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

Appeal No: EA/2016/0131

BETWEEN

CAROLE EVANS

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

TORFAEN COUNTY BOROUGH COUNCIL

Second Respondent

Heard at Clarence House in Newport: 26th October 2016 and

at Cwmbran Magistrates Court in Torfaen: 10 February 2017.

Date of Decision: 14 March 2017.

Before

Brian Kennedy QC

Gareth Jones

Suzanne Cosgrave

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal in part, and orders the release of a redacted transcript of the requested information.

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 dated 26 April 2016 (reference FS50598114), which is a matter of public record. The Public Authority concerned is the second Respondent, Torfaen County Borough Council ("the Council").

[2] The Tribunal Judge and lay members sat at Clarence House, Newport on 26th October 2016 but the Tribunal were unable to conclude the hearing and issued Directions on the 29th September 2016. The Tribunal reconvened at Cwmbran Magistrates Court, Torfaen on 10 February 2017.

Factual Background to this Appeal:

[3] Full details of the background to this appeal, Ms Evans' request for information and the Commissioner's decision are set out in the Decision Notice ("the DN") and not repeated here, other than to state that, in brief, the appeal concerns the question of whether there is a legitimate public interest in the disclosure of Lifeline recordings involving the Appellant's deceased mother that outweighs the personal information exemption.

History and Chronology:

[4]

5 September 2015	Appellant's request for telephone recordings to Lifeline made from her late mother's phone line
8 September 2015	Council refuses request, the Data Protection Act, but makes further enquiries with a named individual to obtain their consent for data release
12 October 2015	Council concludes internal review and refuses request, citing s40(2) FOIA. Appellant complains to the Commissioner

Relevant Law:

[5]

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).

Commissioner's Decision Notice

[6] The Appellant alleged that the Lifeline Service call handlers were negligent in their duty of care to service users in that they told vulnerable people off for pressing the button, and advised carers to remove the Lifeline pendant from them.

[7] The Appellant further stated that she knew the identity of the individuals in the recording – those of the call handler and Individual A (the other party to the calls), and that Individual A had refused his consent to release the contents of the call. The conversations were regarding the health of another and she considered that as her mother's official legal representative, she must have a legitimate interest. She argued that the call handler was negligent in advice given to remove the Lifeline pendant, and that Individual A was negligent in removing the lifeline, leaving her mother with the no option but to get out of bed, leading to her falling, and as a result her death. As the Lifeline service is advertised and paid for as a protection for vulnerable people, the interest in investigating and exposing wrongdoing outweighs any adverse effect on an interest of the individuals concerned.

[8] The Commissioner pointed out that any disclosure under FOIA is considered to be into the public domain and therefore available to the world at large. Also, FOIA requests are blind to both applicant and purpose. She suggested that, as her mother's legal representative, a more appropriate access regime for the Appellant would be the Access to Health Records Act 1990.

[9] As the call identified both individuals, it contained personal data. Therefore, any request for disclosure must meet the requirements of the first data protection principle, which requires that the processing of personal data be fair and lawful and, a. at least one of the conditions in schedule 2 is met, and b. in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.

[10] In determining the fairness of the disclosure, the Commissioner considered three factors:

a. The reasonable expectations of the data subjects.
b. Consequences of disclosure
c. The legitimate interests of the public.

[11] In terms of the reasonable expectations of the Lifeline call handler, the Council provided evidence of its Confidentiality Agreement between itself and Lifeline. It confirmed that the call handler's role within the organisation is relatively junior, and that he does not

have responsibility for policy-making decisions or the expenditure of resources. The Commissioner concluded that the call handler would have reasonable expectation of confidentiality. Given the sensitive nature of the call and the information disclosed about his private life, Individual A too would have an expectation of confidentiality.

[12] The Commissioner further concluded that disclosure would distress Individual A, as he or she had explicitly refused to give his or her consent to the release of the information, and taking into account the distressing nature of the situation and its aftermath. She extrapolated that the Lifeline call handler too could be distressed by the release of the call as there was an expectation of confidentiality.

[13] Whilst the Appellant had a personal interest in exploring any potential negligence, the Commissioner decided that the information is not appropriate for the public domain, and the Commissioner concluded that the balance fell in favour of exemption.

Appellant's Grounds of Appeal

[14] The Appellant did not dispute that the information was personal, but argued that in the particular circumstances of this case the public interest favoured disclosure. She pointed out that these recordings, contrary to the Commissioner's suggestions, do not fall under the Access to Health Records Act.

[15] Regarding the allegations of distress occasioned to Individual A, the Appellant provided evidence that in her belief disproves any distress on the part of Individual A.

[16] The Appellant argues that it is important to know if, when a customer calls in distress, it is Lifeline policy and procedure to chastise the customer and advise a carer to remove the Lifeline pendant to prevent a customer using it. This may impact on the propriety of their advertising campaigns and clearly has repercussions in the safeguarding of vulnerable people. She further noted that the call handler would not be distressed by disclosure if they acted correctly in the course of the call.

Response by the Commissioner

[17] The Commissioner reiterated her point that the FOIA regime is applicant blind, noting that the Upper Tribunal ruled that Article 8 of the ECHR does not extend to providing a right of access to any personal information about a deceased family member: *Rosalyn Bullent v Information Commissioner* (GIA/5678/2014).

[18] While the Appellant disputed any distress caused to Individual A; her characterisation of events may not reflect this. The Commissioner concludes the refusal of consent must be due in part to the distress or anguish he or she would suffer if the recordings were disclosed. Similarly, the call handler would have a legitimate expectation that his or her personal information was not exposed to the world at large in a situation where neither the police nor the Council's Social Care Department found anything of concern in the circumstances or the content of the recordings.

[19] The conclusion that there was no concern of foul play therefore eliminates the interest in disclosing these recordings for the purpose of investigating Individual A's behaviour. There would be a legitimate public interest in knowing Lifeline's general policies and procedures where false alarms have been raised, but these can be satisfied in the disclosure of training materials, standard policies and sample contracts. The Council confirmed to the Commissioner that it did not identify any concerns of impropriety after listening to the calls. Therefore the Commissioner held the balance of interest is in favour of non-disclosure.

Appellant's Reply

[20] The Appellant disputes that she does not have the right to this information. She sees the true data subject as her late mother, and as next of kin, executor and power of attorney she should receive the information. She was informed, by the Council, on 16th July 2015 that they would have no issue disclosing the tapes to her if she had Power of Attorney at that time. She has provided a letter to the Tribunal that shows that the process was in train from March 2015, but that formatting errors meant that this was not put in place at the time of her mother's death.

[21] She also argues that Commissioner is wrong to state that there were no police concerns regarding foul play. The Appellant stated that Gwent Police had told her they could not prove foul play beyond reasonable doubt as there was nothing audible from the tapes about the mechanism of her mother's fall, and therefore there was no reasonable prospect of a conviction. They did not pass any comment on the propriety of the call handler's actions.

[22] In regards to the Council's approach to the tapes, she alleges that on 16 July 2015 she was invited to the Council offices to listen to the tapes. Whilst she was there, she raised concerns about her mother's safety, and it was at that point that permission to listen to the tapes was withdrawn. She stated that she made repeated requests to access the recordings, and her application under FOIA was one of last resort, as she could get no response. The Appellant argues that the Council have a vested interest in protecting their employees, and she can take no reassurance from their investigations.

[23] The Appellant reiterates her contentions that the Commissioner's conclusions about the distress of Individual A are demonstrably unfounded, as the evidence from her, her sister and the hospital records show his or her actual (as to the Commissioner's conjectured) approach to and demeanour during this situation. It was the Individual A who claimed that the call handler told them to remove the Lifeline pendant from her mother and chastised them for a false call – if he or she were lying then this, the Appellant argues, would undoubtedly be distressing but hardly a reason to shield wrongdoing.

[24] The public interest lies, argues that Appellant, in exposing how Lifeline deals with its vulnerable customers in practice i.e. whether it routinely speaks to people other than the service user in determining if the service user is safe. The disclosure of training manuals and standard policies will not shed light on what instruction or advice was actually given in the course of the calls.

Oral Hearings

[25] At the hearing on 26 October 2016, the Tribunal heard evidence from the Appellant's sister regarding the events on the evening of her mother's fall. The Tribunal also took evidence from the Appellant, in which she re-iterated her willingness to accept a transcript

of the material with the names of the individuals redacted from it. The hearing was adjourned until 10 February 2017 for further submissions on the public interest test. The Commissioner and the Council were not represented at the oral hearings and declined to provide further submissions on the public interest test.

Conclusions

[26] Taking first the issue of personal data, the Tribunal found it instructive to consider the Supreme Court's decision in *Durant v Financial Services Authority* [2003] EWCA Civ 1746. At para.28 of Lord Justice Auld's decision, he made the following remarks:

> *"It follows from what I have said that not all information retrieved from a computer search against an individual's name or unique identifier is personal data within the Act. Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity. A recent example is that considered by the European Court in Criminal Proceedings against Lindquist, Case C-101/01 (6th November 2003), in which the Court held, at para. 27, that "personal data" covered the name of a person or identification of him by some other means, for instance by giving his telephone number or information regarding his working conditions or hobbies."*

[27] We note also the Commissioner in the DN at Paragraph 22 makes reference to their own guidance; *"By contrast, information which is about someone working in an official or work capacity* should *normally be provided on request unless there is some risk to the individual concerned".* Considering the transcript, we see no such risk arising in this case.

[28] The Tribunal does not consider that the recordings contain the personal information of the call handler, save for their name. The necessary redactions can be made in order to prevent unlawful disclosure in relation to the call handler. The recordings do however contain the personal information of both the Appellant's mother and Individual A. As the Data Protection Act only protects the personal data of living individuals, the information regarding the Appellant's mother would not attract the necessity of non-disclosure. This is evidently not the case for Individual A, and the Tribunal considers that the recordings contain information about their private and family life that would lead them to attract the exemption.

[29] Public Interest: The question then turns to the issue of the public interest test. This Tribunal accepts the Appellant's submissions that the public interest in disclosure of the disputed information will provide assurance to the public that Lifeline works effectively, efficiently and in demonstrating that it is fit for purpose and fulfils its important role of safeguarding vulnerable individuals. Her case is that the Public are entitled to know that the public funds expended on this service are well spent and fulfil their purpose. She summarised it to us thus;

(i) Transparency in regards to services being purchased by a public authority with taxpayer's money.

(ii) Importance of systems designed to help in the care of vulnerable adults being seen to work effectively.

(iii) In the context of pressure on social care/NHS etc., the public need to have confidence that arrangements such as this work effectively.

We accept these premises as sound in demonstrating significant weight in the balance of favouring disclosure of some of the disputed information in this appeal.

[30] Form of information:

This Tribunal are agreed that the information, being considered to be released should be in the form of a redacted transcript –distinct from the request for a copy of the recording. We find this could legitimately be a transcript (see s11 of FOIA). (But DN para 17 the ICO seems to have only considered the information for release as the tape recording.)

[31] Personal data:

We have approached the information by reference to the individuals concerned of which there are three living and one deceased.

It is easy to determine that the Appellant's mother, now deceased, does not have the benefit of this being personal data according to DPA.

The ICO erred, by virtue to references to the call handler in the singular. It seems a significant error because determining whether the information is "personal data" must be determined by reference to the data AND its relationship to the individual concerned. See DN para 26 – *the data subjects are the Life Line Call handler and another.* DN para 28 also refers to call handler in the singular suggesting that there has been no distinct analysis of the information relating to the two call handlers.

The Durant extract seems to us to fit the case well in relation to whether the information in the transcript is the "personal data" of the two call handlers it does not seem that information (assuming one redacts the first name they each give) is their personal data the conversation is a recorded conversation of them performing their duties in relation to their employment. We have considered a relevant analogy to a policeman recording in his notebook – there may be other exemptions that might apply but it would not be said to be the policeman's personal data.

In the ICO's DN para 22 it seems to state that as their own guidance "*By contrast, information which is about someone working in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned*."

On the related point we discussed the question, if the call handlers were to make a subject access request to their employer would that transcript be released to them as their personal data.

We are of the view the statement in para 25 DN seems very hard to accept, as being applicable in this case "*there is widespread and general expectation that details of a person's employment should be considered confidential"*. In practical terms we would expect this to relate to the terms and detail of the individual's employment relationship with the employer – e.g. his/her recruitment, appraisal, pay and contract details - not the information relating to the discharge of their duties.

Individual A**:** using the Durant guidance we accept that the conversation, which were the statements, made by Individual A were his personal data.

However, we do not think the statements that were being made to him in those calls by the two Call Handlers were Individual A's personal data as they were relatively anodyne questions and responses following what would appear to be script.

[32] Is the information "necessary":

We refer to and cite another Supreme Court case, which gives some guidance on "necessary"
Trinity Term [2013] UKSC 55; On appeal from: [2012] CSIH 30 South Lanarkshire Council (Appellant) V The Scottish Information Commissioner (Respondent

18. It is obvious that condition 6 requires three questions to be answered:

(i) Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
(ii) Is the processing involved necessary for the purposes of those interests?
(iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

27. I disagree with Mrs Wolffe, however, about the meaning of "necessary". It might be thought that, if there is no interference with article 8 rights involved, then all that has to be asked is whether the requester is pursuing a legitimate interest in seeking the information

(which is not at issue in this case) and whether he needs that information in order to pursue it. It is well established in community law that at least in the context of justification rather than derogation, "necessary" means "reasonably" rather than absolutely or strictly necessary (see, for example, R v Secretary of State for Employment, Ex p Seymour-Smith (No 2)[2000] 1 WLR 435;Chief Constable of West Yorkshire Police v Homer [2012] UKSC 15, [2012] ICR 704). The proposition advanced by Advocate General Poiares Maduro in Huber is uncontroversial: necessity is well established in community law as part of the proportionality test. A measure which interferes with a right protected by community law must be the least restrictive for the achievement of a legitimate aim. Indeed, in ordinary language we would understand that a measure would not be necessary if the legitimate aim could be achieved by something less. Thus, for example, if Mr Irvine had asked for the names and addresses of the employees concerned, not only would article 8 have clearly been engaged, but the Commissioner would have had to ask himself whether his legitimate interests could have been served by a lesser degree of disclosure.

[33] The questions outlined in para. 18 of South Lanarkshire relate to condition 6 of Schedule 2 of the DPA *"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."*

We understand that to mean that the legitimate interests can be those of the requester, the Appellant herein. They do not need to be on a wider public interest basis. See paras 21 (c) and para 32 is the Commissioner wrong to refer there to "*the legitimate interests of the public*" and "*does not consider that there is a more compelling public interest in disclosure*". It is clear that the Appellant has a legitimate interest in knowing what the Call Handler (in the first call) said to Individual A… to answer that question she poses did the Call Handler tell Individual A to take the Lifeline pendant away from her (late) mother and more generally from the second call did the service work as she expected in support of her late mother. Is that, according to South Lanarkshire enough of a legitimate interest?

With reference to para 27 i.e. the reference to "*legitimate interests being served by a lesser degree of disclosure"* - We question whether we can give effect to the Appellant's request by revealing only that part of the transcripts which is what the Call handlers said?

On balance we agree that it is Individual A's personal data and hence to give effect to disclosure we would be interfering with that right and we are not convinced that the information in relation to what Individual A said is **necessary** to meet the Appellant's requirements of knowing how the service works. We also agree that the Call Handlers information is not personal data.

Accordingly our finding is that Individual A's words should not be disclosed.

[34] For the above reasons we allow the appeal and direct disclosure of the Transcript (see [29] above as opposed to the recorded tapes) with such redactions as are required in accordance with our above findings which would include redaction of Individual A's name.

Brian Kennedy QC 14 March 2017.