



**Tribunals Service**  
Information Tribunal

**Information Tribunal Appeal Number: EA/2009/0020**  
**Information Commissioner's Ref: FS50093195**

**Determined on written submissions**  
**24<sup>th</sup> August 2009**

**Decision Promulgated**  
**16<sup>th</sup> September 2009**

**BEFORE**

**CHAIRMAN**

**David Farrer Q.C.**

**and**

**LAY MEMBERS**

**Marion Saunders**

**And**

**Michael Hake**

**Between**

**DENNIS HEATH**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**Subject matter:** **FOIA S.40(2) AND 40(5)**  
**Schedules 2 and 3 to the Data Protection Act, 1998**

**Cases:** **Bowbrick v Information Commissioner and Nottingham City**  
**Council – EA/2005/0006**

***Home Office and Ministry of Justice v Information***  
***Commissioner – EA/2008/0062***

## **Decision**

The Tribunal upholds the Decision Notice dated 18th February, 2009 and dismisses the appeal.

### **Our Reasons**

#### **Introduction**

- 1 In 1968 a young girl, a close relative of the appellant, was sexually assaulted then killed by a man who was later convicted of manslaughter, on the ground of diminished responsibility (“the killer”). He was sentenced to life imprisonment, the trial judge apparently expressing the view that he should never be released.
- 2 In June, 1992, a ten – year tariff for that sentence was set in accordance with paragraph 9 of Schedule 12 to the Criminal Justice Act, 1991 ( which contained transitional provisions applicable to current prisoners sentenced before the commencement of new provisions applicable to lifers whose offence involved seriously violent or sexual features ).
- 3 For many years before FOIA was enacted the Appellant sought information as to the killer `s sentence from the National Offender Management Service, which was until April, 2008 an agency answerable to the Home Office and thereafter to the Ministry of Justice (“the Authority”). On 16<sup>th</sup>.January, 2005, the Appellant made a Request under FOIA in these terms :

*Please provide me with these further details:-*

1. *The name of the official who set the tariff in 1992.*
2. *The department of the Home Office in which the official was employed at the time the tariff was set.*
3. *The position of the official in this department.*

4. *The name of the Secretary of State responsible for the department in which this official was employed at this time.*
5. *If the Secretary of State who was responsible for setting this tariff and who delegated this function to an official was not the Home Secretary, please provide details of the transfer of function under the Ministers of the Crown Act 1975.*
6. *If the Secretary of State who was responsible for setting the tariff transferred this function to another minister please provide details of the transfer under the above Act.*
7. *Please provide a copy of the certificate issued by the Secretary of State as required under Paragraph 9 of Schedule 12 of the Criminal Justice Act 1991.”*

4 In a further Request addressed to the Home Secretary, dated 21<sup>st</sup>. August, 2005, the Appellant repeated such requests and posed further questions which do not affect this appeal.

5 The Authority provided certain information but, put shortly, refused, by letter of 27<sup>th</sup>. January, 2005 and subsequently, to disclose the certificate or the identity or status of any official involved. In doing so, it relied on the exemption to the general duty to provide information, which is contained in s.40(2) of FOIA, namely information, disclosure of which, otherwise than under FOIA, would breach any of the data protection principles. Since the killer died in 2007, a fresh request, in so far as it related to his data, would no longer engage s.40, a feature of this appeal which , taken together with the release of other requested information, has caused the Tribunal to question the practical value of its decision to the outcome of this Request.

6 The complaint to the Information Commissioner

The Appellant complained to the Information Commissioner (“The IC”) on 27<sup>th</sup>. October, 2005. There was then a lamentable delay of about ten months, for which the IC rightly apologised in the Decision Notice, before the Authority was notified of the complaint. A belated internal review then took place, the result of which was communicated on 28<sup>th</sup>. June, 2007. The certificate was provided to the Appellant in

redacted form., together with other requested information. For the first time, reliance was further placed on s.38 of FOIA, a contention of which we need say no more. A series of exchanges between the IC and the Authority followed. The details do not need to be recorded here.

7 On 11<sup>th</sup>. October, 2007, the Authority supplied a redacted copy of the certificate to the Appellant (name of responsible official withheld), having had regard to the recent death of the killer. From the standpoint of the Appellant, as distinct from the general public, The name of the official fell within the scope of the information request. His name subsequently appeared, however, at page 159 of the agreed bundle of documents prepared for the Tribunal. The Ministry of Justice, by letter of 7 July 2009 to the Appellant, made a formal disclosure of the name of the official and confirmed, also, that he had consented to the release of his name. This in effect fulfilled the final element of the information request made by the Appellant

8 It is not obvious what substance thereafter remained in his complaint, though, as the IC made clear in the Decision Notice, the Authority had breached FOIA in a number of respects in handling it.

9 By his Decision Notice of 18<sup>th</sup>. February, 2009, the IC upheld the refusal of (by then) the Ministry of Justice but in reliance on s.40(5)(b)(i), which, he said, made any consideration of s.40(2) redundant . In paragraph 20 he identified as the substantive issue whether the Authority, at the date of the Request, should have refused to confirm or deny that it held relevant information, pursuant to s.40(5)((b)(i). He further found that the authority was in breach of s.17 in a number of respects, against which findings no appeal is brought.

10 So far as material, s.40 provides :

*40 Personal information*

- -

*(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 [1998 c. 29.] 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*

*- - -  
(b) - - -*

*(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 - - -*

It is apparent that both s.40(2) and s.40(5)(b)(i) depend for their application on breaches of any of the data protection principles. Whether any of those principles would be breached by confirmation or denial or by supply of the requested information, is contested by the appellant.

## 8 The questions for the Tribunal

A number of related issues are raised by the Appellant. Some, such as the lawfulness of ministerial actions, lie outside our jurisdiction. We conclude that the material questions are :

- (i) Was the IC entitled, or indeed obliged, to have regard to s.40(5)(b)(i) in reaching his decision, given that the authority had not relied upon it ?
- (ii) Would confirmation or denial (s.1(1)(a)) or communication of the requested information(s.1(1)(b)) breach any of the data protection principles ?
- (iii) If so, which of those provisions should the authority have invoked ?

- 9 The answer to (i) is plainly “Yes”. If communication of information would breach a data protection principle, hence the rights of a data subject, then the IC should protect those rights, whether or not the authority claims the exemption, be it under s.40(2) or s.40(5)(b)(i). In **Bowbrick v Information Commissioner and Nottingham City Council EA/2005/0006** (at paragraph 51) and **Home Office and Ministry of Justice v Information Commissioner EA/2008/0062** (at paragraph 75), the Tribunal approved reliance on s.40 in cases where it had been ignored either wholly or initially by the public authority. Indeed, it is arguable that there is an obligation to invoke s.40 exemptions where they apply, given the possible consequences to data protection rights.
- 10 The answer to (ii) raises several sub – issues argued by the Appellant.
- 11 The rights of two data subjects are under scrutiny, namely the killer and the official who signed the tariff certificate. Clearly, the “personal data” of each of them, as defined in s.1 of the Data Protection Act, 1998 (the “DPA”), are involved.
- 12 As to the killer, the certificate contains additionally “sensitive personal data” as defined in s.2(g) and (h) (the commission of offences and the sentence of a court in related proceedings).
- 13 The data protection principles are found in Schedule 1 to the DPA. In addition to fair and lawful processing of personal data they require that at least one condition in Schedule 2 is met and, as to sensitive personal data, at least one of the conditions in Schedule 3. So, in relation to the killer, the Schedule 3 requirement applies
- 14 The Appellant contends that the condition provided for by paragraph 3 (a) or (b) of Schedule 3 is satisfied. Paragraph 3 requires the processing to be necessary :-

*(a) in order to protect the vital interests of the data subject or another person, in a case where-*

*(i) consent cannot be given by or on behalf of the data subject, or*

*(ii) the data controller cannot reasonably be expected to obtain the consent of the data subject, or*

*(b) in order to protect the vital interests of another person, in a case where consent by or on behalf of the data subject has been unreasonably withheld.*

Leaving aside the factor of consent, no vital interest is engaged here. We accept the IC `s submission that "vital" means just that – a matter of life or death. The Appellant's appraisal of the importance of this issue, given his relationship to the girl, is understandable. It does not, however, satisfy such a test.

- 15 The Appellant further argues that all the requested information as to the killer is already in the public domain. The only related condition in Schedule 3 is paragraph 5, which requires that data have been made public as a result of steps deliberately taken by the data subject, which was plainly not the case here.
- 16 That information was communicated to the Appellant before the enactment of the DPA is, with respect, immaterial, since the DPA contains no relevant exception. Moreover, as the Appellant rightly observed in his submissions, the DPA and FOIA are concerned with the disclosure of information to the world at large, not by arrangement to a private individual.
- 17 Since, in our judgement, none of the Schedule 3 conditions is satisfied in relation to the killer, the appeal must to that extent fail, regardless of compliance with Schedule 2 conditions.
- 18 As to the official who signed the certificate, no argument has been advanced to demonstrate fulfilment of any Schedule 2 condition and the Tribunal finds nothing to suggest that any of them is satisfied.
- 19 Given those conclusions, we turn to the final issue, namely whether the authority should have refused to confirm or deny under FOIA s.1(1)(a) that it held this information, including the certificate. Given that the Appellant and anybody else who chose to consider the matter would realise immediately that it did, this may be thought an odd provision to come into play in this case. Nevertheless, if that is the effect of s.40(5)(b)(i), that is the course that the Authority should have taken.

20 Whether confirmation or denial would, of itself, breach any of the data protection principles depends, in our view, on whether such a communication constitutes “processing” of data. We conclude that it does because it involves the “retrieval” of data in the form of the certificate ( see paragraph (b) of the definition of “processing” in s.1 of the DPA ) and subsequent disclosure ( paragraph (c)) of the fact that a tariff had been set. If no tariff had been certified, a denial would equally have amounted to disclosure of the same category of data. As already noted, earlier knowledge possessed by one or more third parties (including the Appellant) does not prevent confirmation from amounting to disclosure.

21 We do not consider that any issue as to the public interest arises in relation to this provision.

22 FOIA s..2 provides :

**2.** - (1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either-

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,

section 1(1)(a) does not apply.

As to s.40, s.2(3)(f) provides that subsection (1) and subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of s.40(3)(a)(i) or (b), confer absolute exemptions. Section 40(3)(a)(i) applies where disclosure to a member of the public other than under FOIA would breach any of the data protection principles.

23 For the purpose of s.40(5)(b)(i), “the provision” conferring absolute exemption is s.40, which, by reason of s.40 (3)(a)(i) confers an absolute exemption for the purpose of s.2(1)(a).



24 Accordingly, the authority should have relied on s.40(5)(b)(i) so that s.40(2) did not come into play.

25 For these reasons we uphold the Decision Notice and dismiss this appeal.

Signed:

David Farrer Q.C.

Deputy Chairman

Date: 16<sup>th</sup> September 2009