



Neutral citation number: [2023] UKFTT 667 (GRC)

Case Reference: EA/2022/0185

**First-tier Tribunal
General Regulatory Chamber
[Information Rights]**

Heard: by determination on the papers

**Heard on: 4 August 2023
Decision given on: 9 August 2023**

Before

**TRIBUNAL JUDGE Alison McKenna
TRIBUNAL MEMBER Susan Wolf
TRIBUNAL MEMBER Aimée Gasston**

Between

EDWARD WILLIAMS

and

THE INFORMATION COMMISSIONER

and

THE CHIEF CONSTABLE of SOUTH YORKSHIRE POLICE

Appellant

First Respondent

Second Respondent

DECISION

The appeal is allowed.

The Tribunal does not make a substituted Decision Notice.

REASONS

Mode of Hearing

1. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of this Chamber's Procedure Rules¹.
2. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 132 and a closed bundle comprising pages 1 to 7.

Background to Appeal

3. The Appellant made an information request to South Yorkshire Police on 12 March 2021 as follows:

"I would like details of how much you have paid to victims of the sex grooming gangs for period 1997 – 2013 for the Rotherham CSE scandal (the period covered by the independent inquiry into Child Sexual Exploitation in Rotherham (1997 – 2013) (A. Jay).

This should include a breakdown of payments by amount".

4. South Yorkshire Police refused to disclose the requested information on 12 April 2021, in reliance on s. 38(1) (a) and (b) of the Freedom of Information Act 2000 ('FOIA'). On internal review, it maintained its position on 22 June 2021.
5. The Appellant complained to the Information Commissioner on 24 June 2021 in the following terms:

"I apply for a s.50 DN.

Failure to confirm info is held.

I do not agree the exemption was correctly applied...

There is no personal data".

6. The Information Commissioner (but not South Yorkshire Police) took steps to clarify the scope of the request. This was because the Appellant had referred to 'personal data' whereas there had been no claimed exemption under s. 40 (1) FOIA.
7. The Information Commissioner issued a Decision Notice on 7 July 2022, upholding South Yorkshire Police's reliance upon s. 38 (1) (a) FOIA and determining that the public interest test favoured maintaining the exemption. The Appellant appealed to the Tribunal.

¹<https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules>

The Law

8. Section 38 of FOIA provides (where relevant) that:

“(1) Information is exempt information if its disclosure under this Act would, or would be likely to-

- (a) Endanger the physical or mental health of any individual, or
(b) Endanger the safety of any individual.”*

9. Section 38 is a qualified exemption, subject to the public interest balancing exercise under s. 2(2)(b) FOIA.

8. The powers of this 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
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.”

9. 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.

The Decision Notice

10. The Decision Notice (Reference IC-114836 – D2X6) refers to previous Decision Notices on this subject-matter but acknowledges that it must determine this complaint on a stand-alone basis.
11. It refers at [21] to the Information Commissioner’s Guidance in identifying mental as well as physical health as within the scope of s. 38 FOIA, and interpreting ‘any individual’ as including members of a group within society.
12. It refers at [22] – [23] to the requirement for a public authority seeking to rely on the exemption to show that there is a causal connection between the disclosure of the information requested and the endangerment, and that the endangerment would, or would be likely to, occur.
13. The Decision Notice summarises the approach of South Yorkshire Police at [24]-[32], stating that the likelihood of endangerment is to the ‘*individuals involved or their families*’ and that, in the circumstances of these cases, that risk is more than hypothetical. It also records the view

that *'the survivors of CSE'* can suffer from long-term effects on their general emotional wellbeing. South Yorkshire Police's position was that if *'the amount of the claims'* [31] was disclosed, it would potentially increase the existing psychological impacts that *'survivors'* [30] are known to suffer from and that disclosure of *'the settlement of compensation claims'* [32] would be detrimental to them achieving closure, especially as *'claimants'* are likely to know each other and be aware of each other's *'compensation claims'* [31].

14. The Decision Notice goes on to consider the engagement of s. 38 (1)(a) FOIA to *'the survivors and members of their families'* and the endangerment identified predominantly relates to their mental health and wellbeing. It states that the Information Commissioner is satisfied of the causal link between disclosure of the requested information and an endangerment to the mental health [41] of these persons [37], and that such endangerment *'would be likely to occur'* [38], concluding that s. 38 (1) (a) FOIA is engaged by the information request.
15. Moving on to consider the public interest balancing exercise, the Decision Notice acknowledges the arguments in favour of transparency and accountability about *'such payments'*, especially in such a high-profile case [45]. It considers South Yorkshire Police's argument that there is a risk of serious endangerment to the mental health of *'those involved'* [47] and that it would not be in the public interest for disclosure to cause a loss of public confidence in the police protecting such sensitive information. At [51], the Decision Notice concludes that the public interest favours maintaining the exemption in order to *'safeguard the mental health of the victims of child sexual exploitation and their families'*.
16. In *'other matters'* [52]-[58] the Decision Notice considers the possibility of the information requested constituting personal data in the sense of whether it could lead to the *'jigsaw'* identification of any individual.
17. The Decision Notice does not determine the Appellant's complaint that South Yorkshire Police failed to confirm or deny whether it held the requested information.

Submissions and Evidence

18. The Appellant's Notice of Appeal dated 8 July 2022 relied on grounds that: (i) South Yorkshire Police had failed to confirm or deny whether it held the requested information; (ii) the exemption claimed was not engaged; (iii) the public interest test was decided wrongfully, especially as *'any payments made must have been unlawful'*; (iv) his request had not been limited to *'settled cases'*; (v) there had been no explanation of why a global figure could not have been provided.
19. The Respondent's Response dated 16 August 2022 maintained the analysis as set out in the Decision Notice. It was submitted that the Appellant's grounds of appeal had failed to state why the Decision Notice was not in accordance with the law or why the Commissioner ought to have exercised his discretion differently. We understand this to be a submission that the jurisdiction of this Tribunal was not engaged by the grounds of appeal, although there was no accompanying strike out application.
20. In response to the Appellant's grounds of appeal, the Information Commissioner made no submission regarding ground (i); in relation to ground (ii) he submitted that s. 38 (1) (a) was engaged by the request; in response to ground (iii) it is submitted that the public interest balancing exercise was properly applied and reached the correct conclusion; in response to grounds (iv) and (v), he made no submissions.

21. South Yorkshire Police was joined as the Second Respondent to this appeal at the suggestion of the Information Commissioner, which was not opposed by the Appellant. South Yorkshire Police filed a Response to the appeal on 5 December 2022, in which it supported the Information Commissioner's stance and raised no new exemptions.
22. The Appellant did not file a Reply but copied the Tribunal into correspondence with South Yorkshire Police aimed (unsuccessfully) at 'settling' the appeal.

Conclusion

23. We do not find it necessary to refer to the closed material we have received in making our Decision, and so there is no closed annexe to this Decision.
24. We find that the Appellant's information request was unclear in a number of respects and that South Yorkshire Police should have sought to clarify it and/or to offer the Appellant advice and assistance. We note that:
 - It is unclear whether the request was for a global figure ('*How much you have paid...*') and whether, if it was a request for a global figure, it was qualified by the subsequent request for '*a breakdown of payments*' or whether (as we understand it) it was a request for both;
 - It is unclear who is meant by '*victims of grooming gangs*': are these all the persons who made complaints? Or only those whose complaints against South Yorkshire Police have been accepted? Or persons whose complaints have resulted in a criminal prosecution? Or persons who have initiated civil proceedings against South Yorkshire Police and which have resulted in a settlement or a judgment?
 - It is unclear what is meant by '*How much have you paid to victims...*'. Does it encompass payments made under an *ex-gratia* scheme? Does it only include payments which represent a settlement of civil proceedings? Does it also include payments which are damages awarded by a court? Or payments awarded by the Criminal Cases Compensation Scheme? Or (as we understand it) is it a request for details of payments made under all these categories and possibly more.
25. As a result of the failure by both South Yorkshire Police and the Information Commissioner to clarify these matters, it seems to us that the Appellant and both Respondents have been operating at cross-purposes throughout the life of this request, complaint, Decision Notice and appeal. This situation gives rise to a number of consequences, described below.
26. Firstly, we are satisfied that the Appellant's grounds of appeal do properly engage the jurisdiction of this Tribunal and reject the Information Commissioner's submission in this regard.
27. Moving on to consider the Appellant's grounds of appeal, we have considered the fourth ground first, because it is the only ground that engages the central question of the uncertain scope of the request, complaint, Decision Notice and appeal. The Appellant submits here that '*the DN refers to settled cases (para 25 DN) but the request was not limited to settled cases. It included all payments including those made after litigation*'. The Information Commissioner did not respond to this ground.

28. We find that the Appellant is correct in this submission. As appears from paragraphs [13], [14] and [15] above, there is an internal inconsistency in the Decision Notice as to whether the s. 38 (1) (a) exemption is engaged only in relation to those who have made and settled claims against South Yorkshire Police, or in relation to members of a much wider group who may nevertheless fall within the Appellant's category of 'victims'. We conclude that this confusion constitutes an error of law in the Decision Notice which requires it to be set aside. In order to know whether s. 38 (1) (a) FOIA was engaged, the Decision Notice needed to make a clear finding about the nature of the risk of endangerment of mental health and to whom this applied, but it failed to do so.
29. Turning to the remaining grounds of appeal, the Appellant is also correct at ground (i) that South Yorkshire Police did not formally confirm or deny whether it held the requested information. It was implicit in its response that it did hold the information requested because it claimed an exemption in relation to it, but that is not a sufficient basis for compliance with its obligations under s. 1 (1)(a) FOIA. We note that the Information Commissioner did not address this ground in his Response. We consider that the Decision Notice should have addressed this complaint, which was made clearly by the Appellant from the outset, although this does not amount to an error of law for the purposes of this appeal.
30. There is a further point relevant to the failure to confirm or deny whether the requested information was held, which is that it is difficult for any public authority to comply with its obligations in this regard unless it is clear about the scope of the request. It remains unclear whether the exemption claimed by South Yorkshire Police related only to settled compensation claims (see paragraph [13] above) or to the risk of endangerment of a wider group of 'survivors' who may not have lodged formal proceedings but were nevertheless within the scope of the Appellant's general reference to 'victims'.
31. In relation to grounds (ii) and (iii), it does not seem to us possible for South Yorkshire Police, or the Information Commissioner or, indeed, ourselves to decide whether s. 38 (1) (a) FOIA was engaged or how the balance of public interest test should be decided without certainty about the composition of the group within scope of the request. For example, we do not know whether the Decision Notice's conclusions about the endangerment of mental health relate only to people who have 'settled claims' (which appears to be the position of South Yorkshire Police) or whether the Information Commissioner's conclusions about endangerment includes a wider group of 'survivors' whose claims are yet to be determined or who have not made formal claims, or who might be affected in some other way. We find that the imprecision of the language used in the Decision Notice makes it impossible to establish the causal link between the disclosure of the requested information (relating as it does to a wide group of 'victims') and the claimed risks identified to those who are variously described as 'claimants' or people who have achieved the 'settlement of a claim' or 'survivors of CSE' in general.
32. The Appellant submits that South Yorkshire Police 'must have' behaved unlawfully in paying money to victims. We would agree that unlawful conduct by a public authority is a matter which would need to be weighed into a public interest balancing exercise, but we find that a mere assertion of unlawfulness without more is an insufficient basis from which to make this submission. The Appellant would need to elaborate on why he thinks this is the case in order for the Tribunal to evaluate this submission and decide whether it should be weighed in the public interest balancing exercise.

33. In relation to ground (v), again the Information Commissioner did not respond. From the wording of this ground, it would appear that the Appellant wished to request both a total sum and a breakdown. However, the Information Commissioner seems to have understood him to have qualified the first with the second, so that the issue of a global figure is not addressed by the Decision Notice. Once again, the difficulty here is that it is impossible to know what is meant by a 'total sum' without knowing whether this related only to the settlement of legal claims or to payments made otherwise.

34. We conclude that, for all these reasons, the Decision Notice is in error of law. We have concluded that it should be set aside. Unfortunately for the Appellant, this does not take him any further towards knowing whether he is entitled to the requested information, but we are not in a position to determine that issue and can only advise him to make a further request, defining his terms carefully, and ensuring that South Yorkshire Police understands its scope before responding.

Signed: Judge Alison McKenna

Date: 7 August 2023