



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

Appeal Reference: EA/2018/0068

**Heard at Field House
On 13th March 2019**

Before

**JUDGE
MISS FIONA HENDERSON**

**TRIBUNAL MEMBERS
MS ANNE CHAFER
DR HENRY FITZHUGH**

Between

**Mr Christopher Horsfield
and**

Appellant

**Information Commissioner
And**

Respondent

Department for Work and Pensions Second Respondent

Mr Horsfield appeared in person by way of video link
Department for Work and Pensions represented by Mr Russell Fortt (Counsel) at Field House
Information Commissioner chose not to be represented at the hearing.

DECISION AND REASONS

1. The Appeal is refused for the reasons set out below.

Introduction

2. This is an appeal against the Information Commissioner's decision notice FS50689669 dated 13th March 2018 which upheld the Department for Work and Pensions (DWP) reliance on s40(2) FOIA (Personal Data) to withhold the requested information.

Information Request

3. Mr Horsfield wrote to the DWP on 20th June 2017 asking for information under FOIA stating:
“I would like the new direct dial contact telephone numbers for Andrew Rhodes (Director General of Operations) and Richard Devereux (Permanent Secretary). The two numbers you have already released under other FOI requests no longer work (0207 449 7520¹ & 0207 449 7720). Please would you furnish me with the new (and working) direct dial contact telephone numbers”?
4. The DWP refused the request in a letter dated 29th June 2017² stating that as far as they were aware the DWP:
“had not previously released these telephone numbers into the public domain, we understand that they were released by 3rd party error”.
They relied upon s40(2) FOIA (personal data) to refuse the request. They acknowledged that the 2 posts were publicly accountable and therefore furnished the telephone number for the Switchboard at Caxton House which is the Head Office of the DWP.
5. Mr Horsfield asked for an internal review³ and provided a copy of the earlier FOIA response dated 2nd March 2016 in which a telephone number was given in response to a request for a contact telephone number for Director General of DWP Operations (0207 449 7720)⁴.
6. The decision to refuse the 20th June 2017 request was upheld upon internal review dated 5th July 2017⁵ in which in addition to relying upon s40(2) FOIA the DWP stated that “this information” was available elsewhere namely in the Civil Service Yearbook relying upon s21 FOIA (information available elsewhere).
7. Mr Horsfield complained to the Information Commissioner on 6th June 2017⁶ arguing that:
 - The information had previously been disclosed under another FOIA request,
 - The Civil Service Yearbook is only available for a fee,
 - The Civil Service Yearbook is not a controlled publication meaning their reliance on s40 was invalid.
8. The Information Commissioner investigated the case prior to the issue of her decision. In correspondence with the Information Commissioner the DWP stated that it holds multiple direct dial numbers for these two people (including mobile and landline, business and personal) all of which they believed were caught by the request⁷. They raised the possibility of relying upon s36 FOIA to withhold the information. However, the Information Commissioner determined the case in relation to s40 FOIA alone and upheld the DWP’s reliance on s40(2) Personal Data to withhold the requested information.

¹ Although this number was published online by 3rd parties on internet forums the DWP have no record of this number which is no longer in use (para 9b w/s Tunstall).

² P14 OB

³ P13 OB

⁴ The Tribunal observes that the request in that case was for a “contact” number and not the direct dial number. We are satisfied that it was not in fact the direct dial number for the DG of DWP Operations but a generic number for a number of senior DWP posts provided online and no longer in use (para 9a w/s Tunstall)

⁵ P16 OB

⁶ P45-47 OB

⁷ P55 OB

The Appeal

9. Mr Horsfield has appealed that decision by notice dated 01/04/2018. From his grounds of appeal and the original complaint to the Commissioner the Tribunal understands his grounds to be:
- i. The information is available in the public domain (via the Civil Service Year book) however in order to access the yearbook a subscription is payable. He contends that this is against the spirit of FOIA.
 - ii. It is inconsistent to rely upon s40(2) DPA when the information is already in the public domain via the Civil Service Yearbook.
10. In addition to asking for the release of the information in dispute, the Appellant asked for:
- the Information Commissioner staff to be retrained on the essence and spirit of the DPA and
 - for an explanation from the Information Commissioner as to why it had taken so long to investigate the case and what they are doing to ensure that future cases are investigated in a more timely manner.
11. The Tribunal observes that its powers on appeal pursuant to s58 FOIA are limited to:
“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”.
- Consequently, the additional remedies sought by the Appellant are outside the Tribunal’s remit on appeal.
12. The Information Commissioner opposed the appeal in her response dated 30th April 2018⁸ along the lines set out in her decision notice. The DWP were joined by the Registrar on 1st May 2018. They opposed the appeal arguing:
- i. The disputed information was personal data,
 - ii. The Appellant had not identified a legitimate interest,
 - iii. But assuming that it could be presumed that he had good reason to correspond with the two data subjects disclosure was not necessary (pursuant to schedule 2 condition 6 DPA).
13. The Tribunal (differently constituted) convened to hear this appeal on 2 October 2018 at Field House. Unfortunately, it was not possible to begin the hearing because a video link could not be established to enable the Appellant to participate. Adjournment directions were issued inviting:
- i. the DWP to make further submissions as to why it is said that the direct dial work telephone number of a senior official is ‘personal data’ for the purposes of s40(2) FOIA.
 - ii. the Appellant to make further representations as to his legitimate interest in disclosure for the purposes of para 6 of schedule 2 of the DPA 1998⁹.

⁸ P17-23 OB

⁹ This he did in his email of 12.10.18.

14. The case was re-listed for an oral hearing on 13th March 2019 at which the Appellant and DWP made oral submissions and the Information Commissioner relied upon the written material. The Tribunal had regard to all the evidence before it (including an open bundle of documents and a closed bundle including the withheld information). A written witness statement was provided by the DWP from Ms Judith Tunstall (Senior Private Secretary to the Permanent Secretary) however she was not required to give oral evidence. Mr James Rowe who manages the DWP Central FOI Policy Team did not provide a witness statement but gave oral evidence relating to the various numbers in the Civil Service Yearbook and the closed bundle to clarify some issues raised by the Tribunal at the hearing. Although the Tribunal was in receipt of a closed bundle and heard argument in closed session referring directly to the withheld information, it has been able to articulate the arguments and its reasons without the need to refer to the specific information in dispute. Consequently, there is no closed annex attached to this decision.
15. At the oral hearing it was apparent that the Tribunal panel of 13.3.19 had not been provided copies with the documents that had arisen since the earlier adjourned hearing namely:
- a) The CMD issued following the 2nd October 2018 hearing.
 - b) An addendum skeleton argument on behalf of the DWP in which they applied to rely upon a new ground namely s36(2) FOIA.
 - c) A copy of the Qualified Person's opinion from Baroness Buscombe dated 15.10.18 and accompanying email of 11.10.18 in support of their reliance on s36FOIA,
 - d) The Appellant's additional submissions dated 12.10.18.
- These have now been added to the open bundle.
16. During the oral hearing on 13.03.19 the Tribunal panel were shown a screenshot on a computer of the disputed entry to the Civil Service Yearbook. In his email of 12.10.19 the Appellant had asked that a copy of this information be placed in the bundle. In a CMD of 13.03.19 the Tribunal Judge directed that redacted and unredacted copies of the relevant entry be served, to be placed in the open and closed bundles respectively. This was done on 15.03.19 at which time by email the DWP confirmed that this was the information that appeared in the Civil Service Yearbook at the relevant date namely at the date of the information request and the date of the internal review. We accept this evidence.

Scope

17. At the start of the oral hearing the Appellant confirmed that he was only concerned with the work telephone number of the named individuals (and not home or mobile numbers). The Tribunal has therefore limited its consideration to the direct dial work telephone numbers. Although there was some discussion as to the structure of the office and the fact that there would also be a PA or immediate subordinate in a senior official's office who might be able to answer a call on the data subjects' behalf, as set out below the Tribunal is satisfied that this would constitute an extension of the request and would not fall within the terms of the request.

Amendment of grounds to rely upon s36(2) FOIA

18. The DWP applied to rely upon a new exemption (s36(2) FOIA) in their skeleton argument. The Tribunal did not hear argument as to whether this application should be allowed or refused, as the issue only became material if the Appellant was successful in relation to his

s21 and s40 FOIA points. In light of the Tribunal’s findings as set out below, this issue is not determinative of the appeal which is resolved entirely in relation to the existing grounds. Consequently, there is no need for the Tribunal to rule upon the application¹⁰.

S21 FOIA

19. The DWP relied upon s21 FOIA in their internal review and before the Commissioner in relation to information contained in the Civil Service Year book. However, by the date of the effective hearing their position was that the information in the Civil Service Yearbook was not in scope as it did not fall within the terms of the request.

20. The information was disclosed in redacted form to the Appellant on 15.3.19 following the issue of case management directions arising out of the hearing. The Tribunal has had sight of the unredacted version. The Tribunal accepts that this was the Civil Service Yearbook that was current at the date of the information request and the information was available in hard copy for £145 or online (daily access costs £60 + VAT). It is also available to view in some reference libraries in the UK. Prior to considering whether the information was “reasonably” accessible to the Appellant¹¹ the Tribunal had to determine whether the information in the Civil Service Yearbook was within the scope of the request.

21. S1 FOIA provides:

(1) Any person making a request for information to a public authority is entitled—

*(a) to be informed in writing by the public authority whether it holds information of **the description specified in the request**¹², and*

*(b) if that is the case, to have **that** information communicated to him.*

Consequently, the Tribunal is satisfied that the Tribunal’s jurisdiction arising from a decision pursuant to rule 50 and the appeal of that decision under s57 FOIA is limited to consideration of the terms of the information request as made.

22. The specific terms of the request are for the “*new direct dial contact telephone*” number. The Tribunal has had regard to the objective meaning of that term and is satisfied that it designates a number that will be answered by the named individual without an intermediary who would screen or need to transfer a call. It was sometimes during the hearing referred to as “the telephone that sits on the desk of the named individual”. It is distinct from a number that would reach another employee through whom the named individual could be contacted such as a switchboard or an administrative secretary. It is acknowledged that a direct dial number could be diverted by the person whose number it was to another employee temporarily (e.g. if it is occupied with another call) but absent

¹⁰ as was signposted in paragraphs 6 and 7 of the CMD of 13.03.19

¹¹ Both in terms of the fee payable and whether it was reasonably accessible via its presence in selected reference libraries

¹² Emphasis added

such diversion in our judgment “direct” in this context means that there is no intermediary prior to reaching the named individual.

23. In this case the information in the Civil Service Yearbook is:

- A telephone number under the name of Sir Robert Devereux KCB,
- A telephone number under the name of the Senior Private Secretary to Sir Robert Devereux, (these numbers are the same) and
- A telephone number under the name of Andrew Rhodes.

24. We accept the evidence of Ms Tunstall that the numbers given are for the then Heads of Office. From this we are satisfied that the number given for Sir Robert Devereux is not his number but the number of his Senior Private Secretary who could put a call through or take a message for Sir Robert. We accept the evidence of Ms Tunstall that in her experience no telephone call from a customer which has been received by the private office has ever been put through to Permanent Secretary. We are satisfied that the number given is in fact the Senior Private Secretary’s direct dial number and we accept that there was a different number for Sir Robert which related to the telephone on his desk which was a direct number for him. That number was not provided in the Civil Service Yearbook. Consequently, the number given for both Sir Robert and his Senior Private Secretary in our judgment falls outside of the terms of the request. Firstly because the request specifies 2 named individuals (and the Senior Private Secretary is not one of them) and secondly because the number given does not fall within our definition of “direct dial” for Sir Robert Devereux as it is the direct dial number for a different individual (albeit one who could if they felt it appropriate transfer the call to Sir Robert Devereux).

25. In relation to the number for Andrew Rhodes the Tribunal was told at the hearing and accepts that this is the number for Mr Rhodes’ then Head of Office and Mr Rhodes had a separate different number through which he could be contacted directly. Again, although it was a number whereby the Head of Office could, if they felt it appropriate, transfer the call; it was not on the facts the direct number for the named individual and as such did not fall within the terms of the request. In light of our finding that the information in the Civil Service Yearbook falls outside of the terms of the request we are satisfied that there is no further issue for us to determine in relation to s21 FOIA and have gone on to consider whether the information requested should be withheld pursuant to s40 FOIA.

s40 DPA Personal Data

S40 FOIA¹³ provides:

- (2) *Any information to which a request for information relates is also exempt information if—*
- (a) *it constitutes personal data... and*

¹³ S40 FOIA has been amended to reflect DPA 2018 however, the Tribunal must apply the law as it stood at the date of the request

(b) the first ... condition below is satisfied.

(3) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act—

(a) would contravene any of the data protection principles...

26. Personal data is defined in s1(1) of the DPA as

“...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;

27. To the extent that the Appellant challenged whether a work telephone number relating to an identified individual constitutes personal data because it is in government premises and the persons to whom the numbers related are public servants, the Tribunal is satisfied that it is personal data¹⁴. *Lindqvist 2003 Case C-101/01* at paragraph 24 is authority that personal data covers the name of a person in conjunction with his telephone coordinates. We accept that nothing in the DPA or Directive 95/46 excludes work related telephone numbers and that *Lindqvist* expressly includes information about a data subject's working conditions¹⁵.

28. The Appellant relied upon the first data protection principle¹⁶ as set out in Part I of Schedule 1 which provides:

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,

29. The DWPs case was that no condition in Schedule 2 is met. The relevant condition in Schedule 2 it is agreed, is condition 6 which provides:

(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.

¹⁴ The Tribunal gave an oral decision on this point as a preliminary issue at the oral hearing as it was material as to whether the Tribunal needed to hear the application to amend to rely upon s36FOIA.

¹⁵ Approved in *Edem v Information Commissioner* [2014] EWCA Civ 92 which also found the Information commissioner's guidance with its emphasis on information "linked to" a data subject to be of assistance

¹⁶ It was not argued by any party that any other data protection principle was relevant.

30. The case of *Goldsmith International Business School v The Information Commissioner and Home Office [2014] UKUT 0563 (AAC)* sets out the approach to be taken when considering the application of condition 6 Schedule 2 namely

Proposition 1: Condition 6(1) of Schedule 2 to the DPA requires three questions to be asked:

- “(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?”*

Proposition 2: The test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

Proposition 3: “Necessity” carries its ordinary English meaning, being more than desirable but less than indispensable or absolute necessity.

Proposition 4: Accordingly, the test is one of “reasonable necessity”, reflecting the European jurisprudence on proportionality, although this may not add much to the ordinary English meaning of the term.

Proposition 5: The test of reasonable necessity itself involves the consideration of alternative measures, and so “a measure would not be necessary if the legitimate aim could be achieved by something less”; accordingly, the measure must be the “least restrictive” means of achieving the legitimate aim in question.

Proposition 6: Where no Article 8 privacy rights are in issue, the question posed under Proposition 1 can be resolved at the necessity stage, i.e. at stage (ii) of the three-part test.

Proposition 7: Where Article 8 privacy rights are in issue, the question posed under Proposition 1 can only be resolved after considering the excessive interference question posed by stage (iii).

Proposition 8: The Supreme Court in South Lanarkshire did not purport to suggest a test which is any different to that adopted by the Information Tribunal in Corporate Officer (Information Tribunal).

31. We accept that there is no presumption that openness and transparency should take priority over personal privacy.¹⁷ This Tribunal considers this apparent from the fact that disclosure under s40 FOIA can only take place subject to the protections as set out in the DPA 1998.

¹⁷ CSA v Scottish Information Commissioner 2008 UKHL 47

Legitimate Interest

32. The Tribunal must have regard to the requestor's legitimate interest rather than general public interest conditions¹⁸. In his email of 12.10.18 the Appellant stated that:
"I had originally requested the Direct Dial telephone numbers for the DWP's Director General of Operations & Permanent Secretary due to an official ongoing complaint that I had with the DWP, this complaint has now been resolved."
At the hearing he provided further information¹⁹ namely that he had already followed stage 1 and stage 2 of the DWP's complaint's procedure, the complaint was logged officially but had not been investigated. He had written via Royal Mail and had had no replies, even "signed for" letters had not been scanned in and had "disappeared into the ether". Ringing the switchboard and asking to be transferred to the 2 data subjects had also been fruitless as the switchboard stated that they were unable to transfer his call. He had not involved his MP as he had no faith in his MP as another issue where he was being helped by his MP had not been resolved 4 years later.
33. We accept the Appellant's evidence that at the date of the request the complaint was unresolved. However, subsequently he had had recourse to an "independent tribunal" (this Tribunal considers it likely that this was the Independent Case Examiner) who had ruled that the level of service he had received was inadequate and he had been compensated for the delays.
34. We are satisfied that the Appellant had a legitimate interest in wishing to progress his DWP complaint. In our judgment this also includes the legitimate interest of accountability and transparency as we accept the Appellant's contention that these senior individuals play a role in the operation of the DWP, are publicly accountable and the public have a right to scrutinise the way in which they work and to have transparency as to the processes and their efficacy in the role.

Necessity

35. The Appellant argued that the direct dial telephone numbers were necessary as he had attempted to write to the individuals and had not received a response. He argued that although the ICE process was available to him this represented additional effort on his behalf and in his view it would be simpler and easier for him to speak to the named data subjects in order to get his complaint actioned. His experience dealing with the DWP was that there was no consistent point of contact with "faceless call centres" and mail handling centres with no named individual prepared to take ownership of the complaint.
36. The Tribunal has therefore gone on to consider whether the information requested is necessary to achieve the legitimate interest as expressed above. Necessity is defined in *Goldsmith* as more than desirable but less than indispensable or absolute necessity. In our judgment the information requested was not necessary. In reaching this conclusion we accept the evidence of Ms Tunstall in particular:
- i. The DWP provides the public with suitable contact details so that they can direct communications (by email, letter, fax or telephone) to the area of business which is best placed to address the issue or query being raised. These areas are resourced to

¹⁸ Cox v Information Commissioner and Home Office 2018 UKUT 119

¹⁹ The DWP observed that they had had no opportunity to verify the detail of the Appellant's contact with the DWP and progress of his complaint as the details were only provided at the oral hearing. The Tribunal was satisfied that there was no need to adjourn to enable the DWP to check the Appellant's account because even taking the Appellant's case at its highest it did not meet the necessity test as set out below.

deal with the queries and in light of the targeted nature of the contact we are satisfied that those tasked with receiving these approaches have the resources to respond appropriately.

- ii. Neither the Permanent Secretary nor the DGO were customer facing. Their roles as set out in the Civil Service Yearbook are respectively:
 - a) “Overall leadership of the department and its day to day operations and the government’s programme of major reform²⁰” and
 - b) “The Director General, Operations is responsible for:
 - Delivering public services for the DWP
 - Providing services to promote parental responsibilities (including family based arrangements) and managing the statutory child maintenance scheme.”²¹
- iii. Private offices do not provide a telephone service for the public and are not resourced to do so.
- iv. If a member of the public is transferred through to the private office details of the issue are recorded and relayed to the relevant area of business to follow up.
- v. We accept that neither the Permanent Secretary nor the DGO nor their Private Office’s had the resources to enable them to deal with a direct customer complaint:
 - A) They did not generally have access to the DWP’s benefits system,
 - B) They would not be in a position to provide direct advice on benefits or individual cases.
- vi. This is consistent with the evidence of Ms Tunstall (she has been a Private Secretary since 2001 and is now a Senior Private Secretary) that none of the issues raised by a customer in her experience has ever been resolved directly by the Permanent Secretary or any member of the Private Office.

37. In our judgment direct access to what in effect is the “wrong” individual who does not have practical responsibility or the resources to resolve a specific complaint would not further the legitimate interest of getting a complaint resolved. Neither would it add transparency or accountability to the performance of the office holder whose job does not include responsibility for resolving the complaint itself. In our judgment referral of specific customer queries, complaints or concerns to these office holders would not provide transparency for the efficacy of the DWP’s procedures and policies because as set out above referral to these 2 individuals is outside of the established procedures.

38. We have had regard to the fact that the test of reasonable necessity itself involves the consideration of alternative measures, and so “a measure would not be necessary if the legitimate aim could be achieved by something less”; accordingly, the measure must be the “least restrictive” means of achieving the legitimate aim in question. Consequently, we rely upon the fact that there are existing well-publicised routes for raising complaints and contesting department decisions available. We rely upon the availability of a scheme of redress outside of the DWP to hold the DWP and its processes to account. From the material before us²² we take into account that there was the Independent Complaints Examiner and MP intervention to provide additional scrutiny and to hold the DWP to account. The fact that Mr Horsfield was able to resolve his complaint without provision of the direct dial numbers requested in our judgment is good evidence that the numbers were not necessary.

²⁰ The Permanent Secretary

²¹ Civil Service Yearbook

²² Discussion from web forums from 2014 and 2016

39. In concluding that following the established procedures would enable the legitimate aim to be achieved with “something less” we take into consideration that disclosure of the direct dial numbers would have a disproportionate impact upon the resources and efficiency of the DWP because:
- i. The DWP provides benefits and services to more than 20 million customers all of whom would have the capability of contacting directly without any filter the most senior leadership diverting them from their actual role causing considerable disruption and financial expense to the public purse.
 - ii. Contacting the 2 named individuals automatically adds an additional layer of processing as the request would have to be referred elsewhere,
 - iii. Direct contact would increase the time taken to resolve a complaint as it is likely to take 30 minutes to 1 hour to refer a request to the correct department (time that would not be spent if the request were directed to the correct department in the first place).
40. The test of “necessity” under stage (ii) of Proposition 1 of *Goldsmith* not having been met the appeal fails at this stage.

Conclusion

41. For the reasons set out we refuse the appeal. We are satisfied that the information in the Civil Service Yearbook falls outside of the terms of the information request and as such is not in scope. We are satisfied that the DWP were entitled to rely upon s40 FOIA to withhold the disputed information as no condition in Schedule 2 DPA was met.

Signed Fiona Henderson

Judge of the First-tier Tribunal

Date: 13th May 2019