EA/2017/0068

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Between:

GABRIEL WEBBER

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE MINISTRY OF JUSTICE

Second Respondent

Hearing at Field House, London on 14 November 2017.

Before:

Brian Kennedy QC
Mike Jones
Michael Hake

The Parties relied on their written submissions.

Decision:

The Tribunal Refuses the Appeal and the Decision Notice stands.

Reasons

Introduction:

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA"). The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice ("DN") dated 6 April 2017 (reference FS50655156), which is a matter of public record.

2. The Tribunal Judge and lay members sat to consider this on papers on 14th November 2017.

Factual Background to this Appeal:

3. Full details of the background to this appeal, Mr Webber's request for information and the Commissioner's decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of whether the Ministry of Justice ('MoJ') was correct to rely on s40(2) in this instance.

Chronology:

1950	Timothy Evans is hanged for murder
1966	Evans receives posthumous royal pardon
2003	Independent Assessor Lord Brennan QC recommends compensation for Evans' family
20 Sept 2016	Appellant's request for Lord Brennan's decisions and reports re Evans
18 Oct 2016	MoJ refuses request, citing s40(2) (personal information)
	Appellant requests review
14 Nov 2016	MoJ review upholds refusal, citing s40(2) and s21
6 April 2017	Commissioner's Decision Notice rejecting Appellant's complaint

Relevant Legislation:

s21 Information accessible to applicant by other means.

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)—

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

(3)For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

s40 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, or

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

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

(5) The duty to confirm or deny—

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

Commissioner's Decision Notice:

4. In correspondence with the Commissioner the MoJ confirmed its view that the information withheld by virtue of section 40(2) relates to, and identifies, living individuals. It also considered that the requested assessments comprise the personal data of the Independent Assessor, Lord Brennan QC "… because they were prepared by him, indicate his authorship and contain his opinions regarding the amount that should be awarded in compensation". The MoJ was of the opinion that disclosure would not be within the individuals' reasonable expectation of confidentiality, and the loss of privacy would likely cause unwarranted distress.

5. The Commissioner accepts that the background to this request is likely to be a sensitive matter for those involved. In the circumstances of this case, the Commissioner was satisfied that the applicants would have a reasonable expectation that their personal data would not be disclosed to the public at large.

6. The MoJ accepted that while the miscarriage of justice in the case of Timothy Evans is of significant public interest, the information in question was held for the sole reason of determining the amount of compensation, and serves no wider public interest in understanding the case. The Commissioner noted parallels with a previous decision (FS50551750) in which disclosure was ordered, but distinguished the current request as relating to a case of significantly greater vintage and involving a well-established assessment

process. She concurred with the MoJ's view that the public interest was in withholding the information from general disclosure, and rejected the Appellant's complaint.

Grounds of Appeal:

7. The Appellant contended that much of the requested report is already in the public domain, having been quoted extensively by Stanley Burton J in *Westlake v Criminal Cases Review Commission* [2004] EWHC 2779 (Admin). He is content for the precise sum of compensation to be redacted in order to make the report disclosable, but stated the argument that distress would be occasioned to the family of Timothy Evans by disclosing an application for compensation is negated by their launching of a judicial review and their campaign to publicise the case. The Appellant also rejects the contention that the personal information of Lord Brennan or the family's legal representatives would be improperly disclosed, claiming that lawyers are "in general, public figures used to having their involvement in specific cases publicised". Lord Brennan held senior public office, and as such the Appellant stated that he must accept some intrusion into his privacy, citing *Ruston v Information Commissioner* (EA/2014/0181).

8. The public interest in transparency is particularly strong in this case, which was described by Stanley Burnton J as "one of the most notorious, if not the most notorious, miscarriages of justice". The importance of the information has not diminished over time.

Commissioner's Response:

9. The Commissioner posited that, in the absence of any verification or otherwise, it is reasonable to assume that at least one of the applicants is still alive, and therefore this information is properly classed as personal data. Confidentiality of such information is the default position. In this case, disclosure without the consent of the applicants would cause unjustified distress, and there is little legitimate public interest in disclosing information relating to the applicants and their application. Whilst they have publicised certain aspects of their campaign, they have chosen not to release this information themselves. The Commissioner submitted that this was more instructive than considering their drive for publicity in isolation.

10. The matters relating to the miscarriage of justice are in the public domain. The public does not have a legitimate interest in knowing everything about every facet of the case, and any such interest is not equal across all facets. Redaction is inappropriate in this case, as the entire document renders the applicants identifiable.

Appellant's Reply:

11. The Appellant accepted that there might be applicants still living, but denied that any of them are identifiable from the excerpts quoted in the judgment. The Appellant stated that the Commissioner needed to justify the exemption to those portions of the report, which refer to deceased individuals. If the Commissioner is arguing that the fact that the applicants applied for compensation is personal information, then it seems incongruous that the MoJ and Commissioner should be content to confirm publicly that a request was made. The applicants themselves were content to make this public, and the notion of 'unjustified distress' is unsubstantiated conjecture. In an addendum to his reply, the Appellant referred to *R v Legal Aid Board ex p Kaim Todner* [1999] QB 966 (CA), quoting Lord Woolf MR at p978:

> "It is not unreasonable to regard the person who initiates the proceedings as having accepted the normal incidence of the public nature of court proceedings... In general, however parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss, which can be inherent in being involved in litigation. The protection to which they are entitled is normally provided by a judgment delivered in public, which will refute unfounded allegations. Any other approach would result in wholly unacceptable inroads on the general rule."

Response of the MoJ:

12. The MoJ supported the Commissioner's submissions and approach, stating that the report contains personal information and there is no legitimate public interest in its disclosure. The sole purpose of the requested documents in this case was to set out factors relevant to determine the appropriate amount of compensation awarded to specific applicants, and so they constitute personal information. The MoJ put before the Tribunal a letter from the solicitors of one of the applicants confirming that they are alive but 'frail' and wish the information contained in the report to remain confidential and undisclosed. This scheme for awarding compensation was changed in 2006, and *ex gratia* compensation scheme was abolished, so there is little to be gained from disclosing this report.

Second Reply of Appellant:

13. The Appellant accepted that the living applicant wished the information to remain undisclosed, but denied that that was "dispositive of the appeal". He cited *Durant v Financial Services Authority* [2003] EWCA Civ 1746 to support the contention that the requested information does not constitute the personal data of Timothy Evans' family; the subject of the report is not the putative data subject but rather Timothy Evans, and just because

information refers to a person by name does not automatically render the information personal data. He also referred to *PNM v Times Newspapers* [2017] UKSC 49, arguing that the fact that the applicants pursued a judicial review negates any expectation of privacy in regards to the court proceedings. Even if the report was not read out in its entirety in open court, the Appellant stated that it was referred to and would have been accessible by the public under the "open justice principle".

Conclusions:

14. It is common ground that the information is personal data and the data subject was living at the time of the request and that Section 40 (2) is engaged. The Appellant accepts paras 22 – 22 of the MoJ's Response that the Evans family objects to the disclosure of the requested information.

15. Personal Data: We accept that the information in the disputed information relates to the data subject or the surviving "Applicant" in the claim for compensation, which was the subject matter of the disputed information. We accept that the sole purpose of the information within the closed documents before us was to set out the factors relevant to determining that appropriate amount of compensation that was ultimately awarded to the Applicants in that claim. Having studied the closed bundle carefully we too find the entirety of the disputed documents related to the applicants for compensation and on the facts we find one of those applicants has objected to disclosure, seeking privacy. She is for the purposes of the issues herein, the Data subject.

16. Reasonable Expectation: Although the DN was based on an assumption that the Applicants were likely to be alive at the time of the request, the subsequent letter dated 17 August 2017 has put beyond doubt that one of the Applicants for compensation is alive (although frail and weak) and as the Data Subject, has clearly raised her objection to disclosure of the disputed documents expressing her wish that this information remain private. This is an expectation that this Tribunal understand and accept as reasonable, particularly in light of the passage of time since the original subject matter of the disputed information was heard and had a more significant degree of public interest.

17. Fair or distressing: We further accept that it would be even more distressing and unfair, to the surviving applicant, to disclose the detail of the information in the closed bundle to the world at large at the time of the request or at this later stage.

18. Public Interest: Whilst the Tribunal also accepts that there is a degree of public interest in disclosure, we are firmly of the view that the degree of pubic interests has greatly reduced given the passage of time since the hearing which led to the disputed document being

reported. The subject matter of the assessment of compensation for victims of a miscarriage of justice has changed considerably since. The matters relating to the underlying miscarriage of justice have been in the public domain for a substantial period of time and have been the subject of extensive review and commentary. As for the process of arriving at compensation awards, this, like all civil claims for compensation has changed significantly and is well documented in statue and in common Law. (see paragraph 26 of the Response of the MoJ dated 6 September 2017). Looking at the disputed closed bundle, we see nothing that would inform the legitimate public interest further or usefully in such processes.

19. The Appellant has submitted further legal argument and cited case law in support of his appeal on 06 July 2017 and 13 September 2017, which we have considered. We have not felt it necessary to delay our decision to seek a response to these submissions from the Respondents as we do not find any persuasive arguments in the cited case law that effectively undermine the principles applied in the DN or in the issues concerning this appeal. The facts, circumstances and context of the case law cited can be distinguished from the determining factors pertaining to this FOIA appeal.

18. Having studied the closed bundle carefully, this Tribunal is not satisfied that redaction could usefully be used to disclose some of the information contained therein. Any necessary redaction, in our view, would be such as to render disclosure effectively meaningless.

19. We also find that Schedule 2 (6) was not met reinforcing the sense of unfairness and breach of reasonable expectations of the Data Subject.

20. Having considered the papers, the evidence and the submissions before us, and given the significant passage of time (and the effect thereof), we are satisfied that the balance between the rights and freedoms of the data subject and the legitimate interests of the public favour non disclosure of the disputed information.

21. Accordingly we dismiss the appeal and the DN stands.

Brian Kennedy QC 24 November 2017.