



**Information Tribunal Appeal Number: EA/2008/0033
Information Commissioner's Ref: FS50114962**

**Preliminary Hearing Heard at Procession House,
London, EC4
On 5th September 2008**

**Decision Promulgated
25 September 2008**

BEFORE

CHAIRMAN

ANNABEL PILLING

and

LAY MEMBERS

**JACQUELINE BLAKE
MARION SAUNDERS**

Between

JOHN BENNETT

Appellant

and

INFORMATION COMMISSIONER

Respondent

Decision

The Tribunal grants the application of the Information Commissioner and this Appeal is struck out under Rule 9 of the Information Tribunal (Enforcement Appeals) Rules 2005.

Reasons for Decision

Introduction

1. Mr. Bennett was involved in an incident on 4 March 2004 involving police officers from the Devon and Cornwall Constabulary. He later made a complaint against the police officers for the use of excessive force when he was arrested. This complaint was investigated by the Devon and Cornwall Constabulary's Professional Standards and Performance Department and, subsequently, by the Independent Police Complaints Commission.

The Request for Information

2. By letter dated 12 April 2005, Mr. Bennett requested that Devon and Cornwall Constabulary (the "Police") provide him with "copies of statements and pocket books of the three officers involved in the incident at the Castle, Bude on 4 March 2004 which was dealt with by the Professional Standard Department" and "a copy of statement from Kenneth Peter Bennett".
3. The Police replied substantively on 31 May 2005, outside the 20 day statutory time for compliance, refusing to provide the information sought claiming that it was exempt from disclosure under the Freedom of Information Act 2000 (the "FOIA") under sections 30(1), 40(2) and 41. At that stage, the Police did not rely on section 40(1), which was raised during the investigation by the Information Commissioner. The Police explained further that Mr. Bennett may be entitled to some of the information sought under the Data Protection Act 1998 (the "DPA") and stated that it had forwarded his details to its Data Protection Unit to contact Mr. Bennett separately.
4. Following correspondence with the Information Commissioner, Mr. Bennett requested an internal review of the Police's decision on 20 February 2006. The

internal review upheld the original decision and Mr. Bennett was notified of the outcome on 23 March 2006.

The complaint to the Information Commissioner

5. On 4 April 2006 Mr. Bennett contacted the Information Commissioner to complain about the way the Police had handled his request for information.
6. In March 2007 the Information Commissioner began to investigate the substantive complaint and concluded that the disputed information amounted to Mr. Bennett's personal data and was therefore exempt from disclosure under section 40(1) of the FOIA. A public authority need not comply with the duty to disclose under section 1 of the FOIA where any of the absolute exemptions provided for by the FOIA apply. Section 40(1) of the FOIA is an absolute exemption. This means that the information is not disclosable regardless of any public interest there may be in disclosure. As a result, the Information Commissioner did not go on to consider the other exemptions claimed. A Decision Notice was served dated 12 March 2008 setting out the reasons for this conclusion.
7. The Information Commissioner also determined that the Police had breached various parts of section 17 of FOIA as follows:
 - i) section 17(1) in that it exceeded the statutory time limit for responding to a request;
 - ii) section 17(1) in that it failed to issue a refusal notice in respect of the statements of the police officers (as opposed to the notebooks of the police officers and the statement of the other individual); and
 - iii) section 17(1)b in that it failed to specify section 40(1) of the FOIA as an exemption and section 17(1) (c) in that it failed to state why that exemption applied.

The Information Commissioner did not require any remedial action to be taken in respect of these.

The Appeal to the Tribunal

8. On 24 March 2008 Mr. Bennett appealed to the Tribunal against the Decision Notice "in its entirety". Three separate Grounds of Appeal were set out:
 - a) that the Information Commissioner found against the Police under section 17(1) of FOIA but went on to explain that he did not intend to take the issue further;
 - b) that the Information Commissioner did not recommend to the Police that the Police could edit the statements; and
 - c) that the Information Commissioner does not appear to have asked for an explanation from the Police as to why the Police only have statements from two of the three officers involved in the incident.
9. The Information Commissioner served a Reply dated 21 April 2008 submitting that the Notice of Appeal disclosed no valid grounds of appeal and applying for the appeal to be struck out under Rule 9 of the Information Tribunal (Enforcement Appeals) Rules 2005, alternatively to dismiss the appeal on the merits under Rule 10 of the Information Tribunal (Enforcement Appeals) Rules 2005 on the basis that the appeal does not have a realistic prospect of success.
10. A Directions hearing was held on 20 June 2008. Mr. Bennett was given the opportunity to reframe his appeal and, specifically, to provide written representations as to:
 - i) what reasonable grounds of appeal were disclosed in the Notice of Appeal such that the appeal should not be struck out under Rule 9;

- ii) the reasonable prospect of success such that the appeal should not be dismissed summarily under Rule 10;
- iii) why an oral hearing would be necessary if he disagreed with the Information Commissioner's view that the matter could properly be dealt with by way of a paper hearing.

11. Mr. Bennett did not avail himself of this opportunity and no further representations were received. The Tribunal is aware that Mr. Bennett and his wife suffer from ill health and have been caused distress arising out of this matter but we must proceed to consider the application to strike out under Rule 9 on the material available.

The Powers of the Tribunal

12. The Tribunal's powers in relation to appeals under section 57 of the FOIA are set out in section 58 of the FOIA, as follows:

(1) If on an appeal under section 57 the Tribunal considers-

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

13. Under Rule 4 of the Information Tribunal (Enforcement Appeals) Rules 2005, an appeal against a Decision Notice must be made in writing and must state the grounds of appeal.

The Issues for the Tribunal

14. The Information Commissioner has applied for the appeal to be struck out under Rule 9 of the Information Tribunal (Enforcement Appeals) Rules 2005 on the basis that the Notice of Appeal discloses no reasonable grounds of appeal. The material parts of Rule 9 provide as follows:

9. (1) where the Commissioner is of the opinion that an appeal does not lie to, or cannot be entertained by, the Tribunal, or that the notice of appeal discloses no reasonable grounds of appeal, he may include in his reply under Rule 8(2) above a notice to that effect stating the grounds for such contention and applying for the appeal to be struck out.

(2) An application under this rule may be heard as a preliminary issue or at the beginning of the substantive appeal.

(3)

15. There is currently no guidance provided for the Tribunal on the circumstances in which it will be appropriate to strike out an appeal under Rule 9. Unlike the summary dismissal of an appeal under Rule 10, the Rules do not prescribe the procedure to be followed, save to allow the Tribunal the discretion to deal with the application as a preliminary issue or at the beginning of the substantive appeal.

16. The Tribunal did not consider it to be in the interests of either party, or in the wider public interest, for this matter to proceed to a full hearing in light of the application made by the Information Commissioner for the appeal to be struck out. It may be that there will be occasions in which it is considered appropriate to direct that the parties prepare for the substantive hearing before the application under Rule 9 is determined but, bearing in mind the inevitable costs and time that would be expended, we are of the opinion that these occasions will be rare.
17. Although no procedure for the determination of an application under Rule 9 is prescribed by the Rules, the Tribunal considered it appropriate in this case to adopt the procedure prescribed under Rule 10. As outlined above, Mr. Bennett was notified that the Tribunal proposed to determine the issue, he was given the opportunity to make written representations against the proposal and to request the Tribunal to hear oral representations.
18. The first question for the Tribunal is to define what amounts to a reasonable ground of appeal. The Tribunal must then go on to apply that definition to the grounds of appeal advanced by Mr. Bennett in his Notice of Appeal. If there is no reasonable ground of appeal, the Tribunal must grant the application of the Information Commissioner for the appeal to be struck out under Rule 9.
19. We consider that the language used in Rule 9 is unambiguous. A reasonable ground of appeal is one that is readily identifiable from the Notice of Appeal, relates to an issue the Tribunal has jurisdiction to decide and is realistic not fanciful.
20. We have considered each of the three grounds of appeal contained within Mr. Bennett's Notice of Appeal.

That the Information Commissioner found against the Police under section 17(1) of FOIA but went on to explain that he did not intend to take the issue further;

21. The Information Commissioner did not order any remedial steps in relation to the breaches of section 17 because the matters had, in effect, been resolved by the

subsequent responses and disclosure. Requiring the Police to comply with section 17 at this stage would not serve any practical purpose. Complaints relating to the way in which the Information Commissioner and his staff dealt with the complaint are not matters for this Tribunal. Our jurisdiction is limited to the consideration of the Decision Notice and related matters as outlined above. This is not, therefore, a ground of appeal.

That the Information Commissioner did not recommend to the Police that the Police could edit the statements

22. The Police had informed Mr. Bennett that he may be entitled to some of the requested information under the DPA. Where a public authority identifies that information requested under the FOIA is in fact the applicant's personal data it should advise them of this fact and automatically process the request under the DPA, albeit subject to any applicable fee and necessary identification.

23. Mr. Bennett in fact made a subject access request under the DPA on 6 June 2006. The Police disclosed some information but Mr. Bennett was dissatisfied with the outcome and complained to the Information Commissioner under section 42 of the DPA. An assessment was carried out and the outcome communicated to Mr. Bennett by letter dated 19 June 2006. The Police have subsequently made further disclosure to Mr. Bennett. He has now received redacted copies of the pocket notebooks of the three officers.

24. As the Information Commissioner had concluded that the information amounted to personal data, he had no power in a Decision Notice issued under the FOIA to go on to consider whether the applicant is entitled to any personal data under the DPA. In other words, the only recourse open to Mr. Bennett with regard to personal data is to submit a request for assessment to the Information Commissioner. Since the assessment was concluded in June 2006 the Information Commissioner has issued new guidance about what is personal data. The Information Commissioner has indicated that in light of this new guidance and Mr. Bennett's complaint that the police should have been recommended to disclose edited versions of the

statements, the matter will be passed back to the Data Protection Casework division for reconsideration, although Mr. Bennett was advised that this did not necessarily mean that either the original Data Protection Assessment or Decision Notice was incorrect or that the new review would lead to the disclosure of the information sought.

25. This does not, therefore, amount to a ground of appeal against the Decision Notice.

That the Information Commissioner does not appear to have asked for an explanation from the Police as to why the Police only have statements from two of the three officers involved in the incident.

26. The Information Commissioner in his Reply, acknowledged that this was not specifically detailed in the Decision Notice. Although there is no requirement on the Information Commissioner to give specific details of the investigation, he explains that this issue was raised with the Police. The Police advised that no record of a third statement had been found and that they were happy to confirm to Mr. Bennett that this information is not held. This criticism of the Information Commissioner does not amount to a ground of appeal; the Tribunal has no jurisdiction over such matters.

Conclusions

27. We consider that the language used in Rule 9 is unambiguous; a reasonable ground of appeal is one that is readily identifiable from the Notice of Appeal and is realistic not fanciful.

28. For the reasons set out above, we have concluded that the Notice of Appeal discloses no reasonable ground of appeal and accordingly the appeal must be struck out under Rule 9 of the Information Tribunal (Enforcement Appeals) Rules 2005.

29. Our decision is unanimous.

Signed:

Annabel Pilling

Deputy Chairman

Date 10 September 2008