



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

**Appeal Reference: EA/2018/0069**

**Decided without a hearing**

**Before  
JUDGE CARTER  
ALISON LOWTON  
ANDREW WHETNALL**

**Between**

**PAMELA LANG**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**and**

**COMPANIES HOUSE**

Second Respondent

**DECISION AND REASONS**

1. This is an appeal by Pamela Lang (“the Appellant”) under s.57 of the Freedom of Information Act 2000 (“FOIA”) against the Information Commissioner’s (“the Commissioner”) Decision Notice dated 20 March 2018 (“the DN”). The Appellant had requested information under FOIA from Companies House, the Second Respondent.
2. This appeal is not upheld for the reasons set out in this decision.

## **Background**

3. The Appellant is a Director of a leasehold Management Company (“the Company”), a limited company registered at Companies House. The Company was formed by the residents of flats in West London. Until 2012, there were five Directors who were also residents. The Appellant was the Company Secretary.
4. In July 2012, forms were filed electronically at Companies House notifying changes to the personnel of the Company: four of the Directors (including the Appellant) were removed, leaving a single Director, and the Appellant was removed as Company Secretary. All Directors were in fact reinstated a few months later.
5. The Appellant made a request for information. At that point, the Appellant was not formally making a request under the Freedom of Information Act (FOIA). Thus, on 3 May 2017, the Appellant requested information from Companies House in the following terms:

*“This is a matter of some importance and full details of who actually submitted the information on both occasions in 2012 is required by the Company, please could you therefore advise which email address was used to electronically file the details.*

*If at all possible, it would be of further help to know a) when the application was first made to register our Company for electronic filing and b) what email address was used when the application was made.”*

6. On 16 May 2018 Companies House confirmed that it did not hold the information requested in part (a) and this remains unchallenged. Companies House confirmed, treating this as a request under FOIA, that it held the relevant e-mail address but was withholding it in reliance on s.40(2) FOIA (third party personal data) and s.41 FOIA (information provided in confidence).

7. Correspondence followed in which the Appellant continued to seek information otherwise than under FOIA. Companies House explained that as the information requested was not in the public domain, and the Appellant was not entitled to it on any other basis, her request fell to be considered under FOIA. The Tribunal acknowledged that it might have been argued that there was some uncertainty over the scope of the request in that the correspondence gave the impression that she was seeking to ascertain not only the email address and date of application but also the identity of the person who had made the application. The Tribunal's view was that it should approach the request on the basis that the plain English used which was to the effect that only the email and date were sought. The Appellant's appeal form only sought the remedy of provision of the email address.
8. The Appellant complained to the Commissioner and, after an investigation, on 28 March 2018, the Commissioner issued the DN, upholding the reliance by Companies House on s.40(2) FOIA. The Commissioner did not go on to consider s.41 FOIA.
9. The Appellant appealed against the DN. The ground of appeal was that that the person who filed the relevant forms did so in the capacity of an officer of the Company, not as a private person, and that this should have a bearing on the correctness of the decision not to disclose.

## The Law

10. The general right of access to information held by a public authority provided under FOIA is subject to a number of exemptions contained in Part II of FOIA. The s.40(2) exemption is a so-called absolute exemption and applies where disclosure would breach any of the Data Protection Principles ("DPP") (see below).
11. Section 40 provides an exemption for personal data:

***"40 Personal information***

[■ ■]

*(1) 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.*

*(2) 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. [...]"*

**12.** 'Personal data' is defined in s.1 of the Data Protection Act 1998 ("**DPA**") as follows:

***"1 Basic interpretative provisions***

*"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 [...]"*

**13.** The effect of s.40(2) and (3) FOIA is that personal data will be absolutely exempt where its disclosure would breach any of the DPPs found in Schedule 1 to the DPA. In the present case, the relevant principle is DPP1, which requires that:

*"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 [...]"*

**14.** The approach of this Tribunal was to consider whether disclosure of the information requested meets one of the conditions in Schedule 2 and then whether disclosure would be unfair, in terms of the general requirement as to fairness in DPP1.

**15.** The only relevant condition in Schedule 2 was determined by the Tribunal to be paragraph 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.”*

**16.** In *Goldsmith International Business School v IC and Home Office* (GIA/1643/2014), the Upper Tribunal endorsed an approach to this condition, which in essence requires three questions to be asked (and a series of propositions which it is not necessary to set out here):

(i) Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?

(ii) Is the processing involved necessary for the purposes of those interests?

(iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

**17.** In deciding whether disclosure of personal data would be unfair in terms of the general requirement as to fairness in DPP1, relevant considerations include the reasonable expectations of the individual as to the ways in which his or her personal data will be processed. This in turn will involve a consideration of what they have been told will happen to their data and their general expectation of privacy, the nature or content of the information itself, the established custom or practice within the public authority and the consequences of disclosing the information (i.e. damage or distress, would the individual suffer if the information was disclosed?).

**18.** Having assessed the data subjects' reasonable expectations or any damage or distress caused by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure into the public

domain (FOIA being disclosure to the world). These interests can include broad general principles of accountability and transparency for their own sake, as well as the legitimate interests pursued by the requester. In balancing these legitimate interests with the rights of the data subject, the public authority, the Commissioner and Tribunal in turn is bound to take a proportionate approach.

### The Appellant's evidence and submissions

- 19.** The Appellant argues that the actions of the person who emailed Companies House were fraudulent and thus she and the Company have a strong interest in disclosure. Without the requested information, that is the email address of the person who made the application, she states, the truth will be allowed to remain buried, with the other three directors, new to the Management Company, kept in the dark about the previous irregularities involved in the running of the Company. She has indicated that she is, in addition, seeking the information in order to clear her own name as there is some suggestion that she herself sought the removal. She has tried to obtain the information through seeking her rights as a Company Director and was told by Companies House that these did not apply in these circumstances and nor was this her personal data to which she had a right of access.
- 20.** The Appellant argues that since the individual who emailed Companies House was acting in a professional capacity, this diminishes his expectation of privacy. The Tribunal is invited to conclude that given this the section 40(2) exemption does not apply.
- 21.** The Appellant provided evidence consisting of various Company returns and forms and correspondence between the Appellant, Companies House and the Appellant's solicitors.

### Companies House's evidence and submissions

- 22.** The evidence of Companies House to the Tribunal was to the effect that:
  - a. It is primarily a registry of company information, maintained under provisions of the Companies Act 2006 ("the 2006 Act"). The Registrar of Companies ("the Registrar") does not conclude on disputes as to fact

and moreover has no investigative powers under the 2006 Act.

- b. The 2006 Act requires companies to keep registers of certain information, including the names of Directors and, where appropriate, Secretaries. Any changes to the register must be notified to Companies House using an appropriate form, although the change takes legal effect when made to the company's register, not when notified to Companies House;
- c. Forms may be filed by a person authorised by the relevant company to do so. An authentication code is sent to the e-mail address of the authorised person, and anyone with access to the e-mail address and the authentication code is then able to file forms on the company's behalf. There is in addition a security password.
- d. Documents filed using the Companies House electronic filing system are in the public domain, but the e-mail address used to file them is not. It was argued that disclosure of such e-mail addresses is prohibited by s.1087(1) of the 2006 Act, which provides that:

*“1087 Material not available for public inspection*

*(3) The following material must not be made available by the Registrar for public inspection:*

*(i) any e-mail address, identification code or password deriving from a document delivered for the purpose of authorising or facilitating electronic filing procedures or providing information by telephone [...]”.*

**23.** Companies House argue that disclosure of the requested information would breach DPP1, it not being within the reasonable expectation of the sender of the email that their personal data would be disclosed further to this FOIA request and that there is a risk of identity fraud if such information were to be given out. In these circumstances, and given that the Appellant has not, it is argued, substantiated the offence of fraud, the absolute exemption in section 40(2) applies.

## The Commissioner's submissions

- 24.** Although the Appellant does not spell out the legal consequences of the ground of appeal, the Commissioner, in its submissions to the Tribunal, considered two possibilities:
- a. That the information is not personal data at all; alternatively
  - b. Although the information is personal data, the data subject's legitimate expectations of privacy are much lower than if s/he had been acting in a private capacity, and are outweighed by the Appellant's legitimate interests in knowing the information.
- 25.** The Commissioner invites the Tribunal to find that the individual who filed the relevant forms can be identified from the e-mail address, both by Companies House and by the Appellant herself, by combining it with other information that they hold about the data subject. That brings it within the definition of personal data given in s.1 DPA (see above), which does not expressly differentiate between information relating to an individual's official or public roles, and the individual's private life.
- 26.** The capacity in which the individual is acting is relevant only to the strength of the interests for and against disclosure. Whilst as a general principle, individuals will have a less strong expectation of privacy in relation to information arising from their professional lives than they do about information relating to their private lives, this does not mean that information about professional activities will always fall to be disclosed. Thus, here, where the activity is on behalf of a private company with a direct link to the data subject's residency, there may still be a significant expectation of privacy. Thus, even if the filing of the forms was technically carried out on behalf of a corporate entity, it was an action that was very closely linked to the individual's private life.
- 27.** The Commissioner argued that it would be unfair to the data subject to disclose the e-mail address, in particular given that:
- a. It is clear to any user of Companies House register that the identity of the person providing information to the Registrar does not form part of the public record;
  - b. The statutory provision expressly prohibiting the Registrar from making this information available for inspection should form part of the reasonable expectation of the data subject;



- c. Any user of a Government service would have a strong expectation that none of the information used to log in to that service would be disclosed to the world at large under FOIA; there are obvious security reasons not to disclose even partial log-in credentials; and
- d. Disclosure would in fact put the data subject at risk of identity fraud and hacking.

## **Decision**

- 28.** The Tribunal was satisfied that the requested information was the personal data of the person who made the application for the removal of the Directors including the Appellant from the register. It allowed for identification of the data subject both by Companies House and by the Appellant herself, by combining it with other information that they hold about the data subject.
- 29.** The ground of appeal was essentially that in considering whether there would be a breach of the DPPs, the Tribunal should give considerable weight to the fact that the data subject was purporting to act on behalf of the Company and therefore not in a private capacity. The Tribunal was of the view that the Company being a leasehold company meant that, whilst the sender of the email was indeed acting in a business related capacity, there was a strong link to his private life, through his private residence. As such, taken alongside the fact that users of the secure Companies House system would assume (particularly given the statutory provision in the 2006 Act and the use of the authentication code) that this would not routinely be disclosed, the Tribunal was satisfied that, on the assumption that the changes in registration were honestly made, it would have been the data subject's reasonable expectation that there would not be disclosure. Given the lack of evidence from sources other than the Appellant and Companies House, and a lack of evidence as to dishonest intent, the Tribunal was unable to form any view as to the motives of the person requesting the changes. As such, it did not consider it appropriate to proceed on any basis other than that that person was acting honestly. The Tribunal also took into account the potential implications for misuse of private information were such email addresses to be routinely disclosed.
- 30.** The Tribunal accepted that the Appellant had a legitimate interest in receiving the email address of the person who had applied to Companies House to have her and the other Directors removed from the register. This amounted to an amendment to her own personal data as held by Companies House. That said, the Appellant had not produced evidence of certain elements of the offence of fraud having been committed (that offence including as it does an element of intent to cause gain or loss and knowledge that a representation is or maybe untrue or misleading). Whilst it was clear that the Directors had

been removed (and she had been removed as Company Secretary), the Tribunal was not in a position to ascertain whether this had been further to a dishonest act. It accepted moreover that it was not Companies House role to investigate and determine private disputes.

- 31.** Nevertheless, the Tribunal acknowledged that the Appellant clearly considered there to have been an irregularity and that this had given rise to difficulties in relation to the operation of the company. As such, she had sought disclosure of the identity of the person seeking removal from Companies House register further to her rights as a director. Companies House had refused this and also refuted the idea that this information was the Appellant's personal data. As such, the Tribunal further accepted that insofar as the Appellant had a legitimate interest in this information it was also necessary for her to seek disclosure further to FOIA. It did not appear that there was any other clear route for her to take, Companies House in fact insisting that her request had to be dealt with under FOIA. Thus, the first two limbs of the test for paragraph 6 of Schedule 2 DPA were met (see paragraph 16 above). This led then to the balancing of the Appellant's legitimate interest as against those of the data subject, and only in circumstances in which the former outweighed any prejudice to the rights and freedoms of the data subject, would disclosure be lawful.
- 32.** In this appeal, the balancing act for both the purposes of paragraph 6 of Schedule 2 and the general requirements as to fairness in DPP1 required the same considerations. The Tribunal carefully considered this equation as it recognised that the Appellant (as noted above) needed to pursue this avenue if she was to obtain proof as to the identity of the person who had sought the changes to the register and this clearly had been of material concern to her. If there had been conclusive evidence of the changes to the register having been made with dishonest intent, this would have increased the legitimate interests of the Appellant. However, neither the Tribunal nor the Commissioner were in a position to investigate or make a determination on this issue, as this went beyond the jurisdiction of FOIA. There did not appear to be any wider public interest in disclosure beyond the general interests of accountability and transparency.
- 33.** The Tribunal ultimately decided that the interests of the Appellant and those in favour of disclosure, viewed in this way, were outweighed by the potential prejudice to the data subject (the person identified in the requested email address) in the context in which it was clear that that person would have a reasonable expectation of privacy. There was potential prejudice that could arise from disclosure given the indications of an underlying dispute and also the wider risk of identity theft if email addresses connected with companies

were to be disclosed. Unlike the application of the other exemptions under FOIA, in relation to section 40 there was no presumption in favour of disclosure, precisely because of the public interest accorded to the protection of the privacy of individual data subjects. In these circumstances, the Tribunal was satisfied that disclosure would be in breach of DPP1 in terms of the general requirement as to fairness and also in that no condition under Schedule 2 was met. As such, Companies House and the Commissioner in turn had been correct in concluding that the exemption in section 40(2) applied.

- 34.** Finally, whilst it was not clear that for Companies House to disclose the requested information would be a breach of section 1087 (see above), as that related to the contents of Companies House register itself, the Tribunal could appreciate that it was important for Companies House to remain neutral in the absence of some compelling evidence of fraud or where it was subject to a legal compulsion to disclose. Companies House had sought to suggest that by reason of a potential breach of section 1087, section 44 FOIA would have applied. Given however the Tribunal's view that section 40(2) did mean that the information should not be disclosed, it did not come to a view on this matter. Nor did the Tribunal consider the application of section 41 FOIA in relation to this matter, as it had concluded that the exemption at section 40(2) did apply.
- 35.** For the reasons above, the Tribunal unanimously dismissed the Appeal.

Signed

Judge of the First-tier Tribunal

Date: 19 October 2018

Promulgation date: 22 October 2018