



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

Appeal No: EA/2012/0250

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50453270
Dated: 22 November 2012

Appellant: Michael Brian Dicker

Respondent: The Information Commissioner

Heard on the papers: Field House

Date of Hearing: 25 March 2013

Before

Chris Hughes

Judge

and

Mike Jones and Narendra Makanji

Tribunal Members

Date of Decision: 29 April 2013

Subject matter:

Freedom of Information Act 2000

Data Protection Act 1998

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 22 November 2012

IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2012/0250**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

SUBSTITUTED DECISION NOTICE

Dated: 29th April 2013

Public authority: NHS Surrey

Address of Public authority: Cedar Court, Guildford Rd., Leatherhead, Surrey, KT22 9AE

Name of Complainant: Michael Brian Dicker

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes its reasoning in place of the decision notice dated 22 November 2012.

Action Required

The public authority disclose the requested information to the complainant within 35 days.

Dated this 29th day of April 2013

Judge Chris Hughes

[Signed on original]

REASONS FOR DECISION

Introduction

1. On 8 May 2012 the Appellant in these proceedings (Mr Dicker) wrote to requested information concerning the remuneration of the chief executive of the public authority:-

“ can you please disclose the details of the salary paid to the Chief Executive officer (CEO) for NHS Surrey (Surrey PC T) for the following periods :

- *30-31 March 2010*
- *1 April 2010 to 31 March 2011*
- *1 April 2011 to 31 March 2012*

I would like this information in the form of a month by month salary breakdown followed by a breakdown of the following information:

- *benefits*
- *appropriate expenses by type*
- *pension contributions*
- *total remuneration"*

2. The initial response by the public authority was to provide links to its annual reports and to indicate that the requested information for 2011-12 would be published in the annual report due in July 2012. Mr Dicker was dissatisfied with this in particular he considered that the information published in the annual report which published salary information by reference to salary band was not the precise information requested.

The complaint to the Information Commissioner

3. Mr Dicker complained to the Information Commissioner; during the course of his investigation the public authority agreed that the information requested would not be published in the annual report and therefore section 22 of FOIA (the information

sought with information intended for future publication) did not apply. The public authority therefore sought to rely on section 40 (2) FOIA - that information is exempt from disclosure if it constitutes the personal data of a third party and one of the conditions listed in section 40(3) or 40(4) is satisfied.

4. The Commissioner concluded that the public authority was relying on s.40(3)(a)(i) – that it was third party information and disclosure would contravene the principles of the Data Protection Act. He concluded that the salary details and other specific information of the CEO fell within the description of personal data and related directly to an identified person – the CEO.
5. The Commissioner then reviewed whether disclosure of the information would be in breach of the first data protection principle – that processing of data should be fair and lawful. To do this he reviewed three factors – whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned, that individual’s reasonable expectations of what would happen to such information and balancing the rights and freedoms of the data subject with the legitimate interests which would be served by the disclosure.
6. The Commissioner recognised the reality of the situation that very senior public servants could expect a certain amount of information about their actions to be disclosed and he considered that:-

“the CEO would expect some details of their salary to be placed in the public domain but it is also reasonable to assume they would not expect their exact salary details to be made publicly available.”

He noted the guidance he has published on this issue

“salary information relates to people’s personal financial circumstances and disclosure of the exact salary of an individual is more intrusive than giving a salary band... it may also prejudice the individual’s interests in ongoing financial or legal negotiations.”

He noted:-

“Disclosure of the exact details would clearly lead to a greater infringement into the privacy of the individuals as it would reveal the specific details of the person’s

financial situation. It is therefore reasonable to consider that disclosure of this information would cause the individual unwarranted distress or unjustified damage.”

He concluded that:-

“disclosure of the exact salary information would lead to a greater infringement of the individual’s legitimate right to privacy than is outweighed by the legitimate public interest in disclosure. This is because the Commissioner accepts that there is already significant information provided in bands by NHS Surrey to allow for public scrutiny and there appears to be no circumstance which creates any greater need for the public to know the specific salary information in this case.”

The appeal to the Tribunal

7. Mr Dicker was not satisfied with this decision and has challenged it. He disputed that accurate information about salary bandings was given by the public body, he claimed that the salary actually paid was in excess of the national guidance on NHS salaries and he claimed that it was in the public interest for that departure from national pay guidance to be revealed.

8. The Commissioner resisted the appeal emphasised that the test for disclosure of personal information was driven by consideration of data protection principles. The first stage was:-

“Whether disclosure is necessary for the purposes of legitimate interests pursued by parties to whom the data are disclosed”

9. If that test was passed a second test had to be considered before deciding that disclosure was permissible; that laid down by Schedule 2 condition 6 of the Data Protection Act of whether it is:-

“unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”

10. The right to which the Commissioner drew attention was :-

“the right of a data subject not to have their personal data disclosed to the public where such disclosure may cause unwarranted distress”

11. He noted that there was a remuneration committee to oversee pay arrangements and ensure regularity. He concluded that the disclosure was not necessary and would interfere with the private life of the CEO. He maintained his opposition to disclosure.

The questions for the Tribunal

12. The questions before the Tribunal were how the tests laid down by the Data Protection Act should be applied in considering the request for disclosure under FOIA, in other words, had the Commissioner come to the correct conclusions with respect to these tests.
13. The Commissioner recognised a legitimate public interest in the public being satisfied that the arrangements for pay were transparent and subject to suitable scrutiny, but that further information was not necessary beyond the publication of banding information which he recommends. In his published guidance (“When should salaries be disclosed” ICO February 2009) the Commissioner noted that salary exact disclosure was sometimes justified in exceptional circumstances for example “there are current controversies” and “the individual in question is paid significantly more than the usual salary for the post”. In this case the arrangements (including secondment and recharge from another public authority at one stage) mean that the arrangements are not as transparent as might be wished and it is not entirely clear from the information published (as opposed to the assurances given) that the national pay guidance has been complied with. Mr Dicker asserted that the CEO was paid in excess of the national framework. The Tribunal was satisfied that there was a legitimate public interest in demonstrating that the national framework had been complied with and that the published information did not properly establish this.
14. The issue with respect to the detail of any actual harm or distress caused to the CEO was also problematic. In simple terms details of the CEO salary are in the public domain. While there is a dispute between Mr Dicker and the Commissioner about precisely what is available and its significance the broad level of pay of the CEO is published. The information does not have the detail and the precision which Mr Dicker has asked for (precise figures, rather than in salary banding done on intervals of £5,000), but some information is there. The CEO is a prominent public servant discharging heavy responsibilities who must expect to be scrutinised. Individuals in

such circumstances are rational, efficient, hard-working and robust. They are fully entitled to a high degree of respect for their private lives. However the protection of personal information about their families and their health is a very different matter from having in the public domain information about income which in one form would be (to use hypothetical figures) **in a band between £140,000 and £145,000**; and in another **£141,234.95**. The Tribunal simply cannot accept that anyone in such a role would feel the slightest distress, or consider that there has been any intrusion or that they would be prejudiced in any way by such information. From the perspective of the individual such information is essentially trivial; indeed, in other European societies, such information would be routinely available.

Conclusion and remedy

15. The Tribunal is therefore satisfied that the Commissioner erred in his decision notice and directs the disclosure of the requested information.

16. Our decision is unanimous

[Signed on original]

Judge C Hughes

29 April 2013