Neutral citation number: [2022] UKFTT 00524 (GRC)

Case Reference: EA.2023.0052

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard in private on the papers.

Heard on: 13 September 2023
Decision given on: 14th September 2023

Before

DISTRICT JUDGE REBECCA WORTH
(Authorised to sit as a Tribunal Judge in the GRC)
TRIBUNAL MEMBER JO MURPHY
TRIBUNAL MEMBER SUSAN WOLF

Between

PROFESSOR GEOFFREY ALDERMAN

Appellant

and

(1) INFORMATION COMMISSIONER
(2) THE CHARITY COMMISSION

Respondents

Decision: The appeal is dismissed.

REASONS

Background

1. On 22 October 2021, Professor Geoffrey Alderman completed a Charity Commission Enquiry Form. When answering the question "What specifically do you need to contact us about?" he answered: "Please provide me with the name or names of the current trustees of this charity".

© CROWN COPYRIGHT 2023

2. The Charity Commission withheld that information relying on an exemption provided in the Freedom of Information Act 2000 (“FOIA”), namely section 41 “Information provided in confidence”.

3. The Appellant applied for a Review and the Charity Commission confirmed their reliance on section 41(1) and also relied upon section 40(2) “Personal information”.

4. Professor Geoffrey Alderman complained to the Information Commissioner’s Office (“the ICO”) who investigated. During the investigation, the Charity Commission stated that it also relies upon section 38 “Health and safety”. On 6th January 2023 the ICO issued Decision Notice IC-172290-V3R4, finding that sections 38 and 40(2) of FOIA applied to the information and the Charity Commission was not required to disclose the information; section 41 was mentioned but not analysed in the Decision Notice.

5. By Notice of Appeal dated 22nd January 2023, Professor Geoffrey Alderman (“the Appellant”) lodged with this Tribunal an appeal against the Decision Notice. Once the necessary procedural steps had been completed, the appeal was placed before this Panel for a decision.

6. The Panel considered:

   6.1. An Open Bundle consisting of 121 pages.

   6.2. Closed Submissions from the Charity Commission dated 31 May 2023.

   6.3. A Closed Bundle (which included an unredacted copy of open bundle pages 103 to 105 and other correspondence between the Charity Commission and the Charity).

   6.4. The Tribunal Registrar’s Case Management Directions dated 17 July 2023.

Type of hearing

7. All parties consented to the appeal being considered without a hearing. We also consider that it is suitable to be dealt with without a hearing[1].

Parties’ positions

8. The Appellant’s grounds of appeal were analysed in the ICO’s Response as being:

   8.1. Ground 1 – the Commissioner erred in concluding that the withheld information is not in the public domain.

   8.2. Ground 2 – the Commissioner erred in concluding that the exemption under s.38(1)(b) FOIA was engaged.

   8.3. Ground 3 – the Commissioner erred in concluding that the public interest in maintaining the exemption under section 38(1)(b) FOIA outweighed the public interest in disclosure of the withheld information.

[1] Rule 32 of the GRC Rules, considered.

9. The Appellant, when invited to reply to the Response, did not challenge that analysis. We therefore accept the ICO's analysis of there being 3 grounds of appeal (none of which concern section 40(2) of FOIA).

10. The ICO's position now is that section 38 is engaged, but section 40(2) is not because (paragraph 45 of the Response):

> The withheld information in this case is the name of a corporate trustee, not the names of the directors of the corporate trustee.

11. The Appellant, when invited to reply to the ICO's Response, noted "with satisfaction that the Information Commissioner now concedes that the name of the corporate trustee does not constitute "personal data" within the meaning of s.3(2) DPA.".

12. The Charity Commission's position is that both sections 38 and 40(2) of FOIA are engaged and permit them to withhold the information under FOIA. Their submission about section 40(2) is, in effect, that there would be jigsaw disclosure of personal information (names of individuals).

13. The ICO and Charity Commission each note that, if the Tribunal finds that neither section 40(2) nor section 38 are engaged, the Tribunal will need to consider section 41 "Information provided in confidence". That section which has not, thus far, been fully analysed by the ICO.

Relevant law

14. The appeal is brought under section 57 of FOIA, our powers are set out in section 58 and are not repeated here. The Appellant seeks to disturb the current position and, therefore, must persuade us that the Decision Notice was wrong in law or discretion. The exemptions we are considering are sections 38 and 40(2).

15. Section 38 of FOIA provides (as relevant):

> 38(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.

16. Section 40(2) of FOIA provides:

> 40(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), and
>
> (b) either the first, section 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 exemption in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.

(3B) The second condition is that the disclosure of the information to a member of the public otherwise than under this Act would contravene Article 21 of the GDPR (general processing: right to object to processing).

(4A) The third condition is that—

(a) on a request under Article 15(1) of the GDPR (general processing: right of access by the data subject) for access to personal data, the information would be withheld in reliance on provision made by or under section 15, 16 or 26 of, or Schedule 2, 3 or 4 to, the Data Protection Act 2018, or

(b) on a request under section 45(1)(b) of that Act (lawful enforcement processing: right of access by the data subject), the information would be withheld in reliance on subsection (4) of that section.

Issues for the Tribunal

17. From the Grounds of Appeal, Responses and Reply, it seems to us that the issues for this Tribunal are:

17.1. Does section 38(2) of FOIA apply to the information requested by the Appellant?

17.2. If so, where does the public interest lie?

17.3. Would disclosure of the name of the Corporate Entity disclose "personal information".

Consideration and discussions

Is the information "in the public domain"?

18. The Appellant's argument is that the information is in the public domain as he has been able to access it via Companies House. However, he had knowledge of historical matters.

19. As is clear to us from the submissions made by the ICO and the Charity Commission, anyone without that knowledge who wanted to access this information would have to be

very persistent; perhaps opening the Articles of each company registered on Companies House.

20. The ICO brought to our attention the case of *Mosley v News Group Newspapers* [2008] EWHC 678 (QB). The ICO and Charity Commission each referred to the case of *Attorney General v Manchester Newspapers Ltd* [2001] EWHC QB 451. The ICO also reminded us that the question of "in the public domain" is to be assessed as at the time of the request (*Montague v Information Commissioner & Department for International Trade* [2022] UKUT 104 (AAC)).

21. It is clear to us that, at the time that the Appellant made his request, the information was not easily, readily and realistically accessible to the public; to access it a member of the public would need to display unrealistic persistence (for example searching the Article of all the companies registered as Companies House) or have specialised knowledge (i.e. the name of the company to look at Companies House).

22. Therefore, we consider that the information cannot be considered to have been been in the public domain at the time of the request.

<u>*If the name of the Corporate Entity was disclosed to the World, would it be likely to endanger the safety of any individual?*</u>

23. The evidence relied upon here is found in the submissions of the parties; we also had the benefit of closed submissions, including an extract from correspondence between the Charity Commission and the Charity.

24. The Appellant relies on his own experience and that he has "never entertained any fear" that putting his personal information (including involvement in various bodies) in the public domain would place him in any danger.

25. The ICO and Charity Commission each submit that, given the number of antisemitic attacks and the specific fears that this Charity holds that the Tribunal should be satisfied that disclosing the corporate name would be likely to endanger the safety of an individual.

26. The Charity Commission further argues that, in 1997, they granted the Charity a dispensation ("the dispensation") under regulation 10(3) of the Charities (Accounts and Reports) Regulations 1995 which dispensed with the requirement under those Regulations for a Charity to publicly name any trustees. That dispensation was reviewed in 2011 (after individuals were replaced by a corporate entity) and continued the dispensation for the corporate entity as, the Charity Commission concluded, individuals could be identified if the corporate body was made known.

27. Here, we place weight on the Charity Commission's position as they have weighed the risks on more than one occasion – when granting the dispensation, when considering this FOIA request, when responding to this appeal – on all those occasions, the Charity Commission has concluded that the risk to individual safety is real. In their response, they refer to a further consideration of the dispensation, this time in March 2023, (which is after the request, meaning that we conclude that this is an on-going consideration for the Charity Commission).

Is the information "personal information"?

28. The Appellant's original request is found at pages 76 to 77 of the Open Bundle. When he is asked to "Describe who you are", he writes:

> *Academic. Author of "British Jewry Since Emancipation" (University of Buckingham Press, 2014)*

29. The fact that he is an academic and the name of his book do not immediately disclose personal information. However, if someone obtains a copy of his book, they can then see personal information: his name as the Author; if someone were to enter the name of his book into an internet search engine, they would almost certainly get his name, so his personal information.

30. In the same way, the name of the corporate entity which is the current trustee of the Charity does not, of itself, disclose personal data. However, knowing that name enables a person to obtain from Companies House the names of individuals who have roles in that corporate entity. Therefore, the corporate entity, if disclosed, discloses personal information.

Do we need to fully analyse the application of section 40(2)?

31. The grounds of appeal only challenge the application of section 38; the only reason that section 40(2) needs to be mentioned here is because the ICO, in their response, changed their position on whether it is personal information. We note that, even with this change of position, the ICO did not ask the Tribunal to substitute the Decision Notice to record that they wrongly applied section 40(2) but asked for the appeal to be dismissed.

32. For completeness, we consider that we need to briefly consider the (unchallenged) position of the application of section 40(2) to the personal information. We will do this as part of our conclusion.

Where does the public interest lie in disclosure, or withholding of, the name of the Corporate Entity?

33. The Appellant seeks to persuade us that there is a strong public interest in the information being in the public domain due to the amount of taxpayers' money that the Charity dispenses, albeit that the bundle does not include any indication of the amount involved. We acknowledge that any entity which dispenses large amounts of government money should expect to have more information publicly known about it than a purely private enterprise.

34. We also find that there is a strong public interest in transparency within the Charity sector. The Charity Commission makes available via its website the names of charities and, usually, the names of the trustees of those charities. There is an expectation that, if you are a trustee of a charity, that your name will be publicly available. However, the Charity Commission here have carefully considered the issue of publication and concluded that, at the time of the request, this Charity should not be required to make public the name or identity of any trustee(s).

35. We reflect that the Charity Commission is the Regulator of the Charity and, if a person is concerned about the way in which the Charity is being run, a complaint can be made

to the Charity Commission who are the body that Parliament has decided should deal with any such matters. The Charity Commission knows the identity of the trustee(s) and can easily contact the relevant individuals involved. They can, therefore, carry out their regulatory role without any need for the public to know the name of the corporate trustee.

36. In this situation we consider there is a strong public interest in not disclosing the information sought because to do so would be likely to endanger the physical safety of an individual (or individuals) and that the individuals involved – those who are in charge of a Charity – need to have the protection of a level of anonymity which should not lightly be stripped away. Further, there is a real risk, we find, that if the protection is stripped away by this Tribunal's decision in these proceedings, it is likely that this Charity would find it more difficult to recruit trustees in the future and that the Charity Commission would find it more difficult to enable Charities to function and find trustees when a Charity, perhaps because of the type of work it is engaged in, has a similar level of high risk to the personal safety of its trustees.

37. We balance the public interest as at the date of the request/review. As it seems to us that the Charity Commission keeps the need for the dispensation under review, it appears to us that, if the public interest balance were to shift to the need for disclosure, the Charity Commission's own processes would reveal the name of the corporate entity, as it is only withheld so long at the Charity Commission is satisfied that the dispensation should continue.

38. We also consider that the promise made by the Regulator to the individuals involved carries some weight in the public interest balance. To effectively regulate this sector, the Charity Commission needs to be able to stand by its word that it will not disclose matters when it has made assurances that it will not do so. If required to disclosed this information (to the Appellant in the first instance, but that means to the world) the Charity Commission's ability to regulate would be undermined as those they regulate would have less assurance that the Charity Commission's word was trustworthy.

Conclusion

Factual findings

39. We are satisfied, on the evidence before us, that it is more likely than not that disclosure of the name of the corporate identity would lead to disclosure of the name of individuals (or of an individual) and, therefore, it is personal information.

40. We are satisfied, on the evidence before us, that disclosure of the name of this corporate entity would be likely to endanger the safety of an individual (or of individuals) as the nature of the work that this Charity does means that those involved are more at risk of attack by those who are antisemitic and who would seek to prevent this Charity from carrying out its work or otherwise undermine its effectiveness.

41. We find that, due to the dispensation made by the Charity Commission to the Charity that there was, at the time of the request, a strong expectation that the name of the corporate identity was not going to be disclosed to the public by the Charity Commission.

Section 38

42. For the above reasons, we find that section 38 applies to the information sought and that the public interest balance lies in withholding the information.

Section 40(2)

43. Our conclusion on section 38 effectively disposes of the appeal as the information can be withheld. However, as section 40(2) is analysed in the Decision Notice and, whilst not raised by the Appellant in his grounds of appeal was raised by the ICO in their response, we consider that we should briefly record findings in relation to that section before dismissing the whole of the appeal.

44. The Decision Notice (paragraphs 33-39) sets out the correct legal test. We apply it as follows:

    44.1. Legitimate interest test: the Appellant has a legitimate interest in pursuing this information as he wishes to update his book "British Jewry Since Emancipation".

    44.2. Necessity test: it is not necessary for the Charity Commission to disclose this information to the Appellant to enable him to update his book, after all, there is no reason why this book has to name the trustee(s) of any organisation.

    44.3. Balancing test: even if we are wrong about the necessity test the fundamental rights and freedoms of the individuals who could be identified from the information are stronger than those of the Appellant. They clearly state that they need the protection of non-disclosure, they have been promised by the Charity Commission that the Charity Commission will not disclose their personal information and they fear that their safety will be endangered by such disclosure. We also consider that, as section 38 applies to the information, that is strong grounds to say that the Appellant's interest in the information cannot override the interests of those whom we find could be in danger.

45. For all the above reasons, we dismiss the appeal.

Signed:

District Judge Worth

Date: 13 September 2023