or that he died in a prison or a camp. They do not believe that he returned to the UK. In the absence of a death certificate, the Appellant is unable to prove that he is no longer living. His date of birth was 9/11/1915 and, therefore, if he is alive today he will be 102 years old.
4. The family made enquiries with the Ministry of Defence ("MoD"). On 24/8/2016, the MoD (APC Disclosures 5 Polish) sent the email at page 63 of the bundle of evidence to the Appellant's son-in-law. They confirmed that they hold the

service records for JB but could not release them without his consent (or an authority from his official next of kin). They did, however disclose some information from his index card, the most relevant of which reads as follows:

“Via Gibraltar, he moved to the United Kingdom and posted to 1 Grenadier Division on 10.08.1943. Served in the United Kingdom. Due to a gradual demobilisation of the Polish Forces under British command, he was commissioned in the Polish Resettlement Corps, served in the United Kingdom until finally relinquished his commission on 16/08/1948.”

The same MOD officer subsequently wrote (page 64 of the bundle):

“... [JB] must have lived on 16.08.1948 when he was released from the Polish Resettlement Corps (PKPR). On that day his service in the Polish Armed Services in the West under the British Command finished.”

The request for information

5. On 24/4/2017, the Appellant wrote a 4 page letter to the MoD requesting information from JB's service record. The Respondent has summarised the request for information in her decision notice. We noted that her request concludes as follows:

“Conclusion [sic]

- *please, disclose the personal file of my uncle captain [JB]*
 - *if you cannot disclose the whole contents of that, please reveal at least the confirmation if my uncle still lived in 1948*
 - *if also this was not possible, please read and check carefully the information from the personal file of captain [JB] related to 16.08.1948 and confirm in writing and give the reasons that captain [JB] really still lived in 1948”*
6. The MoD responded on 28/7/2017, confirming that the service record was held but would not be disclosed in reliance on section 40(2) (personal information) of the Freedom of Information Act 2000 (“FOIA”). They explained that, in the absence of proof of death, they were relying on their established policy of assuming that the person is not deceased until a period of 116 years has passed since their date of birth.

The complaint to the Respondent

7. On 5/8/2017 the Appellant complained to the Respondent about the MOD's refusal to provide the information requested. On 19/10/2017 the Commissioner issued her decision notice (Reference: FS50695574). She decided that the MoD was entitled to rely on section 40(2) to withhold the information and was not required to take any steps.

The appeal

8. On 7/11/2017 the Appellant appealed to the First-tier tribunal against the Respondent's decision.
9. The Appellant's appeal grounds are set out on pages 10 to 14 of the bundle of evidence. They included some points that were outside our remit. The Appellant asserted, for example, that the MOD keeps the records of Polish soldiers illegally. We did not accept that, but it was not an issue that we have the power to consider. We are only concerned about information that is held by a public authority and whether the law requires it to be disclosed, and not why it is held in the first place. She also speculates about the nature of the information held, suggesting that it is not "top secret" or sensitive, when it is the laws referred to below that determine the protection that is given to personal information of whatever nature.
10. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered an agreed open bundle of evidence comprising some 152 pages, including submissions made by both parties, which were helpful and thorough.

The law and the issues we had to decide

11. 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.

12. Section 40(2) of FOIA is set out in full in Annex 1 to this decision.

13. The first issue we had to decide was whether the data held by the MoD and falling within the scope of the request constituted "personal data" (within the meaning of section 1(1) of the DPA) relating to JB.

"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,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

14. If it did not constitute his personal data, section 40(2) could not be relied on to withhold the information. If it did, section 40(2) could only be relied on to withhold the information if its disclosure to a member of the public, other than under FOIA, would contravene any of the data protection principles.

15. Greater protection is given to “sensitive personal data”, defined in section 2 of the DPA as follows:

In this Act “sensitive personal data” means personal data consisting of information as to—

(a) the racial or ethnic origin of the data subject,

(b) his political opinions,

(c) his religious beliefs or other beliefs of a similar nature,

(d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992,

(e) his physical or mental health or condition,

(f) his sexual life,

(g) the commission or alleged commission by him of any offence, or

(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

16. It was clear that only section 40(3)(a)(i) was of potential relevance here.

The evidence

17. The evidence before us consisted of an open bundle of evidence comprising 152 pages of evidence. We were unable to consider some of the evidence provided by the Appellant as it was in Polish.

18. We decided that we needed to see some of the information held by the MOD in order to decide whether its disclosure would contravene any of the data protection principles. On 7/3/2018 we issued directions in the following terms.

“2. The MoD is directed to provide copies of the following information to the Tribunal and to the Respondent only within 14 days:

Any information which is held by the MoD relating to [JB] and which relates to the time period 1 January 1947 to the date when the MoD received the Appellant's information request sent on 24/4/2017.

3. The Tribunal will treat any information received pursuant to paragraph 2 above as closed material, which will not be disclosed to the Appellant unless and until the Tribunal's final decision is to order disclosure of some or all of that material.

4. If, following receipt of any information referred to in paragraph 2 above, the Respondent wishes to make any written representations as to whether she still considers that all or any of that information is exempt from disclosure in reliance on section 40(2) of FOIA, she may do so within 21 days. The Respondent must ensure that a copy of any such representations is provided to the MOD, even though the MOD is not a party to the appeal.

5. The MOD may send a written response to any such representations to the Tribunal within 21 days of their receipt. So far as possible, any such representations must be open and copies should be provided to both parties. If the MOD consider that all or part of their response should not be disclosed to another party, the MOD may apply to the Tribunal to be added as a party and for a direction to be given by the Tribunal that the information concerned will not be disclosed to specified other persons."

19. On 16/3/2018, the MoD provided the Tribunal and the Respondent with the information sought (which from now on is referred to as "the closed material"). This consists of 17 pages of information, only 5 of which consist of, or include, information in the English language (the remainder is in Polish). Some of that information includes sensitive personal data. We were unable to consider the information that was in the Polish language.

Our decision and the reasons for it

Is the information sought personal data?

20. We were satisfied that the information sought constitutes "personal data" relating to JB. It is not known whether he is alive now or at the time of the request for information and there is no death certificate. On the face of it, the MoD's policy of assuming that, in the absence of a death certificate, a person is assumed to be living until they would have reached 116 years of age seemed to us to be surprisingly cautious. However, in view of the substantial amount of personnel records that they hold, the importance of protecting the privacy of the individuals to whom they relate and the apparent acceptance by the Respondent of this policy, we considered this approach to be reasonable. And in any event, JB would have been 102 years of age at the time of the request if he was still living at that time, which falls considerably short of the cut-off age of 116. So, to be clear, we agreed that the MOD was right to treat him as a living individual in the absence of any formal proof to the contrary.

Would its disclosure to a member of the public contravene any of the data protection principles?

21. The data protection principles are set out in Schedule 1 to the DPA. For the purposes of disclosure under FOIA, only the *first data protection principle* is of likely relevance:

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, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

22. The issues we had to decide, in this order, were:

- Whether disclosure of all or any of the closed material would be fair.
- If so, would at least one Schedule 2 condition be met (and, in the case of any sensitive personal data, would at least one Schedule 3 condition be met).
- If so, would the disclosure be lawful.

Fairness

23. Our starting point was that, in the absence of any overriding factors, it would *not* be fair to disclose under FOIA (which is effectively a disclosure to the public at large) information from an individual's service record. Only very exceptionally could this be said to be a reasonable expectation of the individual concerned. We decided, however, that this was one of those exceptional cases where it would be fair to disclose some information (but not any sensitive personal data) from that record. Our reasons were as follows.

24. The MOD has already disclosed to another (more distant) member of the Appellant's family, without any restriction on the subsequent use of that information, some information from JB's records indicating that he continued to serve in the United Kingdom until he relinquished his commission on 16/8/1948. The indications were that the MOD would have provided that information to any member of the general public and we therefore regarded it as being effectively in the public domain.

25. Given the background to this request and the other evidence before us, it seemed to us that there is a strong and legitimate interest in the Appellant and the public having access to information that confirms or, as the case may be, contradicts the information already provided by the MoD. In view of the disclosure that has already been made and the very long passage of time between the events in question and the date of the information request, we considered it unlikely that there could be any adverse consequences for JB of a further disclosure of information that could confirm or contradict the information that MoD has effectively placed in the public domain.

26. We considered that the balance between JB's rights and freedoms on the one hand and the legitimate interests of the Appellant and the public in trying to ascertain the fate of a serving British soldier in the circumstances prevailing at that time was weighted in favour of disclosure of some of the closed material.

Schedule 2

27. As we had decided that it would not be fair to disclose any sensitive personal data, it was only necessary for us to identify an applicable Schedule 2 condition. In the absence of the consent of the data subject, the only condition of potential relevance is condition 6(1):

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.

28. The leading case law on condition 6(1)¹ has established that it requires the following three questions to be answered:
- a. Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
 - b. Is the processing involved necessary for the purposes of those interests?
 - c. Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?
29. We considered limbs a and c as part of the fairness test. We were satisfied that the Appellant *is* pursuing a legitimate interest and we did not consider that the disclosure of some of the withheld information would be unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of JB.

As regards b, case law has established that “necessary” in this limb means “reasonably necessary” and not absolutely or strictly necessary and also that necessity requires the *minimum* interference with privacy rights. Against the background described by the Appellant, the MOD has asserted that JB was alive in August 1948. The disclosure of any information that confirms or undermines that assertion was in our judgement necessary for the purposes of the interests she is pursuing.

Lawfulness

30. There are no specific statutory prohibitions of which we are aware that would make the disclosure of any of the withheld information unlawful. It is unlikely, given our decision on the question of fairness and condition 6(1) of Schedule 2, that a limited disclosure could contravene the Human Rights Act 1998. There are no obvious common law restrictions. We concluded that a limited disclosure of information would not be unlawful.

¹ *Goldsmith International Business School v Information Commissioner and Home Office* [2014] UKUT 563 (AAC) at [35] - [42].

Conclusion

31. For the reasons given above, we decided that section 40(2) of FOIA did not apply to the entirety of JB's service record and that the Respondent's decision notice is not, therefore, fully in accordance with the law. The appeal is allowed in part and our substituted decision notice is set out in paragraph 1 above.

Signed: Karen Booth
Judge of the First-tier Tribunal

Date: 2nd June 2018

Promulgation date: 5th June 2018

ANNEX 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.