

FOI POLICY REVIEW – FTT/UT/CA decision

Tribunal / Court:

Upper Tribunal

FOI or EIR :	Section / Regulation:	Date of decision:	Reference:
FOI	S40(2)	17 September 2018	[2018] UKUT 295 (AAC) GI 3037/2018

Parties :

Appellant – Nicholas Morton

First respondent – Information Commissioner

Second respondent – Wirral Borough Council

Earlier judgement/decision summaries: *(if applicable)*

ICO decision –

- Date - 27 April 2017
- Reference [FS50649341](#)
- Link to DN & summarise main points if appropriate.

The complainant has requested a copy of a report in to the treatment of a group of whistle-blowers. The Council applied section 36(2)(b) to the report in its entirety and, during the course of the Commissioner's investigation, it also applied section 40(2) to some parts of the report. The Commissioner's decision is that the Council is entitled to rely on section 40(2) to withhold the majority of the report. There is however a limited amount of information which the Commissioner has found cannot be withheld under either section 40(2) or section 36(2)(b) and therefore should be disclosed.

FTT –

Transferred straight to UT, not because of the complex nature of the case, but to avoid any suggestion of conflict of interest due to the report which was the subject of the request, having been produced by Nicholas Warren. Prior to writing the report Nicholas Warren had been President of the General Regulatory Chamber. Although the UT stood in the shoes of the FTT and carried out a full reconsideration of the Commissioner's decision as the FTT would have done, the decision still has the binding authority of any other UT decision.

Summary of Decision :

Section 40(2) (Personal Data) – Appeal Dismissed

The Upper Tribunal (on transfer from the FTT) has now issued its decision in this case, upholding the Commissioner’s Decision Notice and dismissing the appeal.

Background

In 2008 a number of employees raised concerns regarding the conduct of a tender exercise under the Council’s whistleblowing policy. This process eventually resulted in an Audit Commission report which found significant failings in the way the contract had been awarded. Subsequently one of the whistleblowers was inadvertently publicly identified by the Council. The whistleblowers submitted a complaint regarding this disclosure, and the disclosure of their details to the successful bidder in the procurement exercise. The Council appointed Nicholas Warren, a former judge of the FTT, to review the Council’s treatment of the whistleblowers.

Request and Decision Notice

The Appellant requested Nicholas Warren’s Report. The Council refused to disclose it on the basis of s.40(2) as it contained the personal data of both the whistleblowers and their managers which would be unfair to disclose. The Commissioner agreed with the Council’s analysis, noting in particular that it was not possible to separate the personal data of the whistleblowers from that of their managers, and that it would not be possible to anonymise the report. However she did order the disclosure of a limited amount of information which could not identify any of the individuals.

Upper Tribunal Decision

The Upper Tribunal concluded that it was not possible to anonymise the report (44-57), or separate the personal data of the managers from the whistleblowers (85). Furthermore the Upper Tribunal concluded that it would be unfair to disclose the personal data of the whistleblowers or the managers (60 – 84). Disclosure was not within their reasonable expectations and would be damaging and distressing, particularly to the managers who had been exonerated. The legitimate interests in disclosure were insufficient to outweigh these interests.

Whilst lengthy this is a useful Upper Tribunal Decision which balances the interests of whistleblowers and senior council officers against the legitimate interest in the substantive issues, with an assessment of the weight to be attached to information already in the public domain released under different circumstances.

Analysis:

(An analysis of the decision, highlighting any differences or similarities in approach, whether or not it aligns with our published guidance)

Headline

The decision is in line with our current policy positions. It does not raise any new issues. However it would be a useful read when dealing with similar cases. It considers the impact of local media interest and other information already in the public domain on the potential harm disclosure could cause. It also considers whether the local media interest etc is evidence that there would be motivated intruders keen to identify the individuals concerned.

The appellant's arguments (para 18 – 28)

In very broad terms, the appellant believed that the Warren report could be anonymised by redacting names and job titles. He also argued that, given the amount of information in the public domain, disclosing the Warren Report could have little additional impact on either the whistleblowers, or their managers and that, given the practice established by the publication of previous reports, those involved could have little expectation that the report would remain confidential.

Could individuals be identified? (paras 48 – 57)

The UT first considered whether individuals could be identified even if their names and job titles were removed. In doing so it applied the motivated intruder test. The UT found it would not be difficult for someone with a working knowledge of the council and its procurement processes to identify those concerned (note - this remained the case despite the fact that the relevant procurement exercise had taken place in 2008, some 8 years before the request). Even if those with a working knowledge of the council were not themselves motivated to cross reference the Warren Report with information in the public domain, the UT was clear that, given the background to the events, journalists would be motivated to do so. The UT was satisfied individuals could be identified and therefore the withheld information was personal data.

By comparing the contents and scope of the Warren Report with the public domain information, the UT was also satisfied that disclosure of the report would result in new information about the individuals becoming public knowledge.

Would disclosure breach the DPA?

Although the application of section 40(2) was made by reference to the DPA 1998, the broad principles of fairness and balancing the legitimate interests in disclosure against the consequence for data subjects remain relevant to the current data protection regime.

Impact on the individuals (paras 59 – 62)

The amount of press coverage the whistleblowing had attracted in the past supported the contention that disclosing the Warren Report would renew interest in those events. There was clear evidence that the whistleblowers had concerns that being identified as such could damage their careers. In respect of their managers the UT, found that although they had ultimately been exonerated, any renewed interest was still likely to cause them distress.

Expectations (paras 63 – 71)

As for the expectations of the data subjects, the terms of the Warren Report explicitly stated that the report would remain confidential. The report was also being used to inform the award of compensation to the whistleblowers; this increased the expectation of confidentiality. The appellant argued that the whistleblowers had placed themselves in the spotlight through statements made by the local MP and so could have no expectation of confidentiality. However the UT was satisfied the whistleblowers had used the MP as a spokesman to preserve their anonymity rather than publicly identifying themselves and discussing the matter directly with the press.

In respect of the managers, the publication of the previous reports had placed significant details about them in the public domain. However the Warren Report differed in its scope and contained additional information. The managers were entitled to rely on the assurance of anonymity contained in the terms of the Warren Report.

Legitimate interests (para 72 – 76)

The UT accepted there was a legitimate interest in disclosing the report as it would shed light on whether the council had safeguarded the interests of whistleblowers. Furthermore, although the report did not directly deal with the level of compensation to be awarded to the whistleblowers out of public funds, it would help the public to better understand the consequences suffered by the whistleblowers.

Conclusion on s40(2)

Having considered the impact disclosure would have on both whistleblowers and managers and their clear expectation that the report would remain confidential, the UT found that despite there being some legitimate interests in its release, disclosure would be unfair and so breach the DPA 1998; s40(2) was therefore engaged.

What can we take from this decision

- Information already in the public domain may make it impossible to effectively anonymise personal data.
- A history of local media and social media interest in a subject may well be evidence of the existence of a motivated intruder.
- The fact there is information in the public domain may be indicative that any further disclosures could renew media interest or local speculation around an issue, which in turn may impact on whether a disclosure would be detrimental.
- Arguments that any further disclosure could not be harmful because there's already a large amount of information in the public domain need to be treated with caution. It's necessary to carefully compare what's already out there with the withheld information to see whether the withheld information would reveal anything new.

- We also have be critical of interpretations placed on information in the public domain, for example, in this case, the appellant’s arguments around the involvement and the statements of the local MP.

Significance of Decision :

- **Minor significance**

Status of Decision :

- **Binding**
Also worth noting that it comprehensively agrees with the Commissioner’s decision

External guidance:

(An indication as to whether the decision will feed into, reinforce or result in changes to any existing or new guidance. Following any changes to guidance, or identification that a decision could reinforce guidance, this section will be updated to provide links to any relevant guidance.)

The decision does not impact on our policy lines or guidance. But will flag to reviewers of s40 guidance as potential example.

Date: 25 Jan 2022	Appeal status: Not appealed	Author: RM
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