THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: GIA/0105/2014

Farrand v the Information Commissioner and the London Fire and Emergency Planning Authority
[2014] UKUT 0310 (AAC)

DECISION ON APPEALS AGAINST A DECISION OF A TRIBUNAL

UPPER TRIBUNAL JUDGE: EDWARD JACOBS

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DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 16 April 2012 under reference EA/2011/0132) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: the Information Commissioner's decision notice FS50312938 is in accordance with the law, except that the information provided should have included personal data relating to Mrs Frimston. Any doubt about what additional information should now be disclosed may be referred to the Upper Tribunal.

REASONS FOR DECISION

A. Abbreviations

DPA: Data Protection Act 1998
FOIA: Freedom of Information Act 2000
LFEPA: London Fire and Emergency Planning Authority
TCEA: Tribunals, Courts and Enforcement Act 2007

B. History and background

1. Mr Farrand requested information from the LFEPA about a fire that occurred in a basement flat in the Mansion block where he lives. In fact, it occurred twice, as the fire rekindled the following day. He asked for the fire investigation report for those fires. The report covers 35 pages and includes a number of photographs of the outside and inside of the flat following the fires. Some of the text and most of the photographs were redacted on the ground that they were personal data. The cause of the fire has never been established, although the most likely cause was a naked flame.

2. Mr Farrand complained to the Information Commissioner, who confirmed that the request had been dealt with in accordance with Part I of the FOIA.

3. Mr Farrand exercised his right of appeal to the First-tier Tribunal and the case was heard on 5 September 2013 by a judge and two members. In part, the hearing was closed in order to discuss the redacted material. Sadly, one of the members died before the tribunal made its decision. The parties agreed, pursuant to paragraph 15(6) of Schedule 4 to the TCEA, that the judge and the surviving

member could decide the appeal, which they did, dismissing the appeal on 23 October 2013.

4. Mr Farrand applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal. This is when things went awry. On 9 December 2013, the judge recorded: 'The tribunal is satisfied that there are two errors of law in its decision dated 23 October 2013 ...' One error concerned the tribunal's attitude to the tenant of the flat. In its decision, the tribunal said that it had observed 'apparent animosity towards her'. Mr Farrand denied this, as did a witness. The tribunal accepted that there had been an error of law to the extent that it had not put its impression to Mr Farrand for comment. The other error concerned the relevance of photographs taken immediately after the original fire and before it was rekindled. There was evidence before the tribunal from a forensic investigator that they would be 'useful ... to show the state of the room following the first fire'. The tribunal admitted that it had overlooked that evidence.

5. Having identified these errors, the judge said that the tribunal 'has therefore undertaken a review of the decision pursuant to rule 44(1)'. That is a reference to rule 44(1) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI No 1976). The judge then went on: 'having undertaken that review the Tribunal confirms its decision to dismiss Mr Farrand's substantive appeal'. This oversimplifies what the tribunal did, which it is difficult to relate to its powers under section 9 of the TCEA.

6. Mr Farrand made a further application for permission to appeal on 16 December 2013. The tribunal gave permission to appeal, but limited to two grounds. Both of those grounds relate to the review decision of 9 December. That decision is excluded from the right of appeal to the Upper Tribunal by section 11(5)(d) of the TCEA. As this tribunal had no jurisdiction to deal with the appeal, I struck out the proceedings under rule 8(2)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698).

7. Fortuitously, Mr Farrand has also applied direct to the Upper Tribunal for permission to appeal under reference *GIA/0105/2014*. I gave him permission to appeal on all grounds.

8. I held an oral hearing of the appeal on 27 June 2014. Mr Farrand, who is a solicitor, appeared on his own behalf. Robin Hopkins of counsel appeared for the Information Commissioner and Saima Hanif of counsel appeared for the LFEPA. I am grateful to all for their arguments at the hearing and in writing. In setting out the arguments, I have mainly referred to Mr Hopkins, because Ms Hanif adopted his oral arguments.

C. The legislation

FOIA

9. Mr Farrand has been denied the redacted information under section 40 of the FOIA:

> **40 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).

This section distinguishes between applications by persons seeking their own data and those seeking the data of other people. The former are covered by section 40(1), the effect of which is to ensure that all applications are dealt with under the DPA. The latter are covered by section 40(2), the effect of which is to give DPA protection to the person who is the subject of the data.

DPA

10. The DPA implemented Directive 95/46/EC.

11. *Data* and *personal data* are defined by section 1:

> **1 Basic interpretative provisions.**
>
> (1) In this Act, unless the context otherwise requires—
>
> 'data' means information which—
>
> (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
>
> (b) is recorded with the intention that it should be processed by means of such equipment,
>
> (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, ...
>
> (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68; or
>
> (e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d);
>
> ...
>
> 'personal data' means 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; ...

12. Schedule 1 to DPA sets out the data protection principles. Paragraph 1 sets out the first principle, which is the only principle relevant to this case:

> 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, ...

Schedule 2 sets out the conditions:

> **Conditions relevant for purposes of the first principle: processing of any personal data**
>
> 1 The data subject has given his consent to the processing.

2 The processing is necessary—

(a) for the performance of a contract to which the data subject is a party, or

(b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3 The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4 The processing is necessary in order to protect the vital interests of the data subject.

5 The processing is necessary—

(a) for the administration of justice,

(aa) for the exercise of any functions of either House of Parliament,

(b) for the exercise of any functions conferred on any person by or under any enactment,

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or

(d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

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.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.

The rules of procedure

13. It is not permissible to operate a closed material procedure without statutory authority: *Al Rawi v Security Service* [2010] 4 All ER 562. Paragraph 11 of Schedule 5 to the TCEA authorises such provision:

> *Use of information*
>
> **11**(1) Rules may make provision for the disclosure or non-disclosure of information received during the course of proceedings before the First-tier Tribunal or Upper Tribunal.

(2) Rules may make provision for imposing reporting restrictions in circumstances described in Rules.

Rule 14 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 is made under that authority:

> **14 Prevention of disclosure or publication of documents and information**
>
> (1) The Tribunal may make an order prohibiting the disclosure or publication of—
>
> (a) specified documents or information relating to the proceedings; or
>
> (b) any matter likely to lead members of the public to identify any person whom the Tribunal considers should not be identified.
>
> (2) The Tribunal may give a direction prohibiting the disclosure of a document or information to a person if—
>
> (a) the Tribunal is satisfied that such disclosure would be likely to cause that person or some other person serious harm; and
>
> (b) the Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction.
>
> (3) If a party ("the first party") considers that the Tribunal should give a direction under paragraph (2) prohibiting the disclosure of a document or information to another party ("the second party"), the first party must—
>
> (a) exclude the relevant document or information from any documents that will be provided to the second party; and
>
> (b) provide to the Tribunal the excluded document or information, and the reason for its exclusion, so that the Tribunal may decide whether the document or information should be disclosed to the second party or should be the subject of a direction under paragraph (2).
>
> (4) If the Tribunal gives a direction under paragraph (2) which prevents disclosure to a party who has appointed a representative, the Tribunal may give a direction that the documents or information be disclosed to that representative if the Tribunal is satisfied that—
>
> (a) disclosure to the representative would be in the interests of the party; and
>
> (b) the representative will act in accordance with paragraph (5).
>
> (5) Documents or information disclosed to a representative in accordance with a direction under paragraph (4) must not be disclosed either directly or indirectly to any other person without the Tribunal's consent.

(6) The Tribunal may give a direction that certain documents or information must or may be disclosed to the Tribunal on the basis that the Tribunal will not disclose such documents or information to other persons, or specified other persons.

(7) A party making an application for a direction under paragraph (6) may withhold the relevant documents or information from other parties until the Tribunal has granted or refused the application.

(8) Unless the Tribunal considers that there is good reason not to do so, the Tribunal must send notice that a party has made an application for a direction under paragraph (6) to each other party.

(9) In a case involving matters relating to national security, the Tribunal must ensure that information is not disclosed contrary to the interests of national security.

(10) The Tribunal must conduct proceedings and record its decision and reasons appropriately so as not to undermine the effect of an order made under paragraph (1), a direction given under paragraph (2) or (6) or the duty imposed by paragraph (9).

14. Rule 35 if also made, in part, under the authority of paragraph 11:

35 Public and private hearings

(1) Subject to the following paragraphs, all hearings must be held in public.

(2) The Tribunal may give a direction that a hearing, or part of it, is to be held in private.

(3) Where a hearing, or part of it, is to be held in private, the Tribunal may determine who is permitted to attend the hearing or part of it.

(4) The Tribunal may give a direction excluding from any hearing, or part of it—

(a) any person whose conduct the Tribunal considers is disrupting or is likely to disrupt the hearing;

(b) any person whose presence the Tribunal considers is likely to prevent another person from giving evidence or making submissions freely;

(c) any person who the Tribunal considers should be excluded in order to give effect to the requirement at rule 14(10) (prevention of disclosure or publication of documents and information); or

(d) any person where the purpose of the hearing would be defeated by the attendance of that person.

(5) The Tribunal may give a direction excluding a witness from a hearing until that witness gives evidence.

D. Personal data

15. These are my conclusions in outline:

- The redacted material is personal data.
- Only two conditions in Schedule 2 to the DPA were potentially relevant.
- Condition 1 applied to the information relating to Mrs Frimston – the tribunal overlooked this.
- Mr Farrand had a proper interest in finding out about the cause of the fire for the purposes of Condition 6.
- Disclosure of the redacted information was not necessary for the purposes of that legitimate interest.

Personal data

16. The redacted material contains information about individuals, principally but not exclusively the tenant of the flat. The issue for me is whether the tenant could be identified from that material. The discussion focused on the photographs. Mr Farrand argued that there was nothing in the photographs that would allow the tenant to be identified. He argued that data was only *personal* data if it contained something that would contribute to the data subject being identified. He relied on a passage from Lord Hope's judgment in *Common Services Agency v Scottish Information Commissioner* [2008] 1 WLR 1550 at [24]:

> The relevant part of the definition is head (b). It directs attention to "those data", which in the present context means the information which is to be barnardised, and to "other information" which is or may come to be in the possession of the data controller. "Those data" will be "personal data" if, taken together with the "other information", they enable a living individual to whom the data relate to be identified. The formula which this part of the definition uses indicates that each of these two components must have a contribution to make to the result. Clearly, if the "other information" is incapable of adding anything and "those data" by themselves cannot lead to identification, the definition will not be satisfied. The "other information" will have no part to play in the identification. The same result would seem to follow if "those data" have been put into a form from which the individual or individuals to whom they relate cannot be identified at all, even with the assistance of the other information from which they were derived. In that situation a person who has access to both sets of information will find nothing in "those data" that will enable him to make the identification. It

will be the other information only, and not anything in "those data", that will lead him to this result.

He also referred to *South Lanarkshire Council v Scottish Information Commissioner* [2013] 1 WLR 2421 at [14] and [26], as supporting his argument. Finally he relied on recitals 42, 53 and 68 to Directive 95/46/EC, as showing that specific provision operated at the level of remedy not definition:

> (2) Whereas Member States may, in the interest of the data subject or so as to protect the rights and freedoms of others, restrict rights of access and information; whereas they may, for example, specify that access to medical data may be obtained only through a health professional;
>
> (53) Whereas, however, certain processing operation are likely to pose specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes, such as that of excluding individuals from a right, benefit or contract, or by virtue of the specific use of new technologies; whereas it is for Member States, if they so wish, to specify such risks in their legislation;
>
> (68) Whereas the principles set out in this Directive regarding the protection of the rights and freedoms of individuals, notably their right to privacy, with regard to the processing of personal data may be supplemented or clarified , in particular as far ascertain sectors are concerned , by specific rules based on those principles;

17. Mr Hopkins argued that this was inconsistent with the statutory definition of personal data, would produce absurd results and would be contrary to the approach of the Court of Appeal in *Edem v Information Commissioner and the Financial Services Authority* [2014] EWCA Civ 92 at [12]:

> It seems to me beyond question that those living individuals could be identified from a combination of their names and the documents emanating from the Financial Services Authority which show that they were working there in the capacity described by Rosalind Leaphard.

I accepted that argument.

18. As to the statutory definition, it must be interpreted to implement and render effective the definition of personal data in Article 2(a), which refers to direct and indirect identification. It seeks to achieve that by providing for two possibilities: (i) the data alone may allow the data subject to be identified; (ii) identification may require the addition of other information. The important issue is whether the data can be related to a living individual, not whether that person can be identified from any particular part of the data. That is exactly how the Information Commissioner and the First-tier Tribunal approached this case. When taken together with the remainder of the information in the report, it

would be possible to identify the individuals to whom the redacted material related. To ignore context would render the legislation ineffective in numerous circumstances to which it is clearly intended to apply, thereby reducing its effectiveness. To take the example I put to Mr Farrand: suppose the request related to my medical records. Each individual entry would probably contain nothing that would identify me as an individual, but every entry could be related to me if it were set in its context of my records as a whole.

19. As to Lord Hope's comments, these were made in the specific context of barnardised data. I do not understand how the recitals to the Directive assist on this issue.

Fairness

20. Paragraph 1 of Schedule 1 to the DPA refers to fairness and then provides specifically that one of the conditions in Schedule must be met. Those conditions arise independently of the general issue of fairness. Mr Hopkins told me that the Information Commissioner began with fairness, because that directs attention to the importance of the data subject's interests. I see no problem with that. However, the First-tier Tribunal and the Upper Tribunal may prefer to take a different approach in the interests of efficiency. A tribunal may come to the conclusion that the appeal has to be decided against the appellant on a particular ground and it may be sufficient for the tribunal's reasons to concentrate on that ground rather than take the comprehensive and structured approach that is expected of the Commissioner. This is such a case, because none of the redacted data satisfies any of the conditions in Schedule 2, with one exception. That is fatal to Mr Farrand's case.

21. In these circumstances, I do not need to deal with Mr Farrand's argument on fairness. He argued that data controllers were not allowed to speculate about a data subject's expectations and distress in lieu of providing her with information and facilitating distress notices under section 10 of FOIA. He also argued, rightly I think, that his argument had been misunderstood by the First-tier Tribunal and in counsel's written arguments. Whatever the merits of this argument in other contexts, in this case there is a provision that prevents disclosure of most of the redacted material without reference to the data subject's expectations or distress, as I now explain.

Condition 1 in Schedule 2

22. This applies if the data subject consents to the processing of their data. The tribunal overlooked the fact that Mrs Frimston had said that she consented to any personal data relating to her that was contained in the redacted material. Mr

Hopkins accepted that this should be disclosed. Ms Hanif did not dissent. I have set aside and re-made the tribunal's decision to incorporate this.

Condition 6 in Schedule 2 – interest

23. Mr Farrand told me what his interest was is seeing the redacted material: 'I want to discover the cause of the fire with a view to preventing it happening again.'

24. Condition 6 refers to a legitimate interest. There was a discussion at the hearing about public and private interests. I consider that this is irrelevant in the context of this case. However Mr Farrand's interest is categorised, it was sufficient to be taken into account for the purposes of Condition 6. That is why I have adopted the neutral phrase *proper* interest. Everyone who lives in the Mansion block is potentially affected by the risk of fire in any of the flats. There is risk that a fire might spread and there is the possibility that a fault that leads to a fire may be common to more, or even all, of the flats. That seems to me self-evident.

25. Some of the redacted material contains the names of various officers who attended the fire. Disclosure of their names would not further Mr Farrand's identified interest, so this condition is not satisfied in respect of that data.

Condition 6 in Schedule 2 – necessary

26. Disclosure must be *necessary* for the purposes of Mr Farrand's interest. That does not mean that it must be essential or indispensable for him to see the material. That is too strict a test. It is not how the word is used in everyday language. To take a slightly factitious example, 'I need a drink' does not mean that I will die or suffer irreparable kidney damage if I don't have one. Lawyers usually convey this less stringent test by qualifying *necessary* with *reasonably*. In truth, this is not a qualification; it merely emphasises how the word is generally used. That is how it is used in European Law: *South Lanarkshire Council v Scottish Information Commissioner* [2013] 1 WLR 2421 at [27]. It is also how the word is used in social security legislation: *Mallinson v Secretary of State for Social Security* [1994] 1 WLR 630 at 641.

27. Necessary connotes a degree of importance or urgency that is lower than absolute necessity but greater than a mere desire or wish. As a word in everyday use, it does not require, or for that matter allow, further elaboration. It merely has to be applied, which I now do.

28. Mr Farrand's interest is in identifying the cause of the fire so as to prevent a recurrence in any of the flats. It is not necessary for him to see the redacted material in order to do that. The experienced fire investigator who visited the flat

was unable to identify the cause of the fire more precisely than to say it was most likely caused by a naked flame. There was also a report from a firm of forensic investigators. The author of their report came to the conclusion that 'the fire was probably caused by a candle causing a smouldering fire in the upholstery of the armchair or an electrical fault in the table lamp in the south east corner of the room.' As Mr Hopkins said, if the expert who had seen the flat after both the original fire and its rekindling could not be more specific, it is unlikely that anyone else will learn something that he missed from the photographs or other redacted material. The forensic investigator did comment that it might be useful to see the photographs of the flat immediately after the original fire. That, no doubt, was so that he could make an independent assessment, but the fire investigator had visited the scene at that time and was in the best position to form an opinion. Despite slightly different conclusions, there was broad agreement between the investigators. In those circumstances, the fire investigator's descriptions and analysis in the body of his report are all that is necessary to understand, as far as that is possible, the possible cause of the fire. The information disclosed satisfies Mr Farrand's proper interest.

29. Since disclosure is not necessary, I do not need to consider the interests of the data subject. They only arise under Condition 6 as an exception if disclosure was otherwise necessary. Despite the numerous references in the arguments to a balancing exercise, that is not how Condition 6 works. It contains a condition that must be satisfied – that processing is necessary – to which there is an exception – prejudice to the data subject. If the necessary condition is satisfied, there may then have to be a balance struck between that and the prejudice to the data subject. But that does not arise unless and until the necessary condition is satisfied. If it is not, as here, prejudice does not arise and no balance is required. A balance may also be required when considering fairness in general terms, but it has not been necessary to do that in order to decide this appeal.

E. The closed hearing procedure

30. This is an argument about process and, on my decision, any failing could not have affected the outcome. Having come to that conclusion, the procedure before the First-tier Tribunal does not arise. I deal with the issue out of courtesy to Mr Farrand's argument, although I do so only briefly.

31. Mr Farrand was excluded from part of the hearing while the tribunal considered and heard argument on the redacted material. When he came back into the room, the judge gave him a summary of matters that could properly be disclosed. Mr Hopkins provided a copy of that summary, based on his instructing solicitor's contemporaneous note. I accept it as accurate. Mr Farrand then had the chance to comment as best he could on those matters.

32. Mr Farrand's argument was that either he should have been allowed to see the material - as a solicitor, he would not be allowed to use material disclosed in proceedings for other purposes: *Home Office v Harman* [1983] 1 AC 280 - or there should have been a special advocate procedure, as envisaged by *Bank Mellat v Her Majesty's Treasury (No 1)* [2013] UKSC 38 at [5]. He also referred to the comment by the Upper Tribunal in *APPGER v Information Commissioner and the Foreign and Commonwealth Office* [2013] UKUT 0560 (AAC) at [146] that a closed hearing should be recorded.

33. Mr Hopkins argued that: (i) there was no authority in the legislation for a special advocate procedure; (ii) the hearing had been properly conducted under the current caselaw; (iii) the First-tier Tribunal had not recorded any part of the hearing in this case, in contrast to *APPGER*, where the main hearing had been recorded but not the closed session; (iv) the tribunal was not under a duty to record the proceedings and this was not requested. I accept those arguments. I add that I have been able to make use of counsel's record when a closed hearing was not recorded.

34. I prefer to say no more, especially as the issue of closed hearings is currently before the Court of Appeal in the *Browning* case.

Signed on original
on 2 July 2014

Edward Jacobs
Upper Tribunal Judge