Tribunals Service
Information Rights

Information Tribunal Appeal Number: EA/2009/0055
Information Commissioner's Ref: FS50197501

Heard at Procession House, London, EC4
On 9 December 2009

Decision Promulgated
On 25 January 2010

BEFORE

THE DEPUTY CHAIRMAN
DAVID MARKS QC
(SITTING ALONE)

Between

THE RT HON FRANK FIELD MP

Appellant

and

INFORMATION COMMISSIONER

Respondent

Representation:

The Appellant in person

The Respondent was neither present nor represented
(however, see paragraph 4 of decision)

Decision

The Tribunal grants the Respondent's application for a summary dismissal of this Appeal.

Reasons for Decision

General

1. This is an application by the Information Commissioner ("Commissioner") to strike out the Appellant's request under the Freedom of Information Act 2000 (FOIA). The request was for information regarding a disciplinary process which occurred in connection with a public authority's control over one of its operatives who had certain professional duties which it was alleged were broken in a fraudulent manner. The process was in effect a counter-fraud investigation. Very little background is needed but it will be referred to below in brief insofar as it applies to this application.

2. The Appellant is a well known Member of Parliament. That fact of itself is irrelevant to the application. However the Appellant appears to accept that, as will be seen in the course of this ruling, his position has been regarded by him, at least, as material to the way this application and the appeal as a whole should be conducted. The Appellant also accepts that the Appellant's motives are to seek to investigate further the counter-fraud process or processes used or to be used by the public authority in the past and/or in the future.

3. The progress of this application regrettably has been somewhat protracted. Every effort was made by the Tribunal to accommodate the Appellant who has for some time been on notice of this application but who has at all times acted in person. It is possible that more recently he has received some information or input from third parties but that is not at all clear nor indeed is it relevant.

4. The Tribunal has at all times been anxious to ensure that all possible arguments have been deployed by both parties in order satisfactorily to resolve this application.

Acting by the Deputy Chairman alone the Tribunal directed that an oral hearing be heard. Only the Appellant attended. This was perhaps underestimated at the time. The Appellant had not provided further arguments and the Commissioner was given permission not to attend.

5. In any event at the completion of the oral hearing the Tribunal again directed that further written submissions be produced. The Tribunal feels it entirely fair to say that it is only in the wake and in the light of those further submissions that what can be seen as the true issues have been addressed.

Jurisdiction to strike out

6. This is an application by the Commissioner under those provisions in Information Tribunal (Enforcement Appeals) Rules 2005 which deals with striking out. The material parts of the relevant Rule being Rule 9 provide as follows, namely:

> "(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 a 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".

7. The definition of what amounts to a reasonable ground of appeal was addressed in *Bennett v ICO* (EA/2008/0033) where it was said that a reasonable ground of appeal is one that is "readily identifiable" from the Notice of Appeal, that relates to an issue which the Tribunal has jurisdiction to decide, and which is "realistic, not fanciful". See also *Reed v Information Commissioner* (EA/2008/0095).

8. Reference however, should also be made to Rule 10 of the above Rules which provides as follows with regard to what is called the summary disposal of appeals, namely:

> "10(1) Where, having considered -

(a) the notice of appeal, and

(b) any reply to the notice of appeal,

the Tribunal is of the opinion that the appeal is of such a nature that it can properly be determined by dismissing it forthwith. It may, subject to the provision of this rule so determine the appeal."

9. The upshot of these provisions is that even though the Commissioner is fully entitled to address the contents of the relevant notice of appeal on the basis that the same discloses no reasonable course of action in the manner enunciated above, nonetheless, the Tribunal retains an obligation towards the parties to consider whether there should in all the circumstances be a summary dismissal. There would, for example, be no justification for a dismissal if it appears to it that there are matters which are deserving of a hearing of some sort either by means of a preliminary hearing or by a full appeal and further either by way of revisiting an earlier application under Rule 9(2) or otherwise.

10. This case is a complex affair even on the admission of the parties. As such the Tribunal must be extremely careful to consider whether there are issues which are deserving of a full hearing within the spirit and breadth of the FOIA as a whole, in particular mindful of the contributions from lay members.

11. In all the circumstances of this case the Tribunal acting by a Deputy Chairman alone is convinced that the Notice of Appeal as amplified during the course of these proceedings is the proper subject for a striking out application. The Tribunal is mindful of the fact that these proceedings occur in the context of a tribunal as distinct from a court of law and that the concept of a Notice of Appeal as reflected in Rule 9 must be given a wide construction so as to include any and all materials which could justifiably be said to relate to the grounds of appeal particularly where as here the Appellant has neither sought nor obtained legal representation. Due allowance must always be made for the litigants in person in a jurisdiction such as the present one where the issues of fact and law are often difficult to grasp. Nonetheless the Tribunal remains satisfied that in all the circumstances this appeal should be struck out on the basis that it reveals no realistic basis in law.

The basic facts

12. The Appellant is as said above a well known Member of Parliament. He has openly expressed concerns about the manner in which investigations have been conducted in a local teaching hospital, namely the Wirral University Teaching Hospital NHS Foundation Trust (the Trust). He made a request in writing by a letter dated 9 January 2009 seeking details of a report conducted by a well known firm of accountants as well as all other papers into and bearing upon what is called a counter-fraud investigation conducted by the Trust into the affairs and activities of a particular Doctor, namely Doctor X. In addition the Appellant sought disclosure of any papers held by the Trust relating to communications with other public bodies regarding the said activities and finally he asked for copies of all email correspondence in relation to the said counter-fraud investigation between the Trust and other bodies. On any basis, the said request was bound to import a consideration of personal data and indeed the sensitive personal data of the doctor involved, namely Doctor X.

13. On 5 February 2008 the Trust neither confirmed nor denied whether information which fell under the scope of the request was held under FOIA. As will be apparent this response lies at the heart of this application.

14. On his own admission and as indicated above the Appellant concedes that the request though framed in terms of the activities of the named doctor was designed to elicit further information about the way in which the Trust conducted counter-fraud investigations and related activities. That admission has to some extent prompted the application to strike out the Notice of Appeal by the Commissioner.

15. The refusal by the Trust to provide any information was thereafter upheld by the Commissioner in a Decision Notice dated 29 June 2009 bearing a reference number FS 50197501.

16. The core of the said Decision Notice for present purposes is to be found in a passage headed “Would complying with the duty to confirm or deny contravene the first data protection principle?” heading paragraphs 29-33 inclusive. It is not proposed to set out those paragraphs in full for present purposes. They can be perused independently.

FOIA and Data Protection

17. Section 40 of FOIA deals with personal information. Insofar as the request relates to the personal information of a party making the request section 40(1) applies. That sub section is not in issue here. It need not be set out any further. Its objective is that where or to the extent that an applicant's request for information captures personal data relating to the Applicant himself that request is to be exclusively determined in accordance with the access provisions of the Data Protection Act 1998 (DPA). The exemption is absolute and therefore not subject to the public interest balancing test which normally applies to qualified exemptions under FOIA, eg disclosure of confidential information etc.

18. Here section 40(2) is material. Section 40(2) provides that:

"(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 sub section (1) and

(b) either the first or second condition below is satisfied."

The conditions which are referred to are those imported into FOIA by the DPA and are commonly called the data protection principles. In effect those principles reflect and are applied as the governing measure of privacy.

19. Insofar as personal data is concerned which relates to an applicant, section 40(5)(a) of FOIA grants an exclusion of what is called under the FOIA the duty to confirm or deny. One of the basic entitlements granted by FOIA to every person who may make a request is the entitlement to be informed in writing by a public authority whether it holds the information requested.

20. From the point of view of the person making the request the duty to confirm means in effect a duty to confirm whether the information exists. Self-evidently an indication of the existence of the information may itself be prejudicial to the person whose personal information or data is in question.

21. In the case of personal data of which the applicant is not the data subject, ie the present case, there are a number of basic requirements. First, the data must relate to a living individual whom it is possible to identify either from the data alone or from such other data. Next the request must be made by an individual who is not the subject of that personal data. The disclosure regime under FOIA is, as it is often put, motive-blind. The Appellant is to be treated as any other member of the public who might not be expected to know of Doctor X's activities or identity.

22. In addition the exemption in section 40(2) will apply to the extent that the information satisfies either of two conditions. The first condition is designed to preserve the privacy of the individual in question. Principally disclosure will not arise if disclosure otherwise than under the DPA would among other things contravene any of the so called data protection principles and/or contravene section 10 of the DPA by causing substantial damage or distress to the data subject. In the first case the exemption is absolute: in the second it is qualified.

23. Section 40(7) of FOIA defines the data protection principles as being those set out in Part I to Schedule 1 of the DPA. However, what is critical in the present case is the position with regard to the duty to confirm or deny. Section 40(5)(b) provides that:

"(5) The duty to confirm or deny

***

(b) does not arise in relation to other information [ie third party 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 …"

In other words if the mere confirmation or denial of the holding of the requested information answering the terms of the request would contravene any or all of the data protection principles then the duty to confirm or deny will be excluded.

24. What is also critical for present purposes is the further issue of whether exclusion of the duty is absolute or qualified. It is absolute in the present case since section 40(2) is treated as conferring an absolute exemption by section 2(3)(f)(ii) of FOIA:

> "… so far as relating to cases where the first condition referred to in that sub section [ie section 40(2)] is satisfied by virtue of sub section (3)(a)(i) or (b) of that section …"

Section 40(3)(a)(i) as indicated above applies where disclosure to a member of the public otherwise than under the DPA would contravene any of the data protection principles. This in turn demands a consideration of the relevant principles

The relevant principles

25. In the present case there is clearly a request for information about the personal data of Doctor X. Moreover, it would constitute so called sensitive personal data as the request for information related to a counter-fraud investigation against the said individual. Although as will be seen below, the Appellant has subsequently taken issue with whether or not sensitive personal data is relevant to the entirety of its request for the present it will be assumed that sensitive personal data is in issue.

26. To comply with the first data protection principle the disclosure of the personal data has to be first fair, second lawful and third meet at least one of the conditions set out in schedule 2 to the DPA. In addition in the case of sensitive personal data at least one of the conditions set out in schedule 3 to the DPA has to be taken into account.

27. Here the Commissioner determined that disclosure would not meet any of the schedule 3 criteria. He therefore did not go on to consider the other aspects of the first data protection principle, ie fairness and lawfulness. However, mention will be made of that below. In passages found in paragraph 29 to 33 of the Decision Notice to which reference has been made the Commissioner dealt with this issue. At paragraph 31 he duly confirmed that having considered the conditions in Schedule 3 he found that none could be met. He therefore determined that to confirm or deny whether the public authority held any information which fell under the regime prescribed by schedule 3 would be a breach of the first data protection

principle. In paragraph 32 he added that he had not gone on to consider whether there was a schedule 2 condition as to which confirmation or denial could be said to apply.

28. In the Tribunal's view the determination of the Commissioner in the Decision Notice cannot be faulted. The Tribunal does not feel it is necessary to set out in detail the criteria prescribed by Schedule 3. It is clear, even from a quick perusal of the various sub paragraphs which might otherwise be thought to apply, that none can possibly be relevant, eg consent by the data subject in accordance with paragraph 1, necessary processing for the protection of the vital interests of the data subject in accordance with paragraph 3, or processing carried out in the course of its legitimate activities by any body or association not established for a profit etc, in accordance with paragraph 4 etc.

29. Even though the Tribunal in the person of the Deputy Chairman has had the benefit of seeing the confidential information which was the subject of the present request, it is in the Tribunal's view clear, that, even without recourse to such material the Commissioner's findings are entirely justified given the fact and content of the request and the ensuing exchanges.

New arguments

30. In the wake of the oral hearing referred to above the Appellant raised new matters which have been responded to in writing by the Commissioner.

31. The Appellant drew attention to two statutory instruments, the first being The Data Protection (Processing of Sensitive Personal Data) (Elected Representatives) Order 2002, (ie SI 2002 No. 2905) which can be called the 2002 Order and the second being The Data Protection (Processing of Sensitive Personal Data) Order 2000 being a SI 2000 No. 417, which can be called the 2000 Order. The first of these statutory instruments relates to processing that is necessary for dealing with requests made by individuals to elected representatives and the second dealing with such processing insofar as exercise the functions conferred by legal authorities is concerned.

32. In relation to the 2002 Order the Appellant contended that the public authority by confirming that it held the information would meet a Schedule 3 DPA condition. The Tribunal respectfully agrees with the Commissioner's response that as indicated above disclosure under FOIA is to the public at large. The Commissioner rightly ignored the status of the Appellant as a Member of Parliament. The key issue, as has hopefully been articulated sufficiently above, is whether confirmation or denial to the general public and not to an elected representative would contravene the data protection principles. The Tribunal therefore dismisses the argument that paragraph 6 or any other paragraph in the 2002 Order is in issue.

33. As for the 2000 Order it is true that part I of the Schedule to the 2000 Order states that sensitive personal data may be processed if the processing is amongst other things "in the substantial public interest" and/or "is necessary for the purpose of the prevention or detection of any unlawful act …".

34. However, the Tribunal again respectfully agrees with the Commissioner in refuting the argument put forward by the Appellant. The processing which is here under consideration is the act of confirming or denying to the public that the information sought is held. That fact and the attendant disclosure cannot be said to be "for the purposes of prevention of the prevention or detection of any unlawful act", quite the contrary; any such confirmation or denial would be for the purpose of disclosure under FOIA and for no other purpose.

35. Moreover, with regard to the Appellant's further contention on the issue that confirmation or denial that the information is held is made initially to the Appellant cannot be viewed as a "necessary first step" to prevent any or any further fraud being prevented or detected. Confirmation or denial in this way or in any other way which results in generalised public disclosure is not "necessary" for the purposes of the prevention or detection of fraud or any unlawful act.

36. Next, the Appellant contends that not all the information requested constituted or constitutes sensitive personal data. The critical considerations are the terms of the request. The request sought papers etc "relating to this matter" with regard to Doctor X's activities and the investigation into his alleged fraud. Irrespective of the motives let alone the merits of the request which in the Appellant's view was sought

principally, if not exclusively, to examine the public authority's investigatory processes generally, neither the Commissioner nor this Tribunal can properly ignore the clear words of the request. Even if sensitive personal data were not in issue it seems that even the Appellant accepts that personal data was in play.

Fairness and lawfulness

37. Quite apart from the more technical issues considered above with regard to sensitive personal data and which the Tribunal regards as determinative the Appellant has failed to contend how confirmation or denial as to whether the information he seeks would constitute processing that was fair and/or lawful and/or meet the Schedule 2 conditions despite having had a number of opportunities so to do.

38. As is common in this kind of case recourse is had to the only condition that is remotely relevant, namely the condition set out in Schedule 2 at paragraph 6.(1) which states as follows, namely:

"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."

Although there is no denying that a clear public interest is involving seeing how counter-fraud investigations are conducted by a public authority such as the public authority in the present case, it is impossible to see how that entails the sacrifice of an individual's right to privacy especially where as here the counter-fraud investigation resulted in the individuals exoneration. The Tribunal does not feel there is a realistic chance of overcoming that conclusion by the holding of a full hearing.

Conclusion

39. Although the Tribunal feels sympathy with the Appellant's concerns it is bound to apply the somewhat technical principles that run throughout FOIA and the DPA. In all the circumstances the Tribunal finds that there is no realistic basis for allowing

the appeal to proceed and in the circumstances grants the Commissioner's application. As indicated above it is perhaps regrettable that it has taken so long to achieve this resolution. However, in mitigation of that fact and of the perhaps undue length of this ruling it can be said that all the issues have now been carefully canvassed by the parties against a background where the issues of law in fact are far from easy.

Signed

David Marks QC
Tribunal Judge

Date: 25 January 2010