



Tribunals Service

Information Tribunal

Information Tribunal Appeal Number: EA/2009/0037

Information Commissioner's Ref: FS 50165494

**Decided on the papers
5 August 2009**

**Decision Promulgated
24 August 2009**

BEFORE

DEPUTY CHAIRMAN

ROBIN CALLENDER SMITH

and

LAY MEMBERS

HENRY FITZHUGH

DAVE SIVERS

Between

JOHN CARLETON

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

THE MINISTRY OF JUSTICE

Additional Party

Subject matter:

Freedom of Information Act 2000

Duty to advise and assist s. 16

Absolute exemptions

- Personal data s. 40

Cases:

Armstrong v Information Commissioner and HMRC (EA/2008/0026)

Representation:

For the Appellant: Mr John Carleton

For the Respondent: Mr Mark Thorogood (Solicitor for the Information Commissioner)

For the Additional Party: Ms Louise Marriott (Solicitor, Treasury Solicitor's Department)

Decision

The Tribunal upholds the decision notice dated 19 March 2009 and dismisses the appeal.

Reasons for Decision

Introduction

1. This appeal is about an individual's attempt to obtain personal data -- the details of the result, plea and penalty in relation to a named person – in relation to someone who had appeared before a specific Magistrates Court on a particular day charged with particular offence.
2. The Appellant complains not only about the delays in getting responses to his complaint but also about what he regards as incorrect decisions by the Information Commissioner under Section 16 and Section 40 FOIA.
3. The Appellant also complains that he paid £25 to HMCS which he believed was so that he could be provided with a Memorandum of Conviction. He stated that the cheque was cashed but nothing was provided in return.

The request for information

4. Mr John Carleton (the Appellant) wrote to Worcester Magistrates Court on 31 December 2006 asking for details of the “charges, verdict and the imposition of the court” in relation to a named individual (a relative) who had appeared before the court on a specific date earlier that month.
5. The Appellant stated he would like the full information -- without the named individual being aware that he had requested or been given the information direct from the court -- because he wanted to help the individual financially.
6. At the time of the request HMCS was not a public authority itself but was an Executive Agency of the Department of Constitutional Affairs (DCS). The DCS’s responsibilities were subsequently assumed by the Ministry of Justice (MOJ), who was joined as an Additional Party in the appeal hearings. For clarity HMCS has been treated as if it was the public authority.

7. Her Majesty's Court Service (HMRC) responded by writing to the Appellant on 6 February 2007 stating:

"Under our Data Protection Policy, no information relating to any person or case is to be given to a third party as a general rule. If you are seeking to help [relative redacted] then it is suggested that you contact [gender redacted] directly in order to obtain the information."

8. On 13 February 2007 the public authority responded in accordance with the provisions of section 1 (1) (a) of FOIA in confirming or denying that it held the information requested. On 5 March 2007 the Appellant requested an internal review from the court and on 17 April 2007 that review was conducted and the Appellant was told the public authority had not changed its view.

The complaint to the Information Commissioner

9. Dissatisfied with this final response the Appellant wrote to the Information Commissioner on 7 June 2007 to complain about the way his request for information had been handled. The Appellant also specifically asked the Information Commissioner to consider whether the public authority had provided sufficient advice and assistance to him.
10. There was a significant delay in dealing fully with the Appellant's complaint. The Decision Notice was not issued until 19 March 2009, 21 months after the original complaint.
11. In April 2009 the Appellant submitted a further appeal (out of time) against the Information Commissioner's conclusions on the operation of section 40 (5) (b) (i) of FOIA. The Tribunal has also dealt with this out of time appeal in the matters before it, in the interests of justice, because all the issues raised have been fully canvassed in the responses, particularly in the Reply and Submissions provided by the MOJ as an additional party.
12. HMCS confirmed -- in answer to the Information Commissioners initial questions -
- that if recorded information was held that was relevant to the request it would be

held in one of three locations: (1) the paper and electronic case files; (2) the Court Register and (3) the fines paid on the Court's accounts system.

13. HMCS identified an alternative regime for entitled members of the public to access information contained in the Court Register. This was governed by the Criminal Procedure Rules requiring the Register to be "open to inspection during reasonable hours by any Justice of the Peace or any person authorised in that behalf by a Justice of the Peace or the Lord Chancellor".
14. Anyone wishing to inspect the Court Register could apply to do so in accordance with Rule 6.1 (15) of the Criminal Procedure Rules. The process was that the enquirer should write to the Court Manager detailing the request and asking for an appointment at court to make a formal request to a Justice of the Peace or District Judge. A convenient appointment time would be arranged for the enquirer to attend court in person to present the application and the Court hearing the application would either grant or refuse the request.
15. The Information Commissioner considered whether Section 16 (1) (Advice and assistance provided by the public authority) had been complied with by HMCS in respect of the Appellant's request and in all the circumstances concluded it would not have been reasonable to expect the public authority to have provided advice and assistance to the Appellant and that HMCS had not breached the requirements of the section. The Information Commissioner noted at the conclusion of the decision notice, however, that it was Good Practice to immediately direct requestors to alternative access regimes (such as Rule 6.1 (15) of the Criminal Procedure Rules in this particular example) when such regimes exist.
16. The Information Commissioner noted that – save in rare scenarios – FOIA was "motive blind". He then considered whether HMCS would have been automatically excluded from the duty imposed on it by the provisions of section 1 (1) (a) by virtue of the provisions of section 40 (5) (b) (i). The conclusion (expressed in Paragraph 34 of the Decision Notice) was that the Information Commissioner was satisfied in this case that the requested information, if held, would be the third party's personal information. The Information Commissioner

accepted that the information relating to the charges against a person in court (if held) and the verdicts of the court (if held) clearly fell within the description of personal data as defined by the Data Protection Act because it was information which directly related to a living individual. The Information Commissioner was also satisfied that -- if there was information held -- there was no possibility of information falling within the scope of the request without being the individual's personal data.

17. In essence the Information Commissioner had to consider whether the proper approach that should have been adopted by HMCS to this request should have been first to consider whether or not, in responding to the request, HMCS would have been excluded from the duty imposed by section 1 (1) (a).
18. The Information Commissioner was "inclined to agree that in this case to reveal to the whole public whether someone was subject to a court case would be unfair. He does not feel that releasing sensitive personal data into the public domain will be fair unless there are exceptional circumstances. He considers that there is a general and reasonable expectation that if someone was to appear in court that the information would not be later released into the public domain. The Commissioner is of the view that even if there was sensitive personal data that was disclosed in open court at the time of prosecution/sentencing, it would not be in a defendant's reasonable expectations that there will be a later disclosure to the general public. This is supported by the reasoning of the Information Tribunal's decision in *David Armstrong and the Commissioners for Her Majesty's Revenue and Customs [EA/2008/0026] Paragraph 84.*"
19. The Information Commissioner decided HMCS did not have a duty to comply with section 1 (1)(a) FOIA on the basis of the exemption contained at section 40 (5) (b) (i) and that HMCS did not breach section 16 (1).
20. The Information Commissioner noted -- in the **Other Matters** section of the notice -- that this was a complex case and he could comprehend HMCS's failure correctly to apply section 40 (5) (b) (i). He encouraged public authorities always initially to consider the possibility of the application of this section when considering responses to requests of this nature in the future. That would ensure

the public authorities remain focused on their responsibilities under the Data Protection Act as well as FOIA when responding to requests.

The questions for the Tribunal

21. Is the Information Commissioner's decision in respect of Section 16 (1) FOIA correct?

22. Is the Information Commissioner's in respect of Section 40 (5) (b) (i) correct?

Relevant Legal Provisions

23. Section 1 of the Act provides in relevant part that:

“(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

24. Section 16 of the Act provides in relevant part as follows:

“(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection 1 in relation to that case”.

25. Section 21 of the Act provides in relevant part as follows:

“(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)—

(a) Information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information

available for inspection) to members of the public on request, whether free of charge or on payment...

26. Section 32 of the Act provides in relevant part as follows:

“(1) Information held by a public authority is exempt information if it is held only by virtue of being contained in—

(a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,

(b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or

(c) any document created by—

(i) a court, or

(ii) a member of the administrative staff of a court,

for the purposes of proceedings in a particular cause or matter.

[...]

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of this section...

27. Section 40 of the Act provides in relevant part as follows:

“Personal information

[...]

(1) 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.

(2) 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).

(5) The duty to confirm or deny—

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

[...]

(7) In this section—

“the data protection principles” means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section (1) of that Act;

“data subject” has the same meaning as in section 1(1) of that Act;

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

28. Section 44 of the Act provides in relevant part that:

“(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—

(a) is prohibited by or under any enactment,

(b) is incompatible with any Community obligation, or

(c) would constitute or be punishable as a contempt of court.

(3) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).”

29. Section 1(1) of the Data Protection Act 1998 ('DPA 1998') provides in relevant part that:

"In this Act, unless the context otherwise requires –

"data" means "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..."

30. Section 2 of the DPA 1998 provides in relevant part:

"In this Act, 'sensitive personal data' means personal data consisting of information as to:

(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings."

Conclusion and remedy

31. Having considered all the submissions provided by all the parties the Tribunal is satisfied that HMCS complied with the obligations imposed on it by s. 16 (1) FOIA to give the Appellant advice and assistance, although it appears to the Tribunal that it was extremely slow in so doing.

32. None of the provisions set out in Section 45 of the Code of Practice were relevant in the circumstances of this case although it is clear that when there are alternative access regimes, individuals like the Appellant should be pointed towards them as quickly and efficiently as possible. The Tribunal can understand the Appellant's frustration in this respect. The Tribunal also hopes -- although it cannot order -- that if £25 was paid by the Appellant towards the provision of a copy of a Memorandum of Conviction (which he never received) it is refunded in full by HMCS.

33. The Tribunal is satisfied that HMCS did not have a duty to comply with section 1 (1) (a) of FOIA because of the exemption contained in section 40 (5) (b) (i) for all the reasons set out in more detail at Paragraphs 16 to 19 above in this decision.
34. The Tribunal notes that there are apparently anomalies created by the current Freedom of Information and Data Protection legislation in this area and which are mentioned briefly below.
35. If the Appellant, as a member of the public, had attended the court on the relevant date there is no reason to suppose that he would not have been able to hear all the information that he was requesting because it would have been part of the normal, public court proceedings.
36. If the Appellant had found out that the press or the media had covered the case and was able to get a copy of the newspaper report or media broadcast then – although the personal data in question would have been processed by becoming part of those reports – the Appellant would have had legitimate access to the information and the personal data he was seeking.
37. If the local newspaper or media outlet put the court report within a webpage on the internet or as a “podcast” to be downloaded by the Appellant – whether there was a “search” facility on the site allowing specific names or topics to be highlighted and retrieved or not - and then viewed, printed out, played or stored, then all of that is legitimate processing of personal data within the current statutory legislation.
38. However he did not attend the Magistrates Court on the day in question and he was seeking the personal data in relation to the individual – from the court itself - after the event.
39. That situation is not permitted in the Magistrates’ Court by the current Statutory regimes save through the filtering situation incorporating permission to inspect the Court Register made in person on application to a Justice of the Peace.
40. It may well be that the Ministry of Justice wish to draw this appeal, the Good Practice highlighted by the Information Commissioner – and these remarks – to

the attention of HMCS's Justices' Clerks and Legal Managers because it is unlikely that this Appellant's request is the only one of its kind received by the Magistrates' Courts throughout England and Wales.

41. Our decision is unanimous.

42. There is no order as to costs.

Signed

Robin Callender Smith

Deputy Chairman

24 August 2009