



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2011/0006

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50277397
Dated: 20 December 2010

Appellant: Mrs Colleen Smith
Respondent: Information Commissioner
Additional Respondent: Devon & Cornwall Constabulary
Date of paper hearing: 30 August 2011

Before
Melanie Carter
(Judge)

and

Melanie Howard
Ivan Wilson

Subject:

Personal Data, s.1 Data Protection Act 1998
Sensitive Personal Data, s.2 Data Protection Act 1998

Cases:

Department of Health v Information Commissioner & Pro-Life Alliance CO/13544/2009
Brett v Information Commissioner EA/2008/0098
David Ferguson v Information Commissioner EA/2010/0085

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal decided to uphold the Decision Notice

REASONS FOR DECISION

Introduction.

1. This appeal arises from a letter of request from under the Freedom of Information Act 2000 (“the Act”) to the Additional Respondent, the Devon and Cornwall Constabulary (“the Constabulary”). The letter of request dated November 2007 asked for the following information:

1. *“How many teaching staff has Devon and Cornwall police investigated under Section 16 of the Sexual Offences Act 2003 from Torbay schools and colleges in the period 2005 to date, November 2007?*
2. *How many of those were cautioned? How many were charged? How many were no further actions?*
3. *How many teaching staff have Devon and Cornwall police investigated under section 16 of the Sexual Offences Act 2003 from Teignbridge schools and colleges in the period January 2005 to date, November 2007?*
4. *How many of those were cautioned? How many were charged? How many were no further actions?*
5. *How many teaching staff have Devon and Cornwall police investigated under Section 16 of the Sexual Offences Act 2003 from South Hams schools and colleges in the period January 2005 to date, November 2007?*
How many of those were cautioned? How many were charged? How many were no further actions?”

2. Initially, the Constabulary responded to the request by refusing to confirm or deny whether it held information falling within the scope of the request. Ms Smith complained to the Respondent, the Information Commissioner (“the Commissioner”)

and he issued a Decision Notice on 25 August 2009. This required the Constabulary to provide to Mrs Smith confirmation or denial of whether information falling within the scope of the request is held, and, for any information that is held, either disclose this, or provide an appropriate refusal notice.

3. On 29 September 2009, the Constabulary issued a refusal notice, stating that the requested information was held but that it was exempt from disclosure under sections 31(1) (a), 31(1) (b) and section 40(2).
4. The complainant again complained to the Commissioner on 21 October 2009 challenging the decision to withhold the information requested.
5. The Commissioner issued a further Decision Notice dated 20 December 2010¹ stating, inter alia, that:
 - a) That the responses to questions 3 – 6, being “0”, did not amount to personal data and should be disclosed;
 - b) The responses to questions 1& 2 however did consist of personal data;
 - c) That disclosure of this personal data would be a breach of the First Data Protection Principle and that therefore the absolute exemption under section 40(2) of the Act applied and the Constabulary had been entitled to refuse disclosure.
6. Mrs Smith has appealed the Decision Notice to this Tribunal.

The appeal

7. Mrs Smith argued in her Notice of Appeal that:
 - a) the Commissioner erred in concluding that the information requested constituted the personal data or sensitive personal data of an individual and as such the exemption under section 40(2) of the Act was wrongly applied.

- b) In the event that it is found that the disputed information does amount to personal data or sensitive personal data, the Commissioner erred in concluding that disclosure of the disputed information would be unfair or in breach of the First Data Protection principle.

The questions for the Tribunal

- 8. It appeared to the Tribunal that the following questions arose:
 - a) Does the disputed information consist of personal data or sensitive personal data within the meanings of sections 1 & 2 of the Data Protection Act 1998 (“the DPA”);
 - b) Would disclosure of the disputed information be unfair and therefore a breach of the first Data Protection Principle;
 - c) If sensitive personal data, is a condition in Schedule 3 of the DPA satisfied (ie: does paragraph 3 of the Schedule of the Data Protection (Processing of Sensitive Personal Data) Order 2000 apply).

The Law

- 9. The Tribunal’s jurisdiction on appeal is governed by section 58 of FOIA. As it applies to this matter it entitles the Tribunal to allow the Appeal if it considers that the Decision Notice is not in accordance with the law or, to the extent that it involved an exercise of discretion, the Commissioner ought to have exercised his discretion differently.
- 10. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and come to the conclusion that the Decision Notice is not in accordance with the law because of those different facts.

11. Under section 1 of FOIA, any person who has made a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information. Under section 2, the duty on the public authority to provide the information requested does not arise if the information is exempt under Part II of FOIA.
12. The exemptions under Part II are either qualified exemptions or absolute exemptions. Information that is subject to a qualified exemption is only exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Where however, the information requested is subject to an absolute exemption, then, as the term suggests, it is exempt regardless of the public interest considerations.
13. Section 40 FOIA, an absolute exemption, provides in the relevant parts:

“(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 the 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

...

(7) In this section—

...

‘data subject’ has the same meaning as in section 1(1) of [the Data Protection

Act 1998];

‘personal data’ has the same meaning as in section 1(1) of that Act.”

14. Personal data is defined in section 1(1) as meaning “ *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”.*

15. Sensitive personal data is defined in section 2 of the DPA as meaning, insofar as is relevant, personal data consisting of information as to:
 - “(f) his sexual life;*
 - (g) the commission or alleged commission by him of any offence”.*

16. The first Data Protection Principle in the DPA states that personal data shall be processed “*fairly and lawfully*” and shall not be processed unless, in the case of personal data, at least one of the conditions of Schedule 2 DPA is met, and where this data is sensitive personal data, in addition, at least one of the conditions of Schedule 3 DPA is also met. The conditions in Schedule 3 are supplemented by those set out, pursuant to condition 10 of that Schedule, in an order made by the Secretary of State. For these purposes the relevant order is Data Protection (Processing of Sensitive Personal Data) Order 2000 (“the Order”). Article 2 of that Order provides that the circumstances specified in any of the paragraphs in the Schedule to the Order are circumstances in which sensitive personal data may be processed. Paragraph 3 of the Schedule to the Order states that:
 - “3.—(1) The disclosure of personal data—*
 - (a) is in the substantial public interest;*
 - (b) is in connection with—*
 - (i) the commission by any person of any unlawful act (whether alleged or established),*
 - (ii) dishonesty, malpractice, or other seriously improper conduct by, or the unfitness or incompetence of, any person (whether alleged or established), or*
 - (iii) mismanagement in the administration of, or failures in services provided by, any body or association (whether alleged or established);*

(c)is for the special purposes as defined in section 3 of the Act; and

(d)is made with a view to the publication of those data by any person and the data controller reasonably believes that such publication would be in the public interest.”

Consideration

Is the disputed information personal data?

17. Mrs Smith has challenged whether any living individual may be identified from disclosure of the disputed information, which as all acknowledge, consists of anonymised statistics – anonymised in the sense that when read on its own, it is not possible to identify any individual. The question is whether, read with other readily available information from the internet or other public sources, anyone becomes identifiable and the data thereby becomes personal data within the meaning of the DPA.
18. Clearly, Mrs Smith is not in a position to determine this question as she had not had sight of the disputed information when she lodged her appeal. The Constabulary and the Commissioner in turn have argued that there is a strong likelihood of identification taking place piecing together the disputed information with other information in the public domain. Section 16 of the Sexual Offences Act 2003, abuse of a position of trust, is an offence for which there are relatively rare convictions. As such, it is a matter of common knowledge that the disputed information will contain low figures.
19. The recent High Court case of *Department of Health v Information Commissioner & Pro-Life Alliance CO/13544/2009*, which was decided subsequent to the Decision Notice, is binding on this Tribunal as to the correct interpretation of section 1 of the Data Protection Act and the meaning of “personal data”. Thus, in the event that a living individual can be identified from anonymised information, the information, on disclosure will amount to personal data and regard must then be had to whether disclosure would comply with the Data Protection Principles.

20. The Tribunal has considered both the disputed information and the “other information” and is satisfied that a living individual can thereby be identified and that therefore the disputed information is “personal data” to which the Data Protection Act applies. The Tribunal took into account that the Torbay schools area covered 42 local authority schools and a number of private institutions but considered that, given the low number of section 16 convictions, this should be viewed as a relatively small geographic area. The Tribunal was satisfied that information existed in the public domain which made identification possible. The Confidential Annex explains at Rider A, the basis for this finding.
21. The Tribunal was further satisfied that the disputed information was sensitive personal data within the meaning of section 2 of the DPA being clearly information as to a data subject’s sexual life (this being a matter relating to sexual offences) and the commission of offences.

Would disclosure of the disputed information be unfair?

22. As noted above, the absolute exemption in section 40 of the Act would apply if disclosure of the information in question would lead to a breach of the Data Protection Principles. In this case, the Constabulary and the Information Commissioner in turn, argued that disclosure would be a breach of the First Data Protection Principle, on the basis that it would be unfair. Critical to this, was the suggestion that data subjects would have a reasonable expectation that their personal data would not be disclosed other than in carefully controlled circumstances, not including in compliance with this FOIA request.
23. The Tribunal was of the view, however, for the reasons set out at Rider B of the Confidential Annex, that in the very particular circumstances of this case, data subjects could not reasonably have expected that their personal data would not be disclosed at the relevant time (ie: late 2007). The Tribunal took into account that registered sex offenders could expect their existence to be included in the overall numbers published in the MAPPAs annual statistics for the Constabulary area such that the disputed information would be subsumed into larger figures in the MAPPAs reports. Data subjects could not be identified from the MAPPAs statistics shown to the Tribunal and the statistics were in the most part in high figures. The Tribunal

accepted that, in the normal course of events, it would be a reasonable expectation that release of such sensitive personal data would be strictly controlled. However, for the exceptional reasons set out at Rider B in the Confidential Annex, it did not accept that such an expectation would have excluded disclosure in this case.

24. Also critical to the question of fairness is a consideration of the potential harm to a data subject set against any potential benefits of disclosure. As to the benefits, the Tribunal agreed with the Commissioner that the press has a legitimate interest in reporting criminal cases and that there is some evidence that the reporting of sex offence prosecutions encourages other victims to report incidents to the police. The Commissioner however set against this a perceived risk of harm to a data subject. In this particular case the Tribunal did not find that there was such a risk at the relevant time (ie: when the letter of request should have been refused). The reasons for this are set out in Rider B.

Does paragraph 3 of the Schedule of the Data Protection (Processing of Sensitive Personal Data) Order 2000 apply?

25. In order for disclosure to comply with the First Data Protection Principle, in addition to being fair and lawful, there needs to be compliance with one of the conditions set out in both Schedules 2 and 3. As is to be expected the circumstances in which sensitive personal data may be processed, those set out in and under Schedule 3, are far narrower than those which relate to simple personal data..
26. Addressing the conditions for processing sensitive personal data first, the only condition which the Tribunal could identify as possibly applying was that set out in paragraph 3 of the Order (see paragraph 15 above). It was argued by Mrs Smith, that this would be disclosure in connection with an unlawful act, would be “for the special purposes” of journalism and that this would be in the “substantial public interest”. The Constabulary and the Commissioner in turn have argued that, being disclosure under FOIA this would be disclosure to the world and therefore not for the “special purposes” of journalism or artistic or literary purposes.
27. In this regard, the ICO drew to the Tribunal’s attention one case (*Right Honourable Frank Field MP v Information Commissioner EA/2009/55*), which whilst not directly

on point, includes reference to the well understood principle that once information is disclosed in compliance with FOIA, it is disclosure to the public at large, not just the requester. The Commissioner did not however draw to the attention of the Tribunal the cases of *Ferguson* and *Brett* (see below) which directly addressed the Order and placed an important gloss on this principle. The Tribunal was concerned that the Commissioner having decided to mention a previous case of the Tribunal sought only to alert the Tribunal to a case supporting his own line of argument. Given that the appellant was a litigant in person, and particularly since the Commissioner had asked for a paper hearing, it was incumbent on him to step beyond the strict adversarial role and to seek to assist the Tribunal.

28. The Tribunal noted the dicta in the case of *David Ferguson v Information Commissioner EA/2010/0085* as follows:

“It is often stated that requester’s rights under FOIA are purpose-blind, in the sense that an applicant’s personal identity and motives for requesting information are irrelevant. This generalisation can mislead. There are some cases in which the applicant’s identity and motives may shed light on the public interests involved. More significantly, the applicant’s identify and motives can be of direct relevance to the exemption in FOIA s40(2) because of the provisions of DPA disclosure and to the interests pursued by the persons to whom the disclosure would be made. For example, a journalist or author may be able to outflank the s40(2) exemption by reliance upon DPA Schedule 3 condition 10 and paragraph 3 of the Schedule to the Data Protection (Processing of Sensitive Personal Data) Order 2000, where it is in the substantial public interest that wrongdoing should be publicised”.

29. Whilst the Tribunal did not find that the paragraph 3 condition applied in that case (the requester was not seeking to rely upon this condition), the dicta are instructive. In the case of *Brett v Information Commissioner EA/2008/0098*, the Tribunal did find that this paragraph applied given that the requester was an author who expressly intended to write a book in relation to the shooting of 3 IRA members in Gibraltar (although it went on to find that the “substantial public interest” test was not met). The Tribunal agreed with the previously constituted Tribunals in the above appeals, that it was entitled to take into account that the requester in this case was a journalist who was seeking to follow up on reports already written. If the Commissioner was

right that this could not be taken into account then this condition, being limited to disclosure for “special purposes”, would in practice never apply in a FOIA context.

30. In the alternative, it was argued by both the Constabulary and Commissioner that such disclosure ought not to be viewed as “in the substantial public interest”.
31. The Constabulary drew the Tribunal’s attention to a series of cases (which albeit not binding) which were in support of this latter submission. The most relevant being the matter of Bernard Madoff Investment Securities (2009). That case concerned the Eighth Data Protection Principle (transfers of personal data outside of the EU) and the exception relating to “substantial public interest” (paragraph 4, Schedule 4 of the DPA). In addition, the Tribunal took note of the *Brett* case and the finding there that the disclosure of disputed information in that case amounted to “*little more than additional speculation*”.
32. The Tribunal considered very carefully whether it might be said that disclosure in this appeal would satisfy the “substantial public interest” test in paragraph 3(a) of the Order. It was reasonable to assume, in the Tribunal’s view, that the public had an ongoing need for reassurance as to the level of activity by sexual offenders in particular localities and transparency and accountability in what the police were doing about it. In that sense, the Tribunal was satisfied that there were public interest factors in favour of disclosure. It took into account, in this regard, the witness evidence of Mrs Smith as to the local interest as supported by various newspaper reports. The Tribunal was careful however to limit its consideration in this regard to the time at which the refusal of the letter of request should have been made (had it not been for the protracted dispute over initial confirmation or denial). The Tribunal’s role was therefore to consider whether disclosure should have been made in and around late 2007, not at any stage subsequently. Mrs Smith had provided information as to sexual offences which had come to light after 2007 and which could not strictly be taken into account as indicating a degree of public interest or concern in these matters. Frustrating though this maybe for the requester, it was important (and indeed necessary as a matter of law) that the question whether disclosure should be made is judged at the relevant time, that is, when the request should have been refused.

33. Whether there was a “substantial public interest” in disclosure, depended in part on the level and urgency of the need to reassure the public. The Tribunal was of the view that, whilst, as stated above, the Tribunal accepted that there was public interest in disclosure, this fell short of being “*substantial* public interest” [emphasis supplied].
34. The Tribunal took into account the evidence of Julie Neville, the CRB Disclosure Unit Manager for the Constabulary with regard to the machinery for supervising sex offenders in the community , the working rules on the limited sharing of information as to their convictions (Criminal Records Bureau checks, the Notifications Occupations Scheme and the role of the Independent Safeguarding Authority). The Tribunal also took into account the evidence of Jill Snell, Detective Sergeant of the Headquarters Public Protection Unit of the Constabulary with regard to the work of the Public Protection Unit and the MAPPA arrangements. The evidence in these witness statements was as to the extensive machinery for the monitoring and supervision of sex offenders in the community. All of the organisations set out above, worked to strict rules on when information may be shared so as to limit the random disclosure of the identify and location of registered sex offenders.
35. Further to this evidence, and the newspaper reports provided, the Tribunal recognised that there was evidence that disclosure of the identity of sex offenders (and thereby renewed efforts to locate and “out” individuals in the community) sometimes led to vigilantism and the individuals then choosing to disappear. In this way, there was the risk of offenders falling outside of the monitoring and supportive role of the police/probation services. The Tribunal accepted as a reasonable assumption that this generally speaking increased the risk of reoffending. Thus, the Tribunal accepted that there was, in general, a factor militating against disclosure on the basis that this ran the risk of identifying sex offenders and thereby heightening the chance of reoffending. The Tribunal was not persuaded however that in this particular case, and at the relevant time, this was a significant factor (see Rider C).
36. The evidence falling within the relevant period, did not substantiate a widespread concern as to the subject matters of the letter of request, a prevalence of sex offender activity in the schools in the Torbay area or of police incompetence or neglect in following this up. It was not enough, in the Tribunal’s view, that sexual offences by

teachers or others in positions of trust was a matter of keen interest to the public. This, on its own, did not make disclosure “in the substantial public interest”. It was the Tribunal’s task to weigh against the wholly understandable concern felt by members of the public on this subject, the detrimental effects that disclosure could have. Moreover, it could reasonably be assumed that the public, being aware of the role of the agencies set out in paragraph 33 above and the annual reports issued by MAPPA, that the need for reassurance was not as necessary or compelling as Mrs. Smith argued. The Tribunal felt overall, although it did consider this to be a finely balanced judgement, that the outstanding answers to the letter of request would be more a matter “of interest” to the public than disclosure “in the substantial public interest”.

37. Given its conclusion with regard to paragraph 3(a) of the Schedule to the Order, the Tribunal did not go on to consider issues with regard to subparagraph (d) and whether the Constabulary and/or the Commissioner needed to ‘reasonably believe’ that publication would be in the public interest. Suffice to say however that this Tribunal agreed with the dicta in paragraphs 54 & 55 of the *Ferguson* case.
38. As, in the Tribunal’s view, no condition in Schedule 3 had been satisfied, there was no need to consider conditions under Schedule 2. Disclosure would be in breach of the First Data Protection Principle and the absolute exemption in section 40(2) of the Act therefore applied. It followed that the Constabulary had been entitled to refuse disclosure, the Commissioner correct in his conclusions and, in turn, the Decision Notice was in accordance with law.

Conclusion

39. In light of the above, the Tribunal upholds the Commissioner’s Decision albeit for reasons different to those set out in the Decision Notice.
40. Our decision is unanimous.

Melanie Carter
Tribunal Judge

15 September 2011