



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2012/0183

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50438587
Dated: 14th August 2012**

Appellant: Patricia Cialfi

and

Respondent: The Information Commissioner

Heard on the papers: Field House on 14th January 2013

Before

Fiona Henderson

Judge

and

Alison Lowton and Rosalind Tatam

Tribunal Members

Date of Decision: 7th February 2013

Subject matter:

FOIA– s40 Personal data

Cases:

Durant v Financial Services Authority [2003] EWCA Civ 1746

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 14th August 2012 and dismisses the appeal.

REASONS FOR DECISION

1. This appeal is against the Information Commissioner's Decision FS50438587 dated 14th August 2012 which concluded that Sheffield Hallam University (the University) correctly applied s40(2) FOIA (data protection) to make redactions to the information disclosed.
2. Common Purpose is a charity which provides leadership training courses. Some University staff have attended these courses as part of their personal development. Additionally Common Purpose has run leadership courses on behalf of the University for selected students. The University has spent in excess of £100,000 with Common Purpose since 2009. At the date of the request the contract for the provision of these courses had not been put out to competitive tender.
3. On 16th August 2012 Ms Cialfi requested that the University provide:
“for the past four years, copies of all invoices and associated communications, including emails, relating to the charity known as Common Purpose”.
4. The University provided a considerable volume of material in response; however, the identity of the participants both students and staff and the identities of those involved in administering the courses and processing the payments were redacted pursuant to s40 FOIA¹.

Scope of the Appeal

5. The University refused to provide some other material on the grounds that the cost limit would be exceeded (s12 FOIA), that is the subject of a separate complaint to the Commissioner and is therefore not considered here. The scope of the appeal has been reduced by Ms Cialfi, who no longer seeks the identities of the students who attended the course and only seeks disclosure of the surnames of the “senior (as defined)” members of staff who attended courses and the Senior employees involved in the processing of the payments. It is not entirely clear what definition of ‘senior’ Ms Cialfi is referring to. ‘Senior’ has been defined by the University as those employed on the Senior Staff Grade rather than the single pay spine on which other staff are paid. Although Ms Cialfi argues that all those authorising invoices are senior, we

¹ First names and some job titles were provided

adopt the pay grade definition as that used by the organisation which would inform the expectation of the employees.

Personal Data

6. The University relied upon the s40(2) FOIA exemption before the Commissioner arguing that it is the personal data of the staff members in question. Ms Cialfi argues that as it relates to the use of public funds that it is public information and not personal data.
7. Personal data is defined in section 1(1) the DPA² as:
*“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, and
includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;*
8. It is not disputed that from their names the staff members are identifiable. We note *Durant v Financial Services Authority [2003] EWCA Civ 1746* where Auld LJ said³:
“Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated.

² incorporated into FOIA by section 40(7)FOIA

³ Paragraph 28

In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity.”

9. We are satisfied that the identity of the attendees on the course does fit the definition of personal data applying the *Durant* principles. It is clearly biographical and they are the focus of the information in that the information relates to their participation in the course whose aim is their personal development. Although in most cases there are benefits to the University in that they would be expected to use what they have learnt on the course to improve and enhance their performance, this is also personal development as they will take the skills learnt with them should they leave the University. It should be noted that one of the courses related to retirement preparation of that particular staff member which the Tribunal would consider had an even higher personal focus as they would not be expected to use that in the performance of their role.

10. In relation to those members of staff involved in the payment process, the information in the context in which it would be disclosed indicates (or allows information to be deduced) regarding where they work, the kind of job that they do, the level that they operate at and what they are permitted to do within that role (e.g what they can agree to spend), the decision that they have made and possibly the way that they have made the decision. We are satisfied that this is biographical and in applying the *Durant* principles that this is personal data.

The First Data Protection Principle

11. The University argued before the Commissioner that the personal data is exempt because pursuant to s40(3)(a)(i) FOIA disclosure otherwise than under FOIA would contravene any of the data protection principles. Schedule 1 Part I of DPA provides:

1. 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,...

The relevant condition provides as follows:

6(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed,

except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

12. The Commissioner argues in his response that disclosure under FOIA is disclosure to the world at large and consequently the legislation affords particularly strong weight to the protection of personal data. There is no presumption under FOIA in favour of disclosure of personal data. The Tribunal agrees. The Tribunal has had regard to the reasoning as set out in the Commissioner's Decision Notice with which it also agrees but makes the following additional points in light of the arguments advanced by Ms Cialfi as part of this appeal.

Expectation of staff:

13. Ms Cialfi argues that since it is a condition of applicants to Common Purposes courses that they agree that their names and positions may be used for Common Purpose publicity⁴, those who attend would expect this information would be disclosed.

14. The Tribunal notes that this disclosure is not automatic, and that disclosure under FOIA is to the world at large without restriction. We have regard to the University Staff Personal Data Code (the Code) in assessing the staff expectation. We note from this that personal information will be dealt with on a case by case basis and that factors favouring an expectation of disclosure include:

- Seniority,
- extent to which the information relates to the employees role within the University.

15. In relation to staff attendees, we are now only considering senior staff, nevertheless, we are satisfied that they would not expect their attendance to be disclosed. Whilst it is stated that there will generally be no presumption of privacy where there is simply a record of a member of staff going about his or her job this is given in the context of e.g. names of attendees at University committees and other meetings. The Tribunal considers that attendance on a Common Purpose course does not fit into this category as this is information pertaining to personal development notwithstanding that it may also have a benefit to the University. Whilst attending the course they were not representing the

⁴ This applies only to attendees on courses and not those involved in the administration and payment for the courses.

University or discharging routine duties. We consider that this applies equally to senior members of staff as junior.

16. We note that the Code is silent as to information about training whereas it is explicit as to the potential that information about qualifications held might be disclosed. We consider that there is a distinction: some jobs can only be filled if certain qualifications are held, whereas training is generally needs based. In distinguishing these categories we note the University's assertion that there is no routine publication of development activities of staff; this information is normally confined to the individual concerned, their manager and HR.

17. In relation to those processing the payments and the related administrative staff the University argued that none of the staff would expect disclosure. The Tribunal repeats its findings in relation to the additional information which can be discerned from their involvement in the administrative process (namely their seniority, role as set out in paragraph 10 above). The Tribunal agrees with the Commissioner's assessment that they were not forward facing in this context. We are satisfied that they would expect to be accountable within the organization but not held publically accountable in the context of a hostile campaign against the organisation whose services were being purchased. This is consistent with the provision in the code for consideration of the likelihood of substantial damage or distress to the member of staff in question or whether disclosure could endanger the physical or mental health or the safety of the member of staff in question. We are satisfied for the reasons set out below that any expectation that the information might be disclosed would have been tempered by these factors. The mechanism for the processing of payments is an internal administrative structure to enable payments to be audited.

Would disclosure cause damage and distress to the data subject:

18. The University argued before the Commissioner that in light of the campaign against Common Purpose which promotes conspiracy theories and publishes lists of names alongside these claims, publication would cause damage and distress to the data subjects who would be worried about disclosure in this context. The Tribunal has been referred to relevant websites which demonstrate this campaign.

19. Ms Cialfi defines this as critical journalism against Common Purpose which she argues could not cause any reasonable data subject concern. She further relies upon the

fact that some of those involved with Common Purpose have self disclosed including some of those involved with the University in this case e.g. the trainers on the student course and some students via a posted video diary. She argues that these sites do not target the rank and file Common Purpose graduates. Additionally she argues that many public authorities have provided names of course participants in reply to FOIA requests, that one site lists thousands of Common Purpose graduates and they are not being harassed or caused any alarm or distress and have no “sane” reason to fear personal harm to themselves or their families.

20. Ms Cialfi strongly distances herself from this hostile campaign against Common Purpose; however, disclosure under FOIA is disclosure to the world at large without restriction. The websites indicate the views that a vocal and campaigning minority have of Common Purpose. The Tribunal has to consider the likelihood therefore that the names disclosed would be added to the searchable sites of those already involved with Common Purpose.⁵ We are satisfied that these sites go beyond ‘critical journalism’ and are worrying, allegedly linking involvement with Common Purpose with brainwashing, corruption, bullying and paedophilia. Whilst rank and file Common Purpose graduates are sometimes viewed as “victims”, readers are nevertheless encouraged to check names against a list of Common Purpose graduates and on one site:

*If you suspect Common Purpose is active in your organization, or see a pattern of incredibly bad decisions, money being wasted, notice bullying, fraud, or threats, note the names of those involved (we've tracked down over a thousand) and please contact us.*⁶

21. Disclosure in this context makes the data subject identifiable, conspicuous, searchable against the key word Common Purpose and therefore vulnerable to targeting for association with this organization. Whilst we have not been provided with any evidence either way to suggest whether this has led to any direct contact or harassment for those already so identified, we are satisfied that disclosure would be unfair and could potentially damage data subjects’ professional reputations. We note the concerns raised by those course attendees that were asked whether they would consent by the University some of whom articulated the fear that they would be targeted and harassed. We accept that knowledge of the possibility that they could be targeted in this way is likely to cause distress to these data subjects.

⁵ [Http://cpexposed.com/graduates](http://cpexposed.com/graduates)

The legitimate public interest

22. Ms Cialfi argues that the website activities of some are creating a blanket ban on the disclosure of personal data in relation to requests about Common Purpose. If the legitimate interests of those to whom the information would be disclosed outweighs the prejudice to the rights and freedoms or legitimate interests of the data subject, then disclosure would be warranted and disclosure would not breach the first data protection principle.

23. In evaluating the competing legitimate interests we accept that there is a legitimate interest in the public being able to scrutinise how public money is spent, whether value for money is achieved and transparency in how decisions are made to use a particular organisation.

23. We note that the University stated that some of the discussions on setting up the courses were conducted on the telephone or in face-to-face meetings, and that withheld material largely relates to process rather than the commissioning stage, and that in any event the legitimate aims as set out above are largely met by the disclosure of the information in redacted form. From this the amount of money spent is visible, as is the feedback from participants, and the fact that the courses were not put out to tender is also apparent. Some job titles have also been disclosed. These transparency and accountability aims would not be significantly furthered in terms of the names of those who attended. We assume that the University remains accountable through its senior management and governing committees, and we are also satisfied that knowledge of individual actions in the administration and payment process would not significantly further these aims. Disclosure of the senior names in both categories in this context would be unwarranted in light of the reasonable expectations of the data subjects and the potentially negative consequences of disclosure.

Conclusion

24. For the reasons set out above we are satisfied that the material was properly withheld under s40 FOIA and we refuse this appeal.

Dated this 7th day of February 2013

Fiona Henderson

Tribunal Judge

⁶ <http://www.tpuc.org/692/>



RULING on an APPLICATION for PERMISSION to APPEAL

By Ms Patricia Cialfi in the Matter of EA//2012/0183

Appellant:

PATRICIA CIALFI

Respondent:

THE INFORMATION COMMISSIONER

REFUSAL OF APPLICATION FOR PERMISSION TO APPEAL

1. Ms Cialfi seeks leave pursuant to r42 the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 to Appeal to the Upper Tribunal (Administrative Appeals Chamber) from the decision dated 7th February 2013 to dismiss her appeal and uphold the Decision Notice of the Information Commissioner (FS50438587).
2. The application for permission to appeal in this case satisfied the formal requirements set out in rule 42 of the Rules in respect of both its contents and the time limit for its submission.
3. In her application Ms Cialfi stated that *“This is a skeleton argument only. Full details will accompany the Appeal itself.. A fully evidenced point-by-point argument of the Decision, coupled with case comparisons, will follow.”*

She was invited to submit any further material that she wished in order to support her application by way of email from the Tribunal Office dated 11th March 2013 but declined indicating:

“The evidence of course is for consideration to the 2nd Tier Tribunal.

I have provided sufficient cause for concern and highlighted sufficient points of weakness or flaws.

As I have said, once I have confirmation that the Appeal is to go ahead then, and only then, will I submit evidence to the appropriate level of the Judiciary.”

4. I have therefore proceeded to consider the application on the basis of the application as it stands.

5. Rule 43(1) requires the Tribunal, on receiving an application for permission to appeal that satisfies those requirements, to consider first whether to review the decision in accordance with Rule 44. That rule provides, so far as is relevant:

“(1) The Tribunal may only undertake a review of a decision –

a) pursuant to rule 43(1)...; and

b) if it is satisfied that there was an error of law in the decision”

6. I am satisfied that there was no error of law in the Decision. In reaching that conclusion I have considered the arguments raised by the Appellant and satisfied myself that:

i) the Tribunal’s reasons for reaching its conclusion were adequately set out in the Decision;

ii) the Tribunal was not bound by other first tier decisions and its application of *Durant v Financial Services Authority [2003] EWCA Civ 1746* was not in error (in particular having regard to *[2012] UKUT 464 (AAC) The Information Commissioner v the FSA and Edem* a decision of the Upper Tribunal which was not drawn to the attention of the first tier Tribunal at the date of the Decision).

iii) The Tribunal was entitled to reach the conclusions it reached based on the evidence before it.

- iv) Notwithstanding the Tribunal's ruling of 27th November 2012 requiring the Appellant to submit her evidence in a way that was focussed and proportionate the procedures adopted by the Tribunal gave the parties adequate opportunity to present their evidence and arguments;
- v) There was no need or requirement for the members of the panel to declare an interest and no appearance of bias as a panel had been assembled that had no connection with Common Purpose.
- vi) The consequences of upholding the exemption were fully considered in the examination of the balance of the legitimate interests of those to whom the information would be disclosed.

7. For the same reasons I am satisfied that the Appellant has not raised an arguable ground of appeal and for this reason I refuse her application for permission to appeal.

Signed: Fiona Henderson
Tribunal Judge

Date: 20th March 2013