



Neutral citation number: [2024] UKFTT 384 (GRC)

Case Reference: EA/2023/0410

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

Heard by CVP on 19 March 2024

Decision given on: 17 May 2024

Before

**TRIBUNAL JUDGE Stephen Cragg KC
TRIBUNAL MEMBER Dr Phebe Mann
TRIBUNAL MEMBER Steve Shaw**

Between

SAM MCBRIDE

Appellant

and

INFORMATION COMMISSIONER

Respondent

Decision: The appeal is Allowed

Substituted Decision Notice: A substituted decision notice is made as described in paragraph 44 below.

The Appellant was represented by Thomas Turner

The Information Commissioner was not represented but made written submissions

REASONS

MODE OF HEARING AND PRELIMINARY MATTERS

1. The proceedings were held via the Cloud Video Platform. All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
2. The Tribunal considered an agreed open bundle of evidence comprising 164 pages, and a closed bundle including the withheld information.

BACKGROUND

3. The Appellant made the following information request to the Northern Ireland Assembly (the Assembly) on 23 February 2022:-

Under the Freedom of Information Act, please provide me with all material held by the Assembly in relation to the removal from the Hansard record of words spoken by Martin McGuinness (the background to this request is explained here - <https://www.belfasttelegraph.co.uk/news/politics/state-papers-assembly-debate-report-altered-after-dups-peter-robinson-threatened-to-sue-41206817.html>)

To this day, the Hansard record of the first Assembly debate does not include the 'offending' words which Mr McGuinness used in the chamber that day. As part of your response, please provide me with a copy of the words which were removed from the first column of page 12 of the Official Report for that day [1 July 1998]: <http://www.niassembly.gov.uk/globalassets/documents/official-reports/bound-volumes/1998-1999/bv-001.pdf>

4. The reference to the Official Report of the Northern Ireland Assembly from 1 July 1998 is a reference to the following passage. It appears that the person referred to in the unredacted part of the transcript by Mr McGuinness was Mr Ian Paisley, but that the

redacted passage also refers to Peter Robinson, the then deputy leader of the Democratic Unionist Party (see the decision notice as set out below). The passage reads as follows:-

Mr M McGuinness: Yes, he does all the time. We want him to be a smart man. We want him to recognise that there is a future for our children. Whatever else he may be, he must be a democrat and accept reality.

[Remarks made at this point may be subject to legal proceedings and have therefore been omitted.]

Sinn Fein has arrived in this building, and Unionists have been compelled by the votes of the people to come. Even in opposition, Unionist Members will be part of the change in this island.

5. The second part of the request relates to the ‘Remarks’ referred to in the middle of the passage.
6. The Assembly responded on 24 May 2022, advising that it did not hold information falling within the scope of the first part of the request. It advised the Appellant that it held audio visual information relating to the second part, and that the complainant could view this information, but that some information would be redacted under section 40(2) of FOIA.
7. The Appellant requested an internal review on 15 June 2022. He did not dispute the Assembly’s position with regard to the first part of the request but argued that the Assembly ought to disclose the withheld information. He contended that given that one of the two senior politicians referenced in the withheld information had faced a number of serious allegations in his long career, it would not be unfair or unjustifiable for the information to be disclosed.
8. The Assembly communicated the outcome of that review on 8 July 2022. It maintained its position that the withheld information was exempt from disclosure by virtue of section 40(2) of FOIA. The Appellant contacted the Commissioner on 3 August 2022 to complain about the way the Assembly handled the second part of his request. Specifically he wished to challenge the Assembly’s reliance on the exemption at section 40(2) FOIA in respect of the withheld information.

LEGAL FRAMEWORK

9. The Appellant is entitled (1) by s1(1)(a) FOIA to be informed in writing by the Assembly whether it holds the requested information; and (2) by s.1(1)(b) to have the requested information communicated to him, subject to the exemptions in Part 2 of FOIA.

10. In particular, s 2(2) and (3) FOIA materially provide:-

2.— Effect of the exemptions in Part II.

...

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—

...

(fa) section 40(2) so far as relating to cases where the first condition referred to in that subsection is satisfied [...]

11. The relevant FOIA exemption is s40(2) FOIA in relation to the first condition set out in s.40(3A) FOIA:-

40.— Personal information.

...

(2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which does not fall within subsection (1) [relating to personal data of which the applicant is the data subject], and

(b) the first, second or third condition below is satisfied.

(3A) 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, or

(b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.

...

(7) In this section—

“the data protection principles” means the principles set out in—

(a) Article 5(1) of the UK GDPR ...

“data subject” has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act);

“personal data” and “processing” have the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2), (4) and (14) of that Act);

“the UK GDPR” has the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(10) and (14) of that Act).

(8) In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted.

12. Section 3(2) of the DPA 2018 defines personal data as ‘any information relating to an identified or identifiable living individual’. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
13. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
14. When considering personal data other than special category/criminal offence data, disclosure under FOIA can be lawful under UK GDPR where either there is consent (therefore meeting Art 6(1)(a) UK GDPR) or where it is ‘necessary for the purposes of legitimate interests ...’, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject’ (meeting Art 6(1)(f) UK GDPR).
15. This imports a balancing exercise: if it does not favour disclosure, then disclosure would not be lawful, would contravene the data protection principles, and would be prevented by s.40(2) read with s.40(3A) FOIA. The Article 6(1)(f) balancing exercise requires consideration of the three questions set by Baroness Hale DPSC in *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55 (with minor updates in square

brackets to reflect the shift from the Data Protection Act 1998 to the current data protection regime):

(i) Is the data controller or 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 [because it is overridden by the interests of fundamental rights and freedoms of the data subject which require protection of personal data]?

16. The second question refers to whether the processing is reasonably necessary for the purposes of the legitimate interest in question: South Lanarkshire at §27.

THE DECISION NOTICE

17. The decision notice is dated 29 August 2023. The Commissioner explained the background of the case, and whether it concerned ‘personal information’ as follows:-

20. In this case, the Assembly has relied on section 40(2) in respect of information comprising words spoken by Martin McGuinness in 1998. Mr McGuinness is now deceased; therefore the information cannot be his personal data within the meaning of the DPA. Mr McGuinness was referring to two individuals, one of whom is also now deceased, and the other of whom is still alive.

21. The Assembly has not explicitly confirmed to the complainant that the living individual who was the subject of Mr McGuinness’s comments is Peter Robinson, the then deputy leader of the Democratic Unionist Party. However the newspaper article referred to in the request for information quotes from information contained in declassified government files. This includes a memo dated 2 September 1998, in which a senior civil servant advised the then Secretary of State for Northern Ireland of Mr Robinson’s threat of legal action in connection with Mr McGuinness’s comments.

22. In light of the above, and having examined the withheld information, the Commissioner is satisfied that it relates to an identifiable third party, namely Mr Robinson. The withheld information therefore falls within the definition of “personal data” in section 3(2) of the DPA.

18. We have referred to the legal framework above. The Commissioner noted that the Assembly’s argument that disclosure of the personal information would be unlawful because it was defamatory, but the Commissioner rejected that argument on the basis

that the Assembly would have legal protection from such a claim: see pp27-33 of the decision notice.

19. In relation to Article 6(1)(f) of the UK GDPR (as set out above), the Commissioner considered whether there was a 'legitimate interest' in the request for disclosure:-

39. The Assembly accepted that there is a legitimate interest in reporting the public proceedings of the Assembly, and that the request pursues this legitimate interest. The Assembly also acknowledged that since November 1999, there has been a statutory requirement for the Assembly to publish an official report of its proceedings, as set out at paragraph 29 above. Therefore, had the comments been made after November 1999, they would have been published in full, in line with the statutory requirement to do so.

40. The Commissioner is satisfied that there is a clear legitimate interest in the publication of accurate reports of public Assembly proceedings, including those of the shadow Assembly. He notes that the shadow Assembly was established following the Belfast (Good Friday) Agreement in order to support power sharing in Northern Ireland. Consequently the Commissioner considers that the legitimate interest in disclosure applies generally to information regarding Assembly proceedings, and in the particular circumstances of this case.

20. As to whether disclosure of the personal data was 'necessary' to meet the legitimate interest, the Commissioner said as follows:-

42. The Assembly accepted that disclosure of the requested information in this case "could" be necessary, in the interests of the publication of accurate reports of public proceedings of the Assembly, should the public interest in the withheld information outweigh the rights and freedoms of the data subject.

43. The Commissioner is further satisfied that disclosure of the withheld information is necessary in order to meet the legitimate interest set out at paragraph 40 above.

21. Finally, then, the Commissioner had to consider whether that interest overrides the legitimate interests or fundamental rights and freedoms of the data subject:-

46. The Commissioner considers a key issue to be the extent to which the data subject has a reasonable expectation that their information will not be disclosed...

47. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual. Disclosure under FOIA equates to publication to the world at large...

48. The Assembly recognised that:

“The different backgrounds of those who were elected to the New Northern Ireland Assembly, and the tension apparent in early sittings of that Assembly, is a matter of obvious historical interest.”

49. However it set out that it had published a large amount of information, including Official Reports of other debates, which would inform the public as to matters of public interest.

50. The Assembly also acknowledged that elected representatives must expect more in the way of criticism than individuals who have not actively sought political office. However it balanced this against the content of the withheld information.

51. Finally, the Assembly considered that it would not be unreasonable for Mr Robinson to expect that the withheld information, having not been published for 25 years old, would not now be published. It confirmed that it had decided not to seek consent from Mr Robinson, since it had assumed that he would not consent to any request that the withheld information be published.

22. The Commissioner concluded that:-

54. For the reasons set out in the confidential annex the Commissioner finds that the Assembly would be able to rely on Article 6(1)(f) as a lawful basis for disclosure of some of the withheld information. He is satisfied that disclosure of the specified portion of the withheld information is necessary in order to meet a legitimate interest. He is further satisfied that the legitimate interest in disclosure of that specified portion overrides the legitimate interests or fundamental rights and freedoms of the data subject.

55. Accordingly the Commissioner finds that disclosure of the information specified in the confidential annex would not contravene DP principle (a). He finds that the Assembly was not entitled to rely on section 40(2) of FOIA in respect of this specified information.

56. However, the Commissioner also finds that the Assembly could not rely on Article 6(1)(f) as a lawful basis for disclosing the remainder of the withheld information. Disclosure of this information would not be lawful and would therefore contravene DP principle (a). The Commissioner finds that the Assembly was entitled to rely on section 40(2) of FOIA in respect of this information.

23. Thus, although the Commissioner required the Assembly to disclose to the Appellant the portion of the withheld information described in the confidential annex, the remaining portion excluded from the records is exempt by way of s40(2) FOIA.

24. The Tribunal has had sight of the confidential annex and so is aware of the information required to be disclosed and the information the Commissioner has decided is lawfully withheld. Thus, we are told (see the Commissioner's response paragraph 27), that the Assembly disclosed a 'newly redacted version of the audio recording to the Appellant disclosing more information identified in the confidential annex to the DN which the Commissioner found was not exempt under s.40(2) FOIA'. Therefore, the passage referred to at the start of this decision would read:-

Mr M McGuinness: Yes, he does all the time. We want him to be a smart man. We want him to recognise that there is a future for our children. Whatever else he may be, he must be a democrat and accept reality. **And he has a responsibility...along with Mr Robinson to discard his maroon beret, to discard Ulster Resistance...**

[Remarks made at this point may be subject to legal proceedings and have therefore been omitted.]

Sinn Fein has arrived in this building, and Unionists have been compelled by the votes of the people to come. Even in opposition, Unionist Members will be part of the change in this island.

(Information now disclosed in bold).

25. In summary, there is now a shorter passage which has been withheld which is the subject of this Tribunal decision.

THE APPEAL AND THE RESPONSE

26. The Appeal is dated 20 September 2021 (before the Assembly disclosed the additional information). The appeal presents some context as follows:-

4. The information sought relates to verbal exchanges between two leading public representatives during the first sitting of the shadow Northern Ireland Assembly after the signing of the historic Good Friday Agreement. The legitimate interest in these exchanges is acknowledged at paragraph 40 of the ICO decision but, given the ultimate decision reached by the ICO, it is worth emphasising the strength of the legitimate interest in disclosure of the material sought.

5. The shadow Assembly performed a critical role in preparing for the Northern Ireland Assembly, Northern Ireland's legislative function, whilst devolution legislation was enacted. The shadow Assembly itself became the Northern Ireland Assembly.

6. This period is of undeniable historic importance. How two sides of the fiercely contested political divide came together to enter into a power sharing agreement and set up the legislative framework for self-governance in Northern Ireland has been, and will continue to be, of significant worldwide interest. The words exchanged in public between two pivotal public figures in this power sharing arrangement are of particular importance, and arguably are of even greater importance if they reveal the underlying tensions between the two sides that had to be overcome to form the Northern Ireland Assembly. The two men who were at loggerheads in this exchange – Mr Peter Robinson and Mr Martin McGuinness – would go on to serve together as first and deputy first minister, providing the longest period of stable power-sharing government in the history of Northern Ireland. Where these two men came from is key to understanding where they ended up.

27. In relation to the legitimate interest in disclosure, the Appellant then emphasises the importance of ‘parliamentary privilege’ which ‘allows members of parliament to raise matters which they feel need to be raised without the threat of interference...’. The appeal helpfully sets out some of the history of parliamentary privilege, including in relation to the Northern Ireland Assembly, to underline this point.

28. The Appellant argues that given ‘the public policy reasons for privilege attaching to parliamentary proceedings and reports of such proceedings’ any potential distress or harm caused by disclosure should be irrelevant. In any event:-

Mr Robinson is an experienced and high profile politician. His political and personal life have been the subject of extensive press coverage. The publication of the words used by Mr McGuinness will be readily understood by the public as historic comments that were made at the early stages of the post-Good Friday political landscape and would be contextualised by the near 30 years’ worth of reporting on Mr Robinson that has followed this period. Publication cannot reasonably be expected to cause “harm or distress” in those circumstances.

29. The Appellant argues that as the redacted words were uttered in a public domain with the press in attendance they would have been contemporaneously available, and refers to press reports which appear to refer to the parts of the withheld material now disclosed.

30. In relation to the reasonable expectations of Mr Robinson, the Appellant argues that:-

Having regard to the general principles applicable to parliamentary proceedings and the fact that such proceedings are held for the public benefit and where the individual was in attendance solely in his capacity as an elected public representative, the

expectation of the individual is entirely subsidiary to the legitimate interest and expectation of the public that the public report of those proceedings is uncensored.

...

Here, there is no basis for the finding that Mr Robinson would have a "reasonable expectation" that the words stated by Mr McGuinness would not be disclosed. In fact, any such expectation would be contrary to the reality that Mr Robinson operated in for the entirety of his political career.

31. The Appellant sets out an example of where Mr Robinson has used parliamentary privilege himself to link a parliamentary opponent to 'IRA dirty money' and encloses the relevant BBC report from February 2006.
32. Finally, the Appellant refers to the wording which replaces the withheld information and the reference to 'legal proceedings' :-

Thus, from the outset, the expectation was that the words were being removed until the issue of legal proceedings had been resolved – not in perpetuity. There is no evidence of any conscious decision to omit the words permanently from the public record. Instead, it appears that no one recalled what had happened and so the issue was forgotten until Mr McBride reviewed a file in the Public Records Office....

Finally, a review of the transcript of the relevant hearing of the Shadow Assembly, or the contemporaneous press reporting of the hearing, highlights the fact that there were a number of potentially defamatory comments made during the hearing. This material was (I submit, properly) not redacted from the report of the proceedings. An exception was made only for the comments made by Mr McGuinness in relation to Mr Robinson, apparently solely on the basis that he threatened legal proceedings.

33. The Commissioner responded to say that he relied on the contents of the decision notice. He notes:-

34...whilst the Commissioner accepts that the comments which form the disputed information were indeed said in public at the time of the sitting of the Shadow Assembly, the Commissioner considers that the fact-sensitive balance of legitimate interests may shift with the passage of time. That is to say, whereas the balance of legitimate interests may favour disclosure over an individual's privacy rights at or around it was made public, it may not do so later.

35. When balancing legitimate interests for the purposes of Article 6(1)(f) UKGDPR, it is not simply a question of whether there was a reasonable expectation of privacy at the time the Shadow Assembly met in 1998. Disclosure under FOIA would be to the world at large and on an indefinite basis. It would extinguish any possibility for the data subject that the matters raised would be allowed to recede in time as envisaged.

36. The material time to consider the application of an exemption - s.40(2) in this case – is at the time of the response to the request. On the facts of this case, the response to the request on 24 May 2022 was given almost 24 years after the material words were uttered in the Shadow Assembly. At this material time, the Commissioner maintains that disclosure of the disputed information would be unfair and an unlawful interference with the data subject’s privacy rights.

37. The Appellant also argues that press reporters were also present at the hearing of the Shadow Assembly...

38. There is no evidence however that the remaining disputed information still withheld was reported on at the time or indeed that press reports remain available today which refer to the particular disputed information still withheld.

...

40...the reasonable expectations of the individual concern was simply one of many factors considered by the Commissioner when carrying out the legitimate interests balancing test.

41. Secondly, it appears that the Appellant is considering what would have been the reasonable expectation of the data subject at the time he made the comments. The reasonable expectation should be considered as at the time of the response to the request as that is the material time at which the exemption under section 40(2) must be considered...

42. The Commissioner is unable to go into further details concerning the reasonable expectation of the data subject with respect to the disputed information without risk of referring to the withheld information itself...

...

45. The Commissioner therefore maintains that the balance of the legitimate interests favours withholding the requested information and that therefore the condition under Article 6(1)(f) is not met. The Commissioner was therefore correct to conclude in his DN that disclosure would contravene the principle in Art 5(1)(a) UKGDPR and that therefore the exemption under section 40(2) was engaged.

34. The Appellant issued a reply, having now seen the information directed to be disclosed by the Commissioner. The Appellant notes that he was told by the Commissioner that ‘the disputed information contained in the audio recording which is exempt under section 40(2) is one sentence’, and so what remains withheld must be part of that sentence. The Appellant says:-

It is notable that it has now disclosed Mr McGuinness’ remarks in relation to Mr Robinson’s relationship with Ulster Resistance, a topic on which Mr Robinson received an apology and damages from the Metro Newspaper in 2017. If its justification for redacting information is based on which comments it considers to cause damage or distress to Mr Robinson, it is a somewhat surprising disclosure.

35. The Appellant also discusses the timing of the requested disclosure and says that ‘confirming that the relevant date for assessment is in 2023, rather than 1998, does not diminish the Appellant’s justification for publication of the material. In fact, it supports it’. The Appellant presents a number of reasons for this.

36. Thus it is said that ‘at the time the material was first removed, Mr Robinson was threatening legal action’ but this was not pursued. No such action was subsequently pursued by Mr Robinson, and the wording inserted in Hansard indicated that the words were being removed because of potential legal action.

37. It is said that, although not in place at the time, absolute privilege has applied to reports of parliamentary debates in Northern Ireland. It is argued that the ‘remarks made were intended to be recorded in perpetuity in Hansard, as an important record of Parliamentary debates’. Reference is made to Mr Robinson’s use of parliamentary privilege (as set out above), also in relation to comments about Mr McGuinness and the alleged membership of the IRA Council.

38. It is also pointed out that Mr Robinson and Mr McGuinness would go on to serve together as first and deputy first minister, providing ‘the longest period of stable power-sharing government in the history of Northern Ireland’ and forging a friendship between them. It is said that ‘Where these two men came from is key to understanding where they ended up. As a result, there is an enhanced public interest in the very early Assembly debates’. The Appellant concludes:-

As the balancing exercise is to be undertaken now, it must be done against the backdrop of the wealth of public reporting on the relationship between Mr Robinson and Mr McGuinness. It cannot be credibly said that the release of one sentence said by Mr McGuinness in 1998 is going to cause damage or distress to Mr Robinson in these circumstances.

THE HEARING

39. In the hearing, the Commissioner was not represented and relied on his written submissions. The Appellant was represented by Mr Turner who emphasised to the Tribunal the points the Appellant had made in writing.

DISCUSSION

40. It has been necessary to set out the majority of our reasons for our decision in this case in an annex which is confidential at least for now. That is to preserve any right of appeal which would be compromised if our reasons were at present in public. However, if in fact there is no appeal and our decision is complied with, the Tribunal will consider further both the disclosure of the confidential annex in this decision, and for the original decision notice.

41. For the purposes of this OPEN part of the decision, and for the reasons set out in the confidential annex the Tribunal finds that the Assembly would be able to rely on Article 6(1)(f) as a lawful basis for disclosure of all of the information initially withheld and not just that portion which has now been disclosed.

42. We are satisfied that disclosure of all the withheld information is necessary in order to meet a legitimate interest. We are further satisfied that the legitimate interest in disclosure of all of the information overrides the legitimate interests or fundamental rights and freedoms of the data subject.

43. The Tribunal finds that that disclosure of all of the information originally withheld would not contravene DP principle (a), and that the Assembly was not entitled to rely on section 40(2) FOIA in respect of any of that information.

CONCLUSION

44. On the basis of the above and the contents of the confidential annex, the Tribunal allows the appeal. Thus, the Tribunal by way of a substituted decision notice, requires the Assembly to take the following steps to ensure compliance with the legislation:-

- **Disclose to the Appellant of all the requested information originally withheld.**
- **The Assembly must take these steps within 35 calendar days of the date of this decision.**

45. Failure to comply may result in the Tribunal making written certification of this fact to the Upper Tribunal, in accordance with rule 7A of the First-tier Tribunal (General Regulatory Chamber) Rules¹ and may be dealt with as a contempt of court.

46. Unless the Commissioner files an application for permission to appeal within 28 days, then the Tribunal intends, subject to any views expressed by the Commissioner, to direct the publication of the confidential annex in the decision notice and to this decision. If the Commissioner makes a decision not to apply for PTA sooner than 28 days, he is requested to inform the Tribunal.

Recorder Stephen Cragg KC

Sitting as Judge of the First-tier Tribunal

Date: 13 May 2024

Date Promulgated:

1

