



Tribunals Service
Information Tribunal

Appeal under section 57 of Freedom of Information Act 2000

Information Tribunal Appeal Number: EA/2009/0010
Information Commissioner's Ref: FS50142499

Determined on papers
14 September 2009

Decision Promulgated
17 September 2009

BEFORE

CHAIRMAN

Murray Shanks

and

LAY MEMBERS

Anne Chafer and Henry Fitzhugh

Between

MIICHAEL O'CONNELL

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

CROWN PROSECUTION SERVICE

Additional Party

Subject areas covered:

Freedom of Information Act 2000:

Personal data s.40

Data Protection Act 1998:

Personal data s.1(1)

Sensitive personal data s.2

Principles, Sched 1

Processing of sensitive data, Shed 3

Processing of Personal data, Sched 2

Cases referred to:

Durant v FSA [2003] EWCA Civ 1746

Tribunal's determination

The appeal is dismissed and the Information Commissioner's decision notice is upheld for the reasons set out below.

Reasons for Determination

Background facts

1. The notorious Guildford bombings took place on 5 October 1974. On 22 October 1975 the Guildford Four (including Patrick Armstrong) were convicted of murder. As is well known the convictions were based on evidence of confessions made to the police. On 19 October 1989 the Guildford Four's appeal against conviction was allowed and they were released.
2. In April 1993 three Surrey police officers involved in the investigation of the bombings (namely Vernon Atwell, John Donaldson and Thomas Style) were tried for conspiracy to pervert the course of justice in relation to Mr Armstrong. At their

trial various documents were put before the jury on their behalf, including, at item 10 of the Defence Jury Bundle, a document described as “Extracts from the Defence Brief of Mr Boxall”. Mr Boxall (who we understand is now deceased) had acted as junior counsel to Mr Armstrong at his trial in 1975.

3. This appeal concerns item 10. The Tribunal has seen the document and been given some information about it by the CPS in the course of the appeal and we can say this much about its contents. It consists of four typed pages extracted from a larger document which sets out the recollection of DS Donaldson and DC Attwell of an interview they conducted with Mr Armstrong on 5 December 1974. The document bears some manuscript notes. Although the CPS is unable to tell us the name of the author of the notes and the Tribunal cannot say for sure, it seems more likely than not from the surrounding circumstances that they were made by Mr Boxall (as the Appellant contends) and that they record instructions Mr Boxall was given by Mr Armstrong in 1975 relating to what is said in the typescript recollection.
4. The Appellant, Mr O’Connell, was an English barrister from 1966 until his retirement in 2006 and was also a member of the Irish Bar from 1977. He states that he is “...researching the area of confessions in police custody and the response of the state when convictions are set aside by the Appeal Court...”. Whatever the exact scope of his research it is apparent that he has a keen interest in and detailed knowledge of the whole affair, which, needless to say, remains one of great public interest.
5. On 14 June 2006 Mr O’Connell made a request under the Freedom of Information Act 2000 for a copy of the entire Defence Jury Bundle from the CPS. Following an internal review of an earlier decision the CPS informed him on 18 October 2006 that they would not supply him with (among other things) item 10 in the bundle because it was exempt under section 40(2) of the Act (“Personal information”). The Commissioner upheld the CPS’s decision on item 10 in a decision notice dated 20 January 2009 and Mr O’Connell appeals to this Tribunal under section 57 of the Act on the basis that the decision notice is “not in accordance with the law”. In the course of his appeal Mr O’Connell has made it clear (initially in a letter to the Tribunal dated 26 March 2009) that he accepts he is not entitled to see the

typescript comprising the police officers' recollection and he seeks only to see the manuscript notes.

The issues

6. Based on the submissions of the parties and the terms of section 40(2) of the 2000 Act and the relevant provisions of the Data Protection Act 1998, the Tribunal understands the issues to be as follows:

- (1) Whether and to what extent the manuscript notes constitute "information" at all for the purposes of the 2000 Act;
- (2) Whether they constitute the "personal data" of any person(s) and, if so, who the data subject(s) is and whether the data is "sensitive personal data" for the purposes of the 1998 Act; and
- (3) If so, whether the disclosure of such information to a member of the public would contravene any of the data protection principles and in particular whether such disclosure would be a fair processing of the information and satisfy one of the conditions in Schedule 2 to the 1998 Act and in addition (if the data is sensitive personal data) one of the conditions in Schedule 3.

Issue (1)

7. There is no doubt that some of the manuscript notes taken in isolation are likely to be of limited value and potentially misleading. The Commissioner has submitted that some of them (identified in his closed response) do not even constitute information. We do not accept this submission: in our view however tenuous and potentially misleading the material sought may be, it still constitutes information, even if it is only information to the effect that certain marks have been made on certain sheets of paper held by the public authority.

Issue (2)

8. We are quite satisfied that item 10 contains information about the alleged involvement of Mr Armstrong and a number of other named individuals in the

Guildford bombing and that it therefore contains “sensitive personal information” relating to those individuals for the purposes of the 1998 Act (see in particular section 2(g)). We are also satisfied that the manuscript notes in isolation (which, as we have said, appear to reflect Mr Armstrong’s instructions on the typescript) also constitute his “sensitive personal data” and contain such data relating to at least one other named individual. Mr O’Connell submits that because Mr Armstrong’s conviction was quashed by the Court of Appeal and the Prime Minister issued a public apology to him and ten others in 2005, information about his alleged involvement in the Guildford bombings is no longer sensitive personal data; there is nothing in the 1998 Act which points to such a conclusion and section 2(g) expressly refers to information “...as to...the commission or *alleged* commission by [the data subject] of any offence.”

9. The CPS have also submitted that the document “contains the personal data of the police officers who have recorded their accounts of the interviews...[ie] DS Donaldson and DCI Attwell”. We reject that submission. The document contains no information about them save for the fact that they interviewed Mr Armstrong and their recollection of that interview, which presumably they recorded as part of their duties as police officers. That information does not in our view therefore satisfy either of the tests (namely “privacy” and “focus”) identified by the Court of Appeal in *Durant v FSA* [2003] EWCA Civ 1746.

Issue (3)

10. Given our conclusion in paragraph 8 above that the information Mr O’Connell seeks constitutes the sensitive personal data of Mr Armstrong, it is clear that it could only be disclosed if one of the conditions in Schedule 3 to the 1998 Act was met (see Schedule 1 para 1(b)). We cannot see that any of those conditions have been met. In particular, so far as we are aware no-one has sought, and Mr Armstrong has not given, his explicit consent to disclosure (para 1 Schedule 3) and the information in question was not made public as a result of steps deliberately taken by him (para 5 Schedule 3) (though the latter may well have applied in relation to the police officers had the information in question constituted only their personal data). It follows that the information sought by Mr O’Connell was exempt under section 40(2) of the 2000 Act.

Conclusion

11. Since section 40(2) provides an absolute exemption, that conclusion means that the appeal must be dismissed. We do not need to and will not comment on what we may have concluded in relation to the balancing exercise required by para 6(1) Schedule 2 to the 1998 Act had we needed to carry it out but we do note in passing (a) that it seems to us that the information sought by Mr O'Connell must have been subject to legal professional privilege in favour of Mr Armstrong at some stage (so that section 42(1) of the 2000 Act may have been relevant) and (b) that section 32(1)(a) and/or (b) of the 2000 Act may also have applied.

12. Our decision is unanimous.

Signed:

Murray Shanks
Deputy Chairman

Date: 17 September 2009