



NCN [2024] UKFTT 711 (GRC).

Case Reference: EA/2023/0082

First-tier Tribunal  
General Regulatory Chamber  
Information Rights

Heard: Determined on the papers  
1 December 2023  
Decision given on: 26 July 2024

Before

TRIBUNAL JUDGE JACQUELINE FINDLAY  
TRIBUNAL MEMBER PIETER DE WAAL  
TRIBUNAL MEMBER EMMA YATES

Between

BENJAMIN FAIFE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision

1. The appeal is Dismissed.

REASONS

Background and Request

2. This appeal is brought under s.57 of the Freedom of Information Act 2000 (FOIA) against the Decision Notice (DN) of the Information Commissioner (the

Commissioner) dated 16 January 2023 with reference IC-205644-M1C7 which is a matter of public record.

3. The parties opted for a paper determination of the appeal. The Tribunal was satisfied that it could properly determine the issues without a hearing within Rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009, as amended (the Rules).
4. In reaching its decision the Tribunal took into account all the evidence before it in an agreed open bundle and a closed bundle and made findings on the balance of probabilities.
5. The full details of the background to this appeal, Mr Faife's request for information (the Request) and the Commissioner's decision are set out in the DN.
6. On 19 July 2021, Mr Faife made a FOIA Request to the HM Land Registry (HMLR) in the following terms:

*"a) Search of the index of proprietors against [name redacted] (My great-great grandfather) and [name redacted] and [name redacted] (My great great grandfathers' executors.*

*b) A full list of registered land that has been adverse possessed since 1934 where the owner was [name redacted] or [name redacted] or [name redacted] or [name redacted]. If you are unable to do this since 1934, then please provide the information from the date on which you are available."*

7. Following the Commissioner's investigation of HMLR's response to the Request on 18 October 2022 a decision notice was served. The Commissioner's decision was that s.31(3) by virtue of s.31(1)(a) of FOIA was not engaged and he considered HMLR was not entitled to neither confirm nor deny holding information within scope of the Request. The Commissioner required HMLR to take steps to ensure compliance with

the legislation. This was to issue a fresh response which must confirm or deny whether HMLR holds information within the scope of the Request, and if held, either disclose the requested information or issue a valid refusal notice compliant with s.17 of FOIA.

8. On 18 November 2022 HMLR provided Mr Faife with an updated response to his Request, namely a refusal notice and confirmed that it held the information within scope of the Request, however, it was exempt from disclosure under s.40(2) (personal information) and s.31(1)(a) (prevention and detection of crime) of FOIA.
9. On 5 December 2022 Mr Faife responded to HMLR and disputed its refusal notice. He outlined that his Request and the previous decision notice were in two parts; a) a list of registered land in deceased relatives' name, b) list of adverse possession for deceased relatives.
10. Mr Faife asked HMLR to confirm what information within the Request it stated is held, as he considered its response was not clear whether the information related to a) and b) or just a) or b) individually. Mr Faife also contacted the Commissioner to complain about the way his Request for information had been handled.
11. On 6 January 2023 HMLR provided Mr Faife with its final response regarding its refusal notice.

### **The Decision Notice**

12. On 16 January 2023 the Commissioner issued the DN which stated that HMLR was entitled to rely on ss.40(2) and 31 of FOIA to refuse to provide the information requested. The Commissioner did not require HMLR to take any steps as a result of this decision.
13. On 15 February 2023 Mr Faife lodged an appeal against the Commissioner's DN.

## Legal Framework

14. A person requesting information from a public authority has a right, subject to exemptions, to be informed by the public authority in writing whether it holds the information under s.1(1)(a) of the FOIA and to have that information communicated to him if the public authority holds it under s.1(1)(b) of the FOIA.
15. These rights are subject to certain exemptions set out in Part II FOIA. The relevant exemptions are contained in s.40(2) (third party personal data) and s.31(1)(a) (prevention or detection of crime).
16. S. 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
17. S. 3(2) of the Data Protection Act 2018 (DPA) defines personal data as:  
“any information relating to an identified or identifiable living individual.”
18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. S. 31(1)(a) of FOIA states that:  
  
“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –  
  
(a) the prevention or detection of crime.”
20. Since s.30 is a qualified right, it is subject to the public interest test within the FOIA. Information can be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.

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

(1) if on an appeal under s.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.

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

22. The Tribunal stands in the shoes of the Commissioner and takes a fresh decision on the evidence. The Tribunal does not undertake a review of the way in which the Commissioner investigates complaints or the way in which the Commissioner's decision was made.

### **Grounds of Appeal**

23. Mr Faife submits the following grounds of appeal:

a) His family has always believed that there is land still in his relatives' name. He believes the executor did not fully or properly administer the estate. Through research he identified land that had been adversely possessed. He had investigated what land remained and what land had been adversely possessed.

- b) The Request does not relate to living individuals and he has suggested a process which could be used to identify non-living individuals (i.e. providing death certificate and historical information on addresses.)
- c) After a certain period any unadministered assets could be classed as 'lost' and there is a precedent set by other organisations to enable those that may have a claim to discover these assets and none of these investigatory processes required an executor.
- d) A person can apply online with the name and address and HMLR then confirms or denies holding the assets. The person then sends the birth certificates or a will and HMLR confirm the value of the assets held.
- e) He queries how a name plus address with reference to a death certificate and then cross referenced to the date of HMLR registration of title could lead to third party personal data being released.
- f) He accepts that personal data under the General Data Protection Regulation (GDPR) which is not in the public domain is not legally bound to be released but he does not understand how his Request could fall under the definition of personal data.
- g) The disclosure of the information is in the public interest taking into account the ability for people to legally adversely possess land when land is 'lost.' It is highly likely to occur by the surrounding land owners who notice that the land has not been used or kept and is therefore 'lost.'
- h) HMRL has no process to identify 'lost' land or indeed to keep an updated record of the register as they actively encourage adverse possession as a means of keeping the register up to date as this prevents them from actively seeking owners of potentially 'lost' land.

- i) HMRL has a conflict of interest between what is best for the public and what is best for them as an entity.
- j) The appeal should be allowed.

### **The Commissioner's Response**

24. The Commissioner submits the following:

- a) The Commissioner is mindful of his role as an independent regulator and therefore the need to keep the merits of his decision under review (*Lubicz v IC and King's College London* [2015] UKUT 555 (AC) at [51]).
- b) The Commissioner concluded that where s.40(2) FOIA did not apply to the extent that the requested information concerned deceased individuals the requested information was exempt from disclosure under s.31(1)(a) FOIA.
- c) The Commissioner correctly decided that s.31(1)(a) FOIA applied to both parts of the Request. HMLR was entitled to withhold the requested information regarding searchable access to property/land registered to a named individual under s.31(1)(a) FOIA.
- d) Both exemptions applied to the withheld information for both parts of the Request. S.40(2) applies to third party personal data connected to the adverse possession application and s.31(1)(a) to the index of proprietors and list of registered land.
- e) The Commissioner did not inspect the withheld information as he did not consider it necessary to do so. The FOIA does not impose any procedural duties on the Commissioner in relation to his investigation.

- f) Mr Faife has sought to recharacterise his Request in his appeal. The Request that is the subject of the DN under appeal is the Request as stated on 19 July 2021.
- g) If the requested information were disclosed, HMLR as the data controller or any other person would be reasonably likely to identify living individuals who currently live in the relevant properties.
- h) Disclosure of the requested information to the world is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects.
- i) S.31 FOIA can apply to information contained in a historical record as referred to in s.63(4) FOIA.
- j) S.69 of the Land Registration Act 2002 (LRA) does not provide a lawful basis of the disclosure of the information sought in part b of the Request. There is no evidence that the data subjects have consented to their personal data being disclosed.
- k) HMLR was entitled to withhold the requested information under s.40(2) FOIA.
- l) The disclosure of the requested information would prejudice the prevention and detention of crime for the purposes of s.31(1)(a) FOIA. The public interests arguments in favour of maintaining the exemption outweigh the public interest arguments in favour of disclosing the requested information.
- m) The appeal should be dismissed.

## **Conclusions**

25. In reaching its decision the Tribunal took into account all the evidence before it whether or not specifically referred to in this Decision. The Tribunal applied the



legislation and case law as set out above. The Tribunal did not rely on any document within the Closed Bundle in reaching its decision.

26. The Tribunal is concerned with Mr Faife's Request as drafted and dated 19 July 2021 not with a Request that Mr Faife might have made or would like to have made.
27. Mr Faife made an unsuccessful application to HMLR for an official search of the index of proprietors names (IOPN) against the names of his great great grandfather and his executors. This application involves matters outside this Tribunal's jurisdiction as it involves the processes of other organisations to assist individuals who may have a claim to unadministered assets.
28. HMLR maintains a Register of Title in accordance with the LRA for the purposes of proving legal ownership.
29. S.66(1) of the LRA provides that any person may inspect and make copies of any part of the register of title and any document referred to in the register of title. Access is available through a payment of fees. The starting point for a search is the land or property in question.
30. The Tribunal found that the Request relates to a search starting with the personal identifiers. The information sought relates to the personal identifiers and falls within the definition of 'personal data' in accordance with the DPA. The disclosure of a title number would allow Mr Faife to access information relating to individuals including not just those requested by the search but also other individuals. There is no lawful basis of disclosure as there is no statutory requirement for this type of information search to be made available within the LRA.
31. Mr Faife submits that the personal identifiers in his Request do not relate to 'living individuals' so is not personal data. HMLR does not maintain any other person

identifiers on the register such as date of birth or death certificates which could be used to confirm whether the information relates to a living individual.

32. The Tribunal found that even if the personal identifiers do relate to individuals who are deceased, the title would reveal third party personal data connected to the adverse possession application. The information of any deceased individual could fall within the definition of personal data in relation to other living relatives of the deceased. The requested information if disclosed would be reasonably likely to identify living individuals who currently live in the relevant properties. Disclosing details of registered land which had been subject to adverse possession would reveal details of individuals with current ownership.
33. The Tribunal found that confirming if an adverse possession had taken place in relation to a named individual could be combined with other information to reveal further personal data that would be in contravention of the data protection principles.
34. In reaching its decision the Tribunal has borne in mind Recital 26 of GDPR, namely that in order to determine whether a person is identifiable account should be taken of all of the means reasonably likely to be used by any person to identify the individual. The Tribunal has borne in mind the 'motivated intruder test':

*"The 'motivated intruder' is taken to be a person who starts without any prior knowledge but who wishes to identify the individual from whose personal data the anonymised data has been derived. This test is meant to assess whether the motivated intruder would be successful.*

*The approach assumes that the 'motivated intruder' is reasonably competent, has access to resources such as the internet, libraries, and all public documents, and would employ investigative techniques such as making enquiries of people who may have additional knowledge of the identity of the data subject or advertising for anyone with information to come forward. The 'motivate intruder' is not assumed to have any specialist knowledge such as computer hacking skills, or to have access to specialist equipment or to resort to criminality such as burglary, to gain access to data that is kept securely."*

35. The Tribunal found that even though property ownership information can be said to be in the public domain by other means, for example by obtaining an official copy of the register of title under the LRA and Rules, it is not automatically fair or lawful to disclose the information in another context. This is because HMLR is a property register, not a register of persons and the payment for each individual register is a control ensuring the entire 26 million property registers are not made available en masse with resultant counter fraud implications.
36. In relation to Mr Faife's argument that s.69 of the LRA provides a lawful basis for disclosure of the information sought in part b of the Request, Mr Faife raised this issue for the first time in his reply. The Tribunal found that there is no evidence to suggest that the data subjects have consented to their personal data being disclosed in response to Mr Faife's Request.
37. There is no lawful basis for disclosing the requested personal data under Article 6(1)(f) GDPR and disclosure would breach the data protection principle in Article 5(1)(a) GDPR.
38. HMLR was entitled to withhold the requested information under s. 40(2) FOIA.
39. The exemption from disclosure in s.40(2) FOIA so far as it related to the data protection principles is an absolute exemption meaning that the public interest test in section 2(2)(b) FOIA does not apply.
40. The Tribunal found that providing open access to registered titles through searches based on personal identifiers would be beneficial to potential fraudsters by providing information for targeting and committing crime.
41. Mr Faife submits that he accepts there is a possibility of fraud but that the requirement to provide a death certificate would limit this. The Tribunal found no

merit in this submission because a request for information under FOIA does not need to be accompanied by a death certificate.

42. The Tribunal found that if the requested information was disclosed the public including anyone with an intention to commit fraud would obtain more information than is already in the public domain.
43. Mr Faife in his reply stated for the first time that “under b) of the data protection principles there is a specific carve out for processing for historical research.” The Tribunal found there was no merit in this argument because HMLR would not be processing or disclosing data to Mr Faife alone for the purposes of historical research. Disclosure would be to the world.
44. The Tribunal attached no weight to Mr Faife’s submission that HMLR published certain information because no details are provided and no context for the information being publicised is provided. In any event the Tribunal is concerned with this particular Request.
45. The Tribunal was satisfied that s.31 FOIA can apply to information contained in a historical record and s.63(4) FOIA provides that information cannot be exempt under s.31 after the end of the period of one hundred years beginning with the year following that in which the record containing the information was created.
46. The Tribunal found that HMLR was entitled to refuse both parts of the Request under s.31(1)(a) (prevention or detection of crime) and to refuse to disclose third party personal data held within the scope of the Request under s. 40(2) FOIA
47. The Tribunal found that the legitimate interests in disclosure of the requested information was insufficient to outweigh the fundamental rights and freedoms of the data subjects.

48. In relation to the exemption under s.31(1)(a) the Tribunal found that there was a clear public interest in protecting society from the impact of crime and the disclosure of the information would prejudice the prevention and detection of crime by facilitating or encouraging the possibility of a criminal offence being carried out.
49. The Tribunal found that the information within the scope of the exemption does not need to be disclosed because in the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure. HMLR has a process in place to serve notice of registered land adverse possession applications on interested parties giving them an opportunity to object to the application if they wish and if it is appropriate. The Tribunal found that this process was proportionate in meeting the public interest in ensuring a proportionate process.
50. The Tribunal found that both exemptions were applied to the withheld information for both parts of the Request.
51. The Tribunal was satisfied that there was no error by the Commissioner in not inspecting the withheld information as he did not consider it necessary to do so. The Tribunal accepts the reasons for this and notes that the FOIA does not impose any procedural duties on the Commissioner with regard to his investigation.
52. The Tribunal found that none of the arguments and grounds presented by Mr Faife identify any error of law in the DN nor do they identify any incorrect exercise of the Commissioner's discretion.
53. Accordingly, the appeal is dismissed.

Signed: **Judge J Findlay**

**Date: 1 December 2023**