



Information Tribunal appeal number: EA/2011/0073 & 0074
Information Commissioner's references: FS50321032 & FS50321035

Determination on paper:

On: 1st. August, 2011

Decision Promulgated On: 7th. September, 2011

BEFORE

David Farrer Q.C.

and

Michael Jones and Jean Nelson

Between

BRUCE BECKLES

Appellant

and

INFORMATION COMMISSIONER

Respondent

FOIA ss. 10, 12, 16, 17 and 40 –

Handling of Requests by Public Authority

Absolute exemption: personal data.

**Cases: Department of Health v Information Commissioner [2011]
EWHC 1430 (Admin.);
Common Services Agency v Scottish Information Commissioner [2008]
UKHL 47.
Alasdair Roberts v ICO EA/2008/0050:**

Decision

The Tribunal upholds both Decision Notices and dismisses both appeals.

Dated 7th. September, 2011

Signed

David Farrer Q.C.
Judge

Reasons for Decision

The Tribunal's Jurisdiction on these appeals

1. It is important to identify at the outset the scope of the Tribunal's jurisdiction since the Appellant has advanced in written argument the proposition that each of a series of letters to the public authority, Cambridge University ("the University") should be treated as a further request under s.1 of FOIA, that his complaints to the Information Commissioner ("the ICO") should be regarded as including every further matter raised in those letters and, seemingly, that the Tribunal should give rulings on each of those matters.
2. The Tribunal's function, as enacted in FOIA s.58, is to determine whether a decision notice issued by the ICO under s.50 is in accordance with law and/or, where applicable, the ICO has exercised his discretion correctly. Requests, if, which is doubtful here, they were requests, upon which the ICO has made no decision, are not, therefore, within the Tribunal's competence.
3. Here the ICO issues two decision notices, dated respectively 15th. February 2011 and 2nd. March, 2011.
4. Notice FS50321032, dated 15th. February, 2011, provided decisions on

- (i) the Appellant`s request dated 12th. February, 2010 as to which the University had claimed exemptions under ss.40 and 43 of FOIA,
 - (ii) the Appellant`s claim under s.10 as to how that request was handled,
 - (iii) his further complaint under s.16 relating to this request and
 - (iv) his complaint under s.17 which was upheld by the ICO and with which we are not concerned.
5. Notice FS5021035, dated 2nd.March, 2011 dealt with
- (i) the University`s reliance on s.12 in reply to the Appellant`s earlier request dated 13th. December, 2009,
 - (ii) his complaint under s.10 as to how this request had been handled and
 - (iii) his further complaint under s.16 in relation to that request.
6. These are, therefore the only matters with which this appeal is concerned, appeals against the two decision notices having been joined by consent.

The Background

7. In 2009 the University proposed changes in its procedures for dismissal of staff of all categories. Staff were balloted by the University Council on the planned changes, which proved controversial. The Appellant made a series of requests for information which he regarded as relevant to an assessment of what was proposed. This appeal relates to two requests referred to at paragraphs 4(i) and 5(i) above.
8. The request dated 13th. December, 2009 was in the following terms:

“For all categories of staff (unestablished, assistant, academic-related, academic, etc) and since 1 January 2004, please supply the answers to the following questions:

- 1) How many appeals against dismissal have been heard by the University (or by some body on behalf of the University)?*
- 2) How many of these appeals have succeeded?*
- 3) How many post-dismissal compensation settlements have been reached?*
- 4) How many of these settlements were subject to confidentiality agreements?”*

9. On 10th. January, 2010 the University provided such information for the period from December 2008 to the date of the request. The answers were:

- 1) Four
- 2) None
- 3) Four
- 4) All.

From 1st. August, 2009 the relevant information was stored on a central database. Before that date it was held at different locations in paper records. The University refused the remaining requested information on the ground of cost, relying on s.12 and the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, 2004, which, in the case of the University prescribed a cost limit of £450¹, representing eighteen hours` work for one member of staff. The Appellant had specifically canvassed the possibility of advice which might enable him to refine his request (s.16) but the University replied that neither a reduction in the specified period nor in the categories of staff would affect materially the scope hence the cost of retrieval. Further correspondence ensued, relating to how the records were held and might be examined; a review was requested; it upheld the s.12 refusal; a

¹ Regulation 3(3)

complaint was made to the ICO on 19th. April, 2010. The issues raised under ss. 10, 12 and 16 are considered at paragraphs 13 to 20 below.

10. The second request stemmed from the first. Dated 12th. February, 2010, it read –

“In response to a previous Freedom of Information request, you have stated that the University agreed four post-dismissal compensation settlements in the period between December 2008 to 13 December 2009. For each post-dismissal compensation settlement, please tell me the amount agreed (in pounds) in the settlement. If the exact amounts cannot be revealed due to data protection concerns, I am happy to accept the amounts to the nearest appropriate figure (provided you indicate this figure in your response)...”

It was followed by an e-mail requesting the information before 12th.

March, 2010, the deadline for the submission of “flysheets” by those entitled to propose amendments to the Council’s proposals.

11. The request was refused on 12th. March, 2010. The University cited the exemptions contained in ss.40 and 43. The Appellant asked for an internal review in a further e-mail dated 22nd. March, 2010 which set out each of the complaints later made to the ICO. The review upheld the refusal, as was notified to the Appellant by letter of 12th. April, 2010.

The Decision Notice of 2nd. March, 2011

12. We deal first with this appeal because it derives from the earlier request.

The complaint under s.12

13. S.12(1) provides –

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

14. That does not mean that a public authority can conjure up any fanciful estimate that it chooses; nor is it required to demonstrate that no method of satisfying the request within the cost limit can possibly be devised. In *Alasdair Roberts v ICO* (EA/2008/0050): the Tribunal observed at paragraph 35

“It does not follow from this that it only needs a person requesting information to suggest one alternative which the public authority had not considered for it to be prevented from relying on its estimate. It is only if an alternative exists that is so obvious to consider that disregarding it renders the estimate unreasonable that it might be open to attack”

We readily adopt that approach.

15. The Appellant argues that the extensive information sought in his request could have been gleaned from “legal documents” held by the legal department and from “some records of financial settlements” in the University’s accounts.

16. Whether or not that is so, we do not regard such an alternative as so obvious as to render the estimate unreasonable. Neither is it obvious

that the necessary investigation, adopting this approach, could have been concluded within the cost limit.

The complaint under s.10

17. S.10(1) requires a public authority to respond promptly to a request and in any event within 20 working days. The request with which we are concerned is the one set out at paragraph 8. We accept the ICO's submission that the ensuing letters were not separate requests but inquiries as to the reasons for claiming the s.12 exemption. The University responded to the request within 20 working days and there is apparently no suggestion that this was not prompt, save in so far as the asserted failure to explain the cost position is said to amount to a breach of s.10. Even if there were such a failure, that argument must fail, if for no other reason, because, s.17(5)² expressly requires only notice of reliance on s.12 for the purpose of compliance with ss.1(1) and 10(1). The plain implication is that, where an exemption is claimed under s.12 (or s.14), no further explanation is required in the authority's notice of refusal. Whether such a bald statement, without more, might involve a breach of s.16 does not require consideration here.

The complaint under s.16

18. S.16(1) requires an authority to

“provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make or have made requests for information to it”.

S.16(2) provides that compliance with the Code of Practice issued under s.45 amounts to compliance with that duty.

² An authority relying on s.12 or s.14 is required by s.17(5), within the time stipulated by s.10(1), to “give the applicant a notice stating that fact”

19. The Appellant`s complaint covers much the same ground as the complaint under s.12. If the University concluded, as it said it did, that his request could not be refined, as to time – scale or personnel, so as to bring it within the cost limit, it is not clear to us what advice or assistance it could have offered. Even if some further investigative route could have been eventually discovered, it is not reasonable to expect an authority to lavish ingenuity upon such a quest. Moreover, having partially fulfilled the request, it explained the problems inhibiting a complete provision of information. The CHRIS and SERQUS computer systems, subsequently discussed, could not, we understand, supply more than a limited part of the information.
20. We see no justification for this complaint.

The Decision Notice of 15th. February, 2011

21. As noted at paragraph 4, three complaints give rise to appeal. They include the one substantive issue raised on these appeals, namely whether the exemption provided by s.40 applies to this request. We shall deal first with the procedural questions.

The complaint under s.10

22. As with the earlier request, the University responded within 20 days. The circumstances as regards the University`s commitments and resources were obviously identical to those prevailing at the time of that request. The sole difference is that the deadline for flysheet entries fell within the 20 day period, creating a degree of urgency from the Appellant`s standpoint.

23. The needs of the requester may be a factor in an assessment of what amounts to a “prompt” response but they cannot be determinative. The Appellant chooses when to make his request. Here he did so just under four weeks after receiving the refusal notice of 13th. January, 2010. The University was entitled to set its own reasonable priorities, having proper regard to competing duties and commitments. We do not consider that its response was unduly tardy.

The complaint under s.16

24. The Appellant contends that the University should have offered to provide him with the information in aggregated form or by specifying the average of the settlements. The University`s answer was that it had not supposed that information provided in such a way would be acceptable. That is not surprising. S.16 requires a public authority, whether before or after the request is made, to suggest obvious alternative formulations of the request which will enable it to supply the core of the information sought within the cost limits. It is not required to exercise its imagination to proffer other possible solutions to the problem.

25. There is, moreover, as the ICO ruled, nothing in the wording of s.16 to indicate that the duty continues after a refusal nor does the code of practice promulgated under s.45 appear to contemplate such an interpretation.

26. During negotiations with the ICO the University offered to resolve the complaint by providing information in the aggregated or average form as described in paragraph 23. However, the Appellant, when that offer was put to him, added a further demand relating to the standard deviation from the arithmetic mean (average), which went beyond the original request. That seems to indicate that the assistance which the University is said to have failed to provide would have not have met his

request anyway. In those circumstances, quite independently of the general point made at paragraph 23, it is hard to see how such a failure was unreasonable.

27. This complaint is, in our judgment, for all these reasons, unfounded.

The complaint under s.40

28. S.40 provides an absolute exemption from the duty to provide information. So far as material, it reads -

40 Personal information.

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

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

(a) it constitutes personal data which do not fall within subsection (1), and

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

(3) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles,³ or

³ The data protection principles are set out in Schedule 1 to DPA, 1998. Paragraph 1 (the first principle) 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”*

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

It is said that provision of the requested information would contravene the first data protection principle. It would be unfair because each settlement contained a confidentiality clause so that each individual was entitled to assume the protection of his or her anonymity. Moreover, none of the conditions in schedule 2 were satisfied anyway. Indeed the Appellant has not argued that any was satisfied.

29. The definition of personal data is that contained in s.1(1) of the Data Protection Act, 1998 (“DPA 1998”) which, so far as material, reads -

“...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,. .

.. “

30. Information as to the settlement of a claim made by an identified individual relating to his or her employment is undoubtedly personal data. The question is whether the four individuals or any of them could be identified if the information requested were disclosed, even in approximated form.

31. The data as to these settlements held by the University is plainly personal data within DPA s.1(1)(a) since the individuals are expressly identified. However, the question for the Tribunal, as is clear from the exposition of Cranston J. in *Department of Health v Information Commissioner [2011] EWHC 1430 (Admin.)*⁴ of the House of Lords decision in *Common Services Agency v Scottish Information Commissioner [2008] UKHL 47*, is whether the individual(s) would be

⁴ Paragraphs 39 - 54

identifiable by members of the public, not armed with the further information held by the University, if the data were disclosed in the form proposed.

32. The question to be determined is therefore whether any individual would be identifiable from the data requested. That depends to a significant degree on the content of the data in question, which is dealt with briefly in the closed annex.
33. Identifiable means identifiable, not by the requester, but by any third party who might relate such information to his or her knowledge and experience. Disclosure is to the public at large.
34. Cambridge University is probably a larger community than a census ward, the unit involved in *Common Services Agency v Scottish Information Commissioner*. Nevertheless, it is made up of a large number of much smaller academic or collegiate communities. It is likely that a number of colleagues or friends will be aware that a particular individual settled a claim with the University within the time – scale specified. They will be aware of the general nature of that person`s employment. This is a small group of claims in a relatively short period. In the form originally requested it is readily foreseeable that one or more of the four will be identified.
35. The Appellant has modified his request to the extent of seeking rounded figures. As the ICO observes, given the disclosure of the number and the total value of the settlements (£104,820) a meaningless rounding of the figures providing effectively no further information would be possible but pointless. Having seen the University`s letter of 13th. October, 2010 in unredacted form in the closed bundle, containing the requested information, the Tribunal is satisfied that no sensible “rounding” exercise

could be performed without risking the disclosure of one or more identities. The closed annex to this decision considers the particular information.

36. Given our finding on the s.40 exemption, we do not make a determination as to the further claimed exemption under s.43.
37. For these reasons and those contained in the closed annex, both decision notices are upheld and these appeals are dismissed.

David Farrer Q.C.

Judge

7th. September, 2011