



Appeal number: EA/2019/0433P

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

IAN CHARLES SADLER

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

**Before:
JUDGE ALISON MCKENNA (CP)**

Determined on the papers, the Tribunal sitting in Chambers on 18 June 2020

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MODE OF HEARING

1. This determination was conducted by a Judge, sitting alone. The Tribunal was satisfied that it was appropriate to compose the panel in this way, having regard to paragraph 6 (a) of the Senior President's Pilot Practice Direction dated 19 March 2020¹ and the desirability of determining all cases which are capable of determination by the most expeditious means possible during the pandemic.
2. The parties and the Tribunal agreed² that this matter was suitable for determination on the papers in accordance with rule 32 of the Chamber's Procedure Rules³.
3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 415, plus 'additional documents' numbered 1 to 10. It also considered a closed bundle containing un-redacted copies of pages 380 and 381, the withheld information and the Information Commissioner's final closed submission.

DECISION

4. The appeal is dismissed.

REASONS

Background to Appeal

5. The Appellant's son died in 2007 while on active service with the British Army. A death in service payment and pension was awarded to a woman accepted by MOD and the Veterans' Agency to have been the deceased's girlfriend. The Appellant disagreed with that assessment and complained to the Pensions Ombudsman and the Parliamentary Ombudsman. He has also made a complaint of fraud to the police, as a result of which no charges were brought.
6. The Pensions Ombudsman considered the case and issued a determination. The Appellant is aware that there is a fax cover sheet which has not been disclosed to him, as a result of his own review of the papers submitted by MOD to the Pensions Ombudsman. This is the subject-matter of his information request.
7. The Appellant made a request to the Ministry of Defence on 16 January 2019, seeking disclosure of the fax cover sheet, sent by the Visiting Officer ("VO") then assigned to the deceased's girlfriend, to a named official at the Veterans' Welfare Service. The fax (consisting of three pages) concerned the payments made to the deceased's girlfriend and the bank account into which it would be paid. The Appellant has explained that his particular interest in the information contained in

¹ <https://www.judiciary.uk/publications/pilot-practice-direction-panel-composition-in-the-first-tier-tribunal-and-the-upper-tribunal/>

² The Appellant originally requested an oral hearing but recently emailed his consent to a determination on the papers.

³ <https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules>

the fax cover sheet is the number of names on the bank account which is referred to on that page, rather than the name or names themselves. He is concerned that the existence of a shared bank account was relied on as evidence of his late son's relationship status, whereas he believes that it was an account shared with other people in a student household and was not indicative of a particular relationship between his late son and the woman to whom the payments were made.

8. MOD confirmed that it held the requested information but refused to disclose it in reliance upon ss. 30 (2) and 40 (2) of the Freedom of Information Act 2000 ("FOIA")⁴. Its position as to s. 40 (2) FOIA alone was confirmed by an internal review dated 22 March 2019. The Appellant complained to the Information Commissioner.
9. The Information Commissioner issued a Decision Notice number FS50834927 on 1 November 2019. She concluded that the Ministry of Defence had been correct to withhold the requested information in reliance upon s. 40 (2) FOIA and required no steps to be taken. The Appellant appealed to the Tribunal.

The Law

10. Section 40 (2) FOIA provides that information is exempt from disclosure if it is the personal data of any person other than the requester and where one of the conditions in s. 40 (3A), (3B) or (4A) is satisfied.
11. Section 40 (3A)(a) FOIA applies where disclosure of the information would contravene any of the principles in Article 5 of the General Data Protection Regulation ("GDPR"). This is an absolute exemption, so no public interest test is to be applied.
12. 'Personal Data' is defined by s. 3(2) of the Data Protection Act 2018 as *any information relating to an identified or identifiable living individual*.
13. Article 5 (1) (a) GDPR provides that *personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject*.
14. *Lawful processing* under Article 6 (1) (f) GDPR requires processing to be *necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child*.
15. The Upper Tribunal has endorsed the adoption of a three-part test in considering whether (i) *there is a legitimate interest*, (ii) *whether disclosure is necessary to meet that interest* if so, (iii) the consideration of a *balancing test* to weigh those interests against the rights and freedoms of the data subject. See *Goldsmith International*

⁴ <https://www.legislation.gov.uk/ukpga/2000/36/contents>

Business School v Information Commissioner and Home Office [2014] UKUT 563 (AAC)⁵ at [35] to [42]. This was a reiteration of the Supreme Court’s judgment in *South Lanarkshire Council v The Scottish Information Commissioner* [2013] UKSC 55⁶ at [18].

16. In *Cox v IC and Home Office* [2018] UKUT 119 (AAC)⁷ Upper Tribunal Judge Wikeley commented that:

45. Also relevant in the present context is Judge Jacobs’s warning in GR-N v Information Commissioner and Nursing and Midwifery Council (at paragraph 30) against over-generalised propositions: “is impossible to apply paragraph 6(1) without having regard to the identity of the applicant, the interest pursued by the request, and the extent to which information is already potentially available to the public.”

17. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

“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.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

18. The burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant. The relevant standard of proof is the balance of probabilities.

⁵ <https://www.bailii.org/uk/cases/UKUT/AAC/2014/563.html>

⁶ <https://www.supremecourt.uk/cases/docs/uksc-2012-0126-judgment.pdf>

⁷ <https://www.gov.uk/administrative-appeals-tribunal-decisions/cox-v-information-commissioner-and-home-office-2018-ukut-119-aac>

Submissions and Evidence

19. The Appellant's Notice of Appeal dated 14 November 2019 relied on grounds which I paraphrase as follows: that the Pensions Ombudsman had found in his favour; that the police investigation had been sub-optimal; staff in the MOD or Veterans Agency had committed a fraud; the balancing test in the Decision Notice should have resulted in a different outcome because the Information Commissioner failed to consider that a crime has been concealed and there is a strong public interest in disclosure to establish this; the Decision Notice is perverse in its conclusions.
20. The Information Commissioner's Response dated 15 January 2020 largely maintained the analysis as set out in the Decision Notice. However, she acknowledged that the Decision Notice contained a factual inaccuracy in suggesting that the Pensions Ombudsman had found that the payments had been appropriately made. In fact, the Pensions Ombudsman found there had been an error of law in the application of the scheme and had consequently awarded a payment to the Appellant. The Information Commissioner apologised for that error but submitted that it did not affect the substantive conclusions reached in the Decision Notice.
21. The Information Commissioner submitted that the Appellant is able to pursue his stated intention of bringing proceedings against MOD without disclosure of the requested information, as he refers to having acquired sufficient evidence already to do this. Thus, the Information Commissioner's position had by the time of the appeal changed, so that whilst she acknowledged that the Appellant had a legitimate interest in the requested information, she considered that its disclosure was not necessary to further that interest. It is noted that any further proceedings would likely involve a power to direct disclosure as part of that process.
22. Having submitted that the second limb of the three-stage test was not met in this case, the Information Commissioner submitted that the balancing test was not required to be undertaken. She asked the Tribunal to uphold the Decision Notice and dismiss the appeal.
23. In the Appellant's Reply dated 22 January 2020, he did not accept the Information Commissioner's apology for the factual error in the Decision Notice and questioned the Information Commissioner's investigative processes. He submitted that there is a default position of releasing requested information under FOIA which should have been applied in this case. He submitted that he needs the requested information in order to convince his MP, who will then through the Minister ensure that the police investigate a case of fraud by the MOD or the Veterans Agency. He asks the Tribunal to direct disclosure of the requested information.
24. On 29 February 2020, the Appellant sent the Tribunal a further submission, containing an update on his further analysis of the documents and submitting that the public interest favoured disclosure of the requested information. He refers to having received significant public support for his campaign via the Daily Mail website. He encloses an email exchange with a former house mate of the deceased,

on which he relies as constituting consent to the release of the personal data he has requested. The Information Commissioner submitted on 4 June 2020 that the words used by the Appellant's correspondent do not provide a valid form of consent for the purposes of GDPR and thus that the 'consent' on which the Appellant relies does not provide a lawful basis for disclosure of the requested information by the Tribunal in this case.

25. Neither party relied on witness evidence. The Appellant has provided the Tribunal with documentary evidence including the Pensions Ombudsman's determination dated 28 March 2011. This, contrary to what is said in the Decision Notice, concluded that his complaint should be upheld as the payment should by law have been made to the deceased's personal representatives. The Appellant also included a draft letter from his solicitors to his Member of Parliament dated 12 September 2018 with enclosures and many other documents generated over years of correspondence and his own inquiries.
26. I have considered the documents in the closed bundle but do not need to refer to them in this Decision save to say that I am satisfied the withheld information contains personal data.

Conclusion

27. Firstly, I would like to offer the Appellant my sincere commiserations for his loss and I record here that I understand his wish to leave no stone unturned in ensuring that due process was followed by MOD and the Veterans' Agency in dealing with the financial issues that resulted from his son's tragic death. It seems to me that the Pensions Ombudsman's report, establishing as it does that there was an error of law in the initial decision-making, represented a significant vindication of the Appellant's legitimate concerns about that process. I also note that the Pensions Ombudsman made recommendations aimed at correcting that error. It is most unfortunate that the Information Commissioner misunderstood that process in her Decision Notice, but I do not consider that this error affected her substantive conclusion.
28. In applying the three-stage test required by the case law, I recognise, as did the Information Commissioner's Decision Notice, that *legitimate interests* can encompass broad issues of accountability and transparency in addition to more personal interests on the part of the requester. In this case, the fact-specific analysis required by the case law clearly establishes in my view that the Appellant has a legitimate interest in transparency in relation to the financial decisions made following his son's death. In this respect, I am satisfied that he crosses the threshold of the first stage.
29. He has also argued that, as the withheld information was omitted from the papers disclosed by the Pensions Ombudsman, he needs to see it in order properly to understand the Ombudsman's conclusions. However, it does not seem to me that the Pensions Ombudsman's conclusions as to an error of law require any further evidential explanation for the Appellant to be able to understand them. In this

respect, I do not accept that the Appellant has established a legitimate interest ground.

30. The Appellant has submitted that he needs the requested information in order to convince others that a fraud was committed by unknown persons in the MOD or Veterans' Agency in relation not the handling of his son's affairs. This is different from a submission that he needs the requested information himself in order to bring legal proceedings, as it assumes that others would be convinced to take action by the disclosure of the information he has requested. In the absence of any evidence to support that assumption, I do not accept that this final aspect of the Appellant's submission has established a legitimate interest ground.
31. Nevertheless, the first stage test has been met in my opinion and I discern no error of law in the Information Commissioner's conclusion that the Appellant has, in this way, established a *legitimate interest* in the withheld information.
32. I move on to consider the second stage test of *necessity*. The Information Commissioner's Decision Notice contained a conclusion that disclosure of the withheld information was necessary to give effect to the Appellant's legitimate interest in transparency by the Ombudsman and in understanding the decision relating to his late son's case. However, in her submissions to the Tribunal, the Information Commission has taken a different stance in submitting that the Appellant has not established necessity, as the information he seeks would be disclosed in any subsequent criminal or civil proceedings, so disclosure under FOIA may not be regarded as necessary.
33. The Appellant's submission, referred to at paragraph 23 above, was not that he needed the withheld information to bring proceedings himself but that he needed it to convince others to take action on his behalf. As I have already concluded above, this argument relies on an assumption that such action would ensue from disclosure and I have received no evidence from any other person to support the Appellant's contention in this regard.
34. The legal framework requires there to be a connection between steps one and two, so I may only consider whether *necessity* has been established in relation to the furtherance of the specific *legitimate interest* I have identified. As I have identified a legitimate interest in transparency and accountability, I must therefore consider whether disclosure is necessary to that aim alone. I have not considered necessity in relation to the other aspects of the Appellant's case where I have not found there to be an established legitimate interest argument. In the particular circumstances of this case, it seems to me that the aim of transparency and accountability was significantly achieved, by the Appellant's own efforts, through the Pensions Ombudsman's report. I am not persuaded that the additional factor of disclosure of the requested information is necessary to the achievement of that aim. It follows that, in my assessment, the Appellant has not met the stage two test in this appeal.
35. In those circumstances, I am not required by the case law to continue to undertake the balancing test, as a failure to meet stage two of the three-stage test is

determinative of the appeal. As explained above, s. 40 FOIA is an absolute exemption, so there is no applicable public interest test as a matter of the statute law enacted by Parliament. I must also reject the Appellant's submission that there is a default expectation of disclosure under FOIA, as I am afraid it is not good law.

36. I doubt that the question of whether or not there has been a recent valid GDPR consent to disclosure is a matter properly before me in determining an appeal against the Information Commissioner's Decision Notice. It seems to me that a case for consensual disclosure is a new type of request which would have to be made to MOD. However, it may assist the Appellant to know that I agree with the Information Commissioner's submission that the form and scope of consent I have seen, and on which he relies, is insufficient to meet the stringent requirements of GDPR.
37. For all these reasons I discern no error of law or inappropriate exercise of discretion in the final conclusion reached by the Information Commissioner in her Decision Notice, although my analysis has differed in some respects. Accordingly, I must now dismiss this appeal.
38. The Appellant has the right to apply for permission to appeal to the Upper Tribunal (Administrative Appeals Chamber).

ALISON MCKENNA

DATE of DECISION: 23 June 2020

CHAMBER PRESIDENT

DATE PROMULGATED: 26 June 2020