



Information Tribunal

Appeal Number: EA/2007/0021

Freedom of Information Act 2000 (FOIA)

Heard at Procession House, London 21st November, 2007

Decision Promulgated 19th December, 2007

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

David Farrer Q.C.

and

LAY MEMBERS

Roger Creedon

and

Paul Taylor

Between

LONDON BOROUGH OF CAMDEN

Appellant

and

INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: Anya Proops

For the Commissioner: Akhlaq Choudhury

Unless the contrary is expressly indicated, references to sections of a statute are to The Freedom of Information Act, 2000 ("FOIA"). The Data Protection Act, 1998 is identified as "DPA".

Decision

The Appeal is allowed. The Appellant is not required to provide any further information to the complainant.

Reasons for Decision

The Request

- 1 On 11th. May, 2006, David Leigh, a journalist working for "The Guardian" newspaper, requested from the Appellant ("Camden") a copy of a database which he believed Camden to possess, containing details of all Anti - social Behaviour Orders ("ASBOs") issued in the borough of Camden, whether current or expired. Those details were expected to include names, addresses and the terms and nature of the orders made. The request was carefully and courteously framed and supported by reasoning meeting possible objections, which, to some extent, foreshadowed arguments addressed to this Tribunal. Though the motive of the requester is, of course, generally immaterial, it is fair to observe that Mr. Leigh `s intention was to pursue legitimate research into the effectiveness of a comparatively new tool in the penal toolbox.
- 2 Camden responded by letter of 26th. May, 2006, attaching an edited version of the database that it held. It contained a great deal of information but expressly excluded the names of the individuals concerned and information (such as addresses, which were not on the database) which might serve to identify them. It fully complied with the requirements of s.17(1) of FOIA, identifying what Camden regarded as applicable exemptions under sections 31 and 40 and setting out its reasons for reliance upon them. To the extent that Camden `s response excluded certain of the requested information, it amounted plainly to a refusal for the purposes of s.17
- 3 On 1st. June, 2006, Mr. Leigh duly sought a review of this refusal. He countered arguments based on s.40 and asserted that s.31 was not engaged at all. The Respondent ("the I.C.") did

not consider that Camden had shown that s.31 was engaged. We have not been asked to review his decision and need say no more about it. This appeal turns exclusively on the application of s.40.

- 4 Mr. Leigh supported his request for a review by reference to a number of examples of press releases by Camden, identifying recent recipients of ASBOs in the borough and specifying the conduct involved.
- 5 On 20th. June, 2006, Camden confirmed its decision to withhold names or other means of identification. Mr. Leigh complained immediately to the I.C.
- 6 The I.C. `s investigation spanned several months and included an inspection of Camden `s ASBO database. On 5th. January, 2007, Mr. Brian Payne, one of the I.C. `s senior complaints officers sent an e mail to Mr. Leigh, pointing out that his request embraced spent as well as current ASBOs, expressing the I.C. `s view that disclosure of that information would breach the first data protection principle (which is considered later in this Decision) and inquiring whether the substitution of identifiers for names would be acceptable. Mr. Leigh, in reply, gave examples of cases in which, he said, the public interest could not be served without identification but, more fundamentally, asserted a public entitlement to such information, where an individual had faced open justice in a public court.

The Decision Notice

- 7 The I.C., in a Decision Notice dated 13th. February, 2007, upheld the complaint, subject to certain limitations as to the information to be provided. He excluded from his requirement cases in which :
 - The court had imposed reporting restrictions ;
 - The ASBO did not proceed beyond the interim stage ;

- Camden was satisfied that an ASBO subject was especially vulnerable to the consequences of disclosure or
- The ASBO had expired.or
- The names were those of victims, witnesses or other third parties.

8 He concluded that, save in those cases, there would be no breach of the first or second data protection principles, as asserted by Camden. He adjudged that processing of such data by providing it to Mr. Leigh would be fair and lawful but did not further specify which of the particular tests of fairness it satisfied. Later submissions rectified any failure involved.

ASBOs and the evidence concerning their operation

9 ASBOs were introduced by s.1 of the Crime and Disorder Act, 1998 which, so far as material, provides (as amended):

(1) An application for an order under this section may be made by a relevant authority if it appears to the authority that the following conditions are fulfilled with respect to any person aged 10 or over, namely—

(a) that the person has acted, since the commencement date, in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself; and

(b) that such an order is necessary to protect relevant persons from further anti-social acts by him.

(1A) in this section and [sections 1B - - --) “relevant authority” means—

(a) the council for a local government area;

(1B) In this section “relevant persons” means—

(a) in relation to a relevant authority falling within paragraph (a) of subsection (1A), persons within the local government area of that council;

(3) Such an application shall be made by complaint to a magistrates' court.

(4) If, on such an application, it is proved that the conditions mentioned in subsection (1) above are fulfilled, the magistrates' court may make an order under this section (an "anti-social behaviour order") which prohibits the defendant from doing anything described in the order.

(5) For the purpose of determining whether the condition mentioned in subsection (1)(a) above is fulfilled, the court shall disregard any act of the defendant which he shows was reasonable in the circumstances.

(6) The prohibitions that may be imposed by an anti-social behaviour order are those necessary for the purpose of protecting persons (whether relevant persons or persons elsewhere in England and Wales) from further anti-social acts by the defendant.

(7) An anti-social behaviour order shall have effect for a period (not less than two years) specified in the order or until further order.

(8) Subject to subsection (9) below, the applicant or the defendant may apply by complaint to the court which made an anti-social behaviour order for it to be varied or discharged by a further order.

(9) Except with the consent of both parties, no anti-social behaviour order shall be discharged before the end of the period of two years beginning with the date of service of the order.

(10) If without reasonable excuse a person does anything which he is prohibited from doing by an anti-social behaviour order, he is guilty of an offence and liable—

(a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both; or

(b) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both.

(10A) The following may bring proceedings for an offence under subsection (10)—

(a) a council which is a relevant authority; (b) the council for the local government area in which a person in respect of whom an anti-social behaviour order has been made resides or appears to reside.

(10B) If proceedings for an offence under subsection (10) are brought in a youth court section 47(2) of the Children and Young Persons Act 1933 (c. 12) has effect as if the

persons entitled to be present at a sitting for the purposes of those proceedings include one person authorised to be present by a relevant authority.

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(10D) In relation to proceedings brought against a child or a young person for an offence under subsection (10)—

(a) section 49 of the Children and Young Persons Act 1933 (restrictions on reports of proceedings in which children and young persons are concerned) does not apply in respect of the child or young person against whom the proceedings are brought;

(b) section 45 of the Youth Justice and Criminal Evidence Act 1999 (power to restrict reporting of criminal proceedings involving persons under 18) does so apply.

(10E) If, in relation to any such proceedings, the court does exercise its power to give a direction under section 45 of the Youth Justice and Criminal Evidence Act 1999, it shall give its reasons for doing so.

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(12) In this section—

“child” and “young person” shall have the same meaning as in the Children and Young Persons Act 1933;

“the commencement date” means the date of the commencement of this section;

“local government area” means—

(a) in relation to England, a district or London borough, the City of London, the Isle of Wight and the Isles of Scilly; - - - -

10 We note that the material features of such orders for the purposes of this appeal are

:-

- Their possible duration – at least two years.
- Their status as orders, not convictions¹, hence
- Their preventative, not punitive purpose.
- The jurisdiction to make orders, based upon the need to protect from future anti

¹ Though similar orders may now be used following conviction

– social behaviour of the subject people within the area of the relevant local authority, here Camden.

- The power to impose prohibitions designed to protect additionally persons outside the local government area of the authority applying for the order.

11 Monitoring of the ASBO by the relevant authority, here Camden, is an essential element in this scheme. We received written and oral evidence from Anthony Brooks, Head of Community safety in the Anti – Social Behaviour Action Group (“ASBAG”) in Camden, which, in collaboration with the police, is responsible for the operation of ASBOs in Camden, including the decision, case by case, as to the use of publicity. He informed us that, by June, 2007, 245 ASBOs had been made in Camden, including those made post – conviction.

12 In addition to an account of the nature of such orders and the way in which they are managed, Mr. Brooks gave important evidence, which we accept, as to the problems which further publicity may cause when the behaviour of an individual has substantially improved over a significant period, whilst subject to an order. The effect of naming or otherwise identifying him or her may be very different from publicity at or shortly after the date of the order. He also referred us to the Home Office Guidance on publicising Anti – Social Behaviour Orders of October, 2005 (“the H.O. Guidance”) which was exhibited to the statement of Mr. Neil Townley of the Anti – Social Behaviour and Alcohol Unit at the Home Office, who supported Camden `s stance. Mr. Brooks also contended that identification of especially vulnerable ASBO subjects (see paragraph 7) would be a very difficult and time – consuming exercise.

13 The H. O. Guidance is intended to reflect the judgment of Kennedy L.J. in ***R (Stanley, Marshall and Kelly) v Commissioner of police for the Metropolis and Chief Executive of London Borough of Brent [2004] EWHC 2229***. Both parties drew support from it. Its principles include the need for publicity to assist enforcement and to reassure the community.” Publicising should be the norm, not the exception”. On the other hand, a case by case approach to publicity is advocated. Its purpose is not to punish. Authorities must have regard to the human rights of all concerned and

must be mindful of data protection principles.

- 14 We observe that different considerations may arise, depending on the timing of the publicity under consideration. **Stanley v Brent** involved leaflets distributed quite soon after the making of the orders. Whilst we are mindful of the fact that every ASBO is made in public and that, as regards an order in respect of an adult, any member of the public is entitled to attend court to witness the proceedings and the making of the order, the re- opening of publicity eighteen months or two years later may pose different problems.

The relevant statutory provisions

- 15 Section 1 sets out the general right to information.
- 16 Section 2(2)(a) provides for absolute exemptions from the duty to communicate information. Section 2(3)(f)(ii) applies such an absolute exemption to information caught by s.40 (2) where the first condition referred to in that subsection is satisfied by virtue of s.40(3)(a)(i) or (b)..
- 17 So far as relevant, s.40 provides:

(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,

- - - -

16 "Data" is defined in s.1 of the DPA.

1. -(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, or*
- (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;

"Processing", in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including-

(c) disclosure of the information or data by transmission, dissemination or otherwise making available, or -- - - -

17 The data protection principles are identified in DPA s. 4 and the first three schedules.

4 -(1) References in this Act to the data protection principles are to the principles set out in Part I of Schedule 1.

(2) Those principles are to be interpreted in accordance with Part II of Schedule 1.

(3) Schedule 2(which applies to all personal data) and Schedule 3(which applies only to sensitive personal data) set out conditions applying for the purposes of the first principle; - - -

(4) Subject to section 27(1), it shall be the duty of a data controller to comply with the data protection principles in relation to all personal data with respect to which he is the data controller.

SCHEDULE 1

THE DATA PROTECTION PRINCIPLES

PART I

THE PRINCIPLES

1. 1 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, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

INTERPRETATION OF THE PRINCIPLES IN PART I

- - - - -
- *The second principle*
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6. In determining whether any disclosure of personal data is compatible with the purpose or purposes for which the data were obtained, regard is to be had to the purpose or purposes for which the personal data are intended to be processed by any person to whom they are disclosed.

SCHEDULE 2

CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF ANY PERSONAL DATA

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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.

Schedule 3 deals with sensitive data, a category to which, it is agreed, the requested information does not belong.

18 Construing as simply as possible these intricate provisions, it is common ground that the identities of ASBO subjects are personal data and that the information requested is subject to an absolute exemption from the duty to communicate if any of the eight data protection principles would be contravened by its disclosure to the public. We add, for the avoidance of doubt, that the ASBO subjects to whom we refer are those not already excluded from disclosure by the conditions attached to the requirement to provide information contained in paragraph 32 of the I.C. 's Decision Notice.

19 It is further agreed that the principles which disclosure might contravene are the first and second principles and that the only schedule 2 condition which might be met for the purposes of compliance with the first data principle is condition 6.

The issues

20 They are therefore these :

- Would the communication of the names or other identification of the ASBO subjects to a member of the public amount to fair and lawful processing of their personal data? ²
- If so, is it necessary for the purpose of a legitimate interest pursued by Mr. Leigh, namely his research into the use of ASBOs and their effectiveness?
- If it is, is disclosure nevertheless unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the ASBO subjects? The wording of condition 6 indicates that what is necessary for the specified purposes may nevertheless be unwarranted.
- Would the communication of this information to Mr. Leigh be compatible with the purpose or purposes for which Camden obtained it when creating its ASBO database?
- If all these conditions for disclosure are met, can Camden reasonably be expected to apply the exception for “particularly vulnerable” subjects?
- If not, can these data be fairly and lawfully processed?

21 For the I.C. `s Decision Notice to be upheld, each of those issues must be resolved in his favour.

The approach to s.40.

22 Where s.40 is engaged, the Tribunal is required to embark on a quite different task from those which confront it when dealing with other claims to exemption, absolute or qualified, from the duty to communicate information. FOIA promotes the right to information. DPA conversely protects the right to privacy. As the distinctive referential drafting of s.40 demonstrates, the very different principles of DPA govern the approach of the public authority and, where the

² It undoubtedly constitutes “processing” – see DPA s.1 (above)

need arises, the decisions of the I.C. and of this Tribunal, when s.40 is under consideration. This was the approach adopted by this Tribunal in *The Corporate Officer of the House of Commons v Information Commissioner EA/2006/0015 and 0016 (“MP`s expenses”)* to which we shall return. Whether or not the data subject`s interests are to be regarded as “paramount” and whatever the meaning of the epithet in the context of data protection, (see *CCN Systems Ltd. v The Data Protection Registrar (DA/90 25/49/8, Infolink Ltd.v The Data Protection Registrar (DA/ 90 25/49/ 6)*), his non – sensitive personal data undoubtedly receive a high degree of protection from Schedules 1 and 2 to DPA and from Schedule 3, where sensitive personal data are involved. It is, therefore salutary for the Tribunal to remind itself at the outset that it is working in very different territory from that to which it is otherwise accustomed.

The case for Camden

23 We were assisted by very full written and oral submissions from Ms. Proops, including a helpful summary of her case served at or just before the hearing. We hope to do justice to the breadth and refinement of her arguments in formulating them as follows:

- Where s. 40 is engaged, the interests of the data subject are paramount, that is to say, the weightiest consideration.
- A fundamentally important interest is the right to privacy under Article 8 of E.C.H.R, notwithstanding the public nature of the conduct which justified the order, the public hearing at court and the expectation of immediate publicity.
- “Naming and shaming” is not the purpose of publicising an ASBO; rather it is to inform and reassure the local community and to bring home to the subject of the order the fact that the community is aware of it and its implications.
- The expectation of the properly briefed ASBO subject, having regard to the geographical limits on most ASBOs, *Stanley v Brent* and the H. O. guidance, is for local publicity, focussed on the area in which his conduct has had an effect. National or even international publicity, such as could result from publicity in a national daily newspaper, goes far beyond any reasonable expectation.

- Such widespread publicity and/or publicity long after the making of the order, when the subject's progress may be severely disrupted by fresh identification, would not amount to fair or lawful processing as required by the first data protection principle..
- Communication of the identities of ASBO subjects is not necessary for the purposes of Mr. Leigh's legitimate interests, namely his research. Identifiers would serve as well.
- If it is necessary, it is nevertheless unwarranted by reason of the prejudice to the interests of the ASBO subjects, which are at least as great as those of Mr. Leigh.
- For the purposes of the second data protection principle, the purpose for which Mr. Leigh wants Camden to disclose the information to him is incompatible with those for which it was obtained.
- The condition as to excluding particularly vulnerable subjects is unworkable and therefore reinforces Camden's case, as already set out.

24 The Commissioner supplemented his Reply with a further skeleton argument and oral argument of Mr. Choudhury. In essence he submits :

- In deciding what is fair and lawful processing, it is essential to keep in mind that ASBOs are made in open court and that the expectation of the subject is that they will be publicised.
- If the rights of the data subject are generally paramount, the principle is not sacrosanct. At paragraph 78 of *MPs' expenses* this Tribunal indicated a different approach where the expenses arose from the performance of public duties so that an MP would expect greater public scrutiny of his/her conduct. The same approach was justified where the data subject had misconducted himself in public and knew that his ASBO would be made in public and publicly reported.
- The tenor of ***Stanley v Brent*** and the H.O. Guidance is that publicity is the norm.

- Wider publicity, in the geographical sense, is of little practical consequence to the ASBO subject.
- Condition 6 of Schedule 2 was satisfied because Mr. Leigh `s research depended on identification, if the possibility of multiple orders against the same individual in different parts of the country was to be tackled.
- Such research was entirely compatible with the purpose for which Camden `s database had been created, namely the review and monitoring of orders within the borough.

The findings of the Tribunal

25 We focus on the first Data Protection Principle and on the two questions :

- (i) Would this disclosure of names or other means of identification be fair processing?
- (ii) Would it comply with condition 6 of Schedule 2 to DPA 1998?

26 At first blush, the public forum in which an ASBO is made and the related and expected publicity are powerful arguments against Camden `s refusal to identify individuals who are currently subject to such orders. However, such an instinctive response ignores both the safeguards on disclosure imposed by the data protection principles and an important factor in the ASBO regime, highlighted by Mr. Brookes, namely the management of the subject `s conduct over a considerable period of time.

27 Publicity is likely to be a feature of most orders, though the H.O. Guidance, following **Stanley v Brent**, enjoins a pragmatic approach.

28 Nevertheless, we note that any order will normally run for at least two years³. As indicated in paragraphs 14 and 15, we agree with Ms. Proops` submission that publicity long after the making of the order and without regard to the effect of the order and its management on the subject `s subsequent behaviour, is quite different from identification and denunciation when or shortly after the order is made. It is easy to see that, notwithstanding the honourable

³ S.1(9) of the C.A.D.A. 1998

motives of the serious journalist publishing the results of a responsible investigation, it may be seen by the subject as an unjustified humiliation which takes no account of the improvements in his behaviour which have followed the making of the order. Such a reaction would be understandable where real progress has been made and its consequences could be damaging for the subject and the future course of the ASBO.

29 We observe that where, by contrast, the subject `s behaviour infringes the restrictions which the ASBO imposes, there is power to prosecute him/ her for an offence carrying a significant sentence, which will attract further deserved publicity in any event.

30 We are much less impressed by the argument that the unexpectedly wide publicity resulting from publication in the national media would constitute unfair processing. ASBO prohibitions may extend beyond the local government area where the subject is active and its immediate neighbours. More importantly, we do not think that communication of a name to distant strangers is as likely to affect the subject as to his or her neighbours or social contacts.

31 In our judgement, there is a persuasive case that processing of such data long after the making of the relevant ASBO is unfair.

32 Even if that view were wrong, we do not consider that condition 6 of Schedule 2 is satisfied in this case because processing by Camden, that is to say communication of names or other identifying features to Mr. Leigh, is not shown to be necessary for the purposes of his research.

33 It was accepted by the I.C. that other identifiers would suffice for the purpose of establishing whether the same individual had been the subject of multiple orders within a given local government area, whether Camden or other areas covered by Mr. Leigh `s research. We heard no evidence to suggest that ASBO subjects tend to migrate in significant numbers to other parts of the country during the currency of their orders, though Mr. Brookes, for example, might be expected to know of such a problem, if it exists, in the course of monitoring and supervising a large number of orders over several years. Given that a large proportion of orders in Camden relate to people with drug dependency problems, we believe that the opposite is likely to be the case.

34 Even if the processing were shown to be necessary, condition 6 requires that we ask ourselves whether it would be “unwarranted in (this) case by reason of prejudice to the rights

and freedoms or legitimate interests” of the subjects of these orders. If, contrary to our view, it were necessary, we think it would be unwarranted because the very limited additional value to the research provided by the identification of the subjects would be substantially outweighed by the damage that would probably be done in some cases by belated publicity, as discussed in paragraph 28 above. Such damage would amount to prejudice to their legitimate interests and possibly their rights under Article 8.

35 Given those conclusions, we do not have to rule on the problems arising from the exclusion of particularly vulnerable subjects from the I.C. `s order. Nevertheless, we observe that, in our opinion, such a condition would impose substantial and unjustified burdens on those who administer the ASBO regime in Camden and other local government authorities and would have diminished significantly such value to Mr. Leigh `s research as was said to result from identification.

36 It is similarly unnecessary to reach a firm conclusion on the alleged infringement of the second data protection principle, though we are inclined to doubt whether the purpose of processing would be incompatible with the purposes for which the data were obtained. Whilst disclosure would be to the world at large, compatibility can only be judged against Mr. Leigh `s intended purpose, when compliance with condition 6 is in issue.

Conclusion

37 For these reasons, we rule that the Decision Notice was not in accordance with law and that Camden is not required to comply with paragraph 32.

David Farrer Q.C.

Deputy Chairman

Date 14th December, 2007