IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0240**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50386674

Dated: 4 October 2011

Appellant: **ASHOK MAHAJAN**

First Respondent: **THE INFORMATION COMMISSIONER**

Second Respondent: **THE MINISTRY OF JUSTICE**

Heard at: Field House, by video link

Date of hearing: 20 June 2012

Date of decision: 14 September 2012

Before

CHRIS RYAN

(Judge)

and

HENRY FITZHUGH

ROGER CREEDON

Attendances:

The Appellant represented himself, via video link.

The First and Second Respondents did not attend the hearing.

Subject matter: Duty to confirm or deny s.1(1)(a);

Whether information held s.1; Vexatious or repeated requests s.14;

Personal data s.40

Cases: *Bromley v Information Commissioner and Environment Agency* (EA/2006/0072).

DECISION OF THE FIRST-TIER TRIBUNAL

We dismiss the appeal. The public authority was entitled to refuse disclosure although, in respect of most elements of the information request, for reasons that are different to those set out in the Information Commissioner's Decision Notice.

REASONS FOR DECISION

Introduction

1. We have decided that the public authority was entitled to refuse each of 29 requests set out in the Appellant's information request. In the case of four of the requests we agree with the Decision Notice in deciding that the public authority had been entitled to issue a "neither confirm nor deny" response under section 40(5)(b)(i) of the Freedom of Information Act 2000. However, in respect of the remainder we have concluded that this statutory provision does not apply, but that the information was either not held by the public authority or, if or to the extent that it might have been held, the information was exempt information under section 14 of the Act, because the request was vexatious.

The Request for Information

2. On 21 February 2011 the Appellant wrote to Southwark Crown Court seeking 29 items of information. He made his request under the Freedom of Information Act 2000 ("FOIA") and sections 7-9 of the Data Protection Act 1998 ("DPA").

3. FOIA section 1 imposes on the public authorities to whom it applies an obligation to disclose requested information unless certain conditions apply, or the information falls within one of a number of exemptions set out in the FOIA. DPA section 7 gives individuals a right of access to their personal data held by another and sections 8 and 9 make provisions supplementing that right. Section 7 applied to some elements of the information request, but it has been dealt with as a separate issue and does not form any part of this appeal.

4. The parties are agreed that the Ministry of Justice was the appropriate public authority to have responded to the information request and to have been joined as Second Respondent to this appeal. We will refer to it simply as “the Public Authority”.

5. The text of the information request, with a number of individual’s names redacted, is set out in the first column of the Annex to this decision. The second column indicates the basis on which we have determined, in respect of each request, that the Public Authority was entitled to refuse disclosure.

6. The information sought arose from the conduct of criminal proceedings in which the Appellant was involved, in particular:

    a. The arrangements made by the judge for a particular individual to prepare a note of the hearing and information about both that individual and the judge (requests 1, 2, 3, 4 and 5)

    b. Payments made to certain identified individuals and firms out of the legal aid fund and the role those individuals and firms played in the criminal proceedings (requests 7, 8 (part), 10 and 18)

    c. Clarification of the judge’s contribution at various stages during the proceedings (requests 6, 8 (part), 9, 12, 13, 16, 17, 19, 20, 21, 22, 23, 27, 28 and 29)

d. The manner in which parts of the proceedings had been recorded in official transcripts of certain hearings (requests 11, 14 and 15)

e. Details regarding communications between the Appellant and the court's administrative staff (requests 24 and 25 and 26)

7. The information request was refused. The Appellant was informed that no information was held in respect of some of the requests, that other requests were not for recorded information and that there was no obligation to respond to those that were regarded as vexatious. That view was maintained following an internal review and the Appellant complained to the Information Commissioner on 21 March 2011.

The Information Commissioner's Decision Notice

8. The Information Commissioner took a different view of the case. He felt that the exemption provided under FOIA section 40(5)(b)(i) (third party personal data) applied and that it was appropriate for him to consider that ground for refusing disclosure, even though it had not been relied upon in the initial refusal or subsequent correspondence with the Appellant.

9. FOIA section 40(2) provides that information is exempt information if it constitutes personal data of a third party the disclosure of which would contravene any of the data protection principles.

10. Personal data is itself defined in section 1 of the Data Protection Act 1998 ("DPA") which provides:

> *"'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"*

11. The data protection principles are set out in Part 1 of Schedule 1 to the DPA. The Information Commissioner relied in his Decision Notice on the first data protection principle. It reads:

> *"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 …"*

The term "processing" has a wide meaning (DPA section 1(1)) and includes disclosure.

12. The Information Commissioner focused on the general issue of whether disclosure would be fair to the relevant individuals, taking into account, on the one hand, the consequences of any release of personal data and the reasonable expectation of those individuals and, on the other, general principles of accountability and transparency. He concluded that the personal data that would potentially be disclosed by confirmation or denial of the holding of the requested information related to the individuals in a private capacity, as opposed to an official or work capacity. The individuals would have a legitimate expectation that information that might or might not confirm whether they had been part of an investigation and/or court proceedings would not be released. A confirmation or denial would, in his view, reveal some information which was not already in the public domain and was not reasonably accessible to the general public. It would also publicise the existence or otherwise of an investigation and court proceedings involving those named parties.

13. On that basis the Information Commissioner concluded that the Public Authority would have been entitled to have responded to the information request with a statement that it neither confirmed nor denied that it held any of the information that the Appellant sought, because to either confirm or deny that the requested information was held would *" inevitably put into the public domain information about the existence or otherwise of a trial relating to a criminal conviction which would constitute the disclosure of information that would relate to [*the individuals identified in the information

request]". The Information Commissioner considered that this would "*disclose personal data and that the disclosure of this personal data would be in breach of the first data protection principle*".

14. The Information Commissioner added that the requested information was also "*sensitive personal data*", to which even greater restrictions on disclosure are imposed, and that this would have been another justification for a "neither confirm nor deny" response to the information request. DPA section 2 defines "*sensitive personal data*" as personal data consisting of information about, among other things, *"any proceedings for an offence committed or alleged to have been committed by* [the individual in question], *the disposal of such proceedings or the sentence of any court in such proceedings."*

15. In light of his conclusions under FOIA section 40 the Information Commissioner concluded that the Public Authority had been entitled to refuse the information request in its entirety. He felt that, in those circumstances, it was not necessary or appropriate for him to consider whether any of the grounds for refusal put forward by the Public Authority would have been justified.

The Appeal to this Tribunal

16. On 17 October 2011 the Appellant lodged an appeal against the Decision Notice with this Tribunal. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.

17. The Public Authority was joined as Second Respondent to the Appeal. The Appellant stated a preference for an oral hearing, rather than have his appeal determined on the papers, and directions were given for an agreed bundle of documents to be prepared and for skeleton arguments to be served. In the event the Information Commissioner and the Public Authority decided not to attend the hearing, or to file skeleton arguments, but to rely solely on the Response that each had served. The Appellant himself attended the hearing over a video link.

18. The Response of the Information Commissioner argued that the reasoning set out in the Decision Notice was correct and that the Appeal should be dismissed. He allowed the Decision Notice to speak for itself but did address the criticisms of it that the Appellant had set out in his Grounds of Appeal. For the most part those criticisms stressed the Appellant's view that he was entitled to be provided with the information requested in light of various failings in the legal system, which he believed had caused him harm, and that the Information Commissioner had not given due weight to those factors..

19. The Public Authority filed a very short Response in which it did little more than to support the case made by the Information Commissioner and summarised its grounds for relying, in addition, on the grounds for refusal that it had originally given to the Appellant.

20. The Appellant had a number of concerns about the preparations for the hearing. He was concerned about the lack of email facilities for him to use and that this created an inequality of arms between himself and the other parties. However, we adjusted the timetable to accommodate the fact that he could only communicate by post and that his preparation time was limited by his circumstances.

21. The Appellant also complained that the document bundle included documents he thought were not relevant and represented, in his view, a "selective and partial" selection of documents, which prejudiced his case.

In the event none of the features of the bundle that he criticised gave rise to any difficulty during the hearing or caused us any concern that we had not seen the materials we needed to reach a decision.

22. At the hearing the Appellant asked for recording facilities (which were not available in the allocated room at the venue) and for more time than the two hours allotted for use of video equipment. However, we were content that, with the benefit of the additional written submissions filed by the Appellant, we had sufficient time to air fully all the issues we needed to reach our decision. Finally, the Appellant invited us to castigate the other parties for having failed to file a skeleton argument each. It was to their disadvantage, and the Appellant's advantage, that no skeletons were provided and we therefore made no ruling on the point.

Our decision on the Decision Notice

23. We think that the Information Commissioner's reasoning was wrong in respect of most of the information requests. Requests 1, 6, 8, 9, 11, 12, 13, 14 -17, 20-23, 27-29 related to a particular judge. The decision of the Information Commissioner was that, the request having identified that individual, any response to it (other than "neither confirm nor deny") would have disclosed the personal data of that individual. In our view that is not correct. The question the ICO had to consider was whether the mere confirmation or denial of the holding of information answering the terms of the request would amount to a disclosure to the world of the judge's personal data, contrary to one or more of the data protection principles. The information that would be disclosed would have been that the named individual performed the role of judge at the trial in question and that, in the performance of that role, he made the various decisions and rulings referred to. Although that information may fall within the definition of personal data, its disclosure would not have been in breach of any data protection principle because it was already public information. The trial would have taken place in public, as is required by long established principles, reinforced by the terms of Article 6 of the European Convention

on Human Rights. The venue, scheduled starting date and time, as well as the identity of the judge would have been publicly listed. The judge would not reasonably have expected that privacy would be maintained in respect of his role on the day, including the trial management decisions he made while performing that role or the summing up he delivered.

24. Request 7 sought information about legal aid payments made to five named firms and the work for which payment was authorised. Each of the redacted names was a commercial business. They were not living individuals and accordingly information about them would not, in any event, constitute personal data. No issue of personal data rights therefore arises and FOIA section 40(5)(b) can have no application. The same criteria apply to the information about a firm included in requests 18 and 19.

25. Request 10 sought similar information about an individual. Information about the source and amount of his or her remuneration would have constituted personal data, even though it resulted from the performance of a public role at a public hearing, and a confirmation or denial that the MOJ held information on the subject would have contravened the data protection principles. In this case, therefore, the conclusion reached by the Information Commissioner was correct. The same reasoning applies to one part of request 7, in which the Appellant included in the request about a firm a reference to an individual advocate.

26. Request 8 asked who a named advocate represented at a particular public hearing. Although it is not part of our decision-making, one may speculate, based on the transcript that was included in our bundle, that the individual had been instructed by a firm of solicitors whose retainer had terminated, to attend the hearing and, as a courtesy to the court, explain the fact that they would not be representing their former client at the substantive part of the hearing. The Appellant came close to saying as much in paragraph 4 of his Grounds of Appeal. Confirming or denying that the MOJ held information on the question of who the individual

represented at a particular public hearing would not contravene a data protection principle, because it is public domain information in respect of which the individual would have had no reasonable expectation of privacy. The same individual was named in requests 13 and 22, which again sought information about part of a public hearing at which that individual appeared as an advocate. The same criteria arise and the Public Authority was therefore not entitled to have given a “neither confirmed nor deny” response in respect of those parts of the requested information.

27. Request 2 asked whether the judge had any personal and/or professional relationship with the unnamed individual barrister he had appointed as noting counsel at a particular hearing and request 3 asked for the name of the chambers to which each of them belonged at the time. The ICO’s decision was correct in respect of request 2. Whether or not two individuals have a personal relationship constitutes personal data that they would reasonably expect to remain private. In the case of professional relationships the information is also personal data protected from disclosure, at least to the extent that it is not already in the public domain. Accordingly, the MOJ would have processed the personal data of the Judge, in breach of the data protection principles, if it had responded to the request in any way other than in the form of a neither confirm nor deny answer. We consider that such processing would have been in contravention of the data protection principles and accordingly the information about the existence or non-existence of a relationship would have been exempt information. However, we do not think that the Decision Notice was correct in respect of request 3. In our view the information requested is in the public domain as being information about the individuals’ professional affiliations that is made available to the public through official directories (as well, no doubt, as the lists of tenants and judicial members located on chambers’ premises). To the extent that it is personal data, therefore, there could have been no reasonable expectation by either of the individuals that it would remain private. The mere confirmation or denial of the holding of information answering the terms of

the request would not therefore amount to a disclosure to the world of personal data contrary to one or more of the data protection principles.

28. Request 4 asked for information about the experience and shorthand skills of the unnamed individual appointed as noting counsel. The ICO was right to say, in his Decision Notice, that either confirming or denying that the individual was a qualified shorthand writer would have disclosed personal data about that individual and that this was information that the individual would reasonably expect to remain private. Although it is more difficult to interpret the rest of the request as capable of a “neither confirm nor deny” response, it would be difficult for the Public Authority to have responded to it in any other way that did not confirm that the individual did or did not have experience. Accordingly the Decision Notice was right on that part of the request also.

29. Request 5 asked for information about payment made to the noting counsel. The Information Commissioner decided that the Public Authority could not have responded in any way that did not disclose either that noting counsel was unpaid or that she received a payment. An individual’s remuneration, even for the performance of a function at a public event (the trial) is personal data, in our view. Accordingly the ICO was correct to conclude that the MOJ would have been entitled to give a neither confirm nor deny response to this request.

30. Request 7 included an enquiry about any relationship between the judge and a particular law firm. That is personal data. No persuasive justification for its disclosure was put forward and accordingly any response, other than “neither confirm nor deny” would have breached the data protection principles.

31. We should add at this stage that we saw no merit whatsoever in the Information Commissioner’s argument that any of the information constituted “sensitive personal data”. The definition of that term makes it clear that it applies to data about defendants in criminal proceedings and

not those performing the role of legal representative or judge in those proceedings.

32. Our conclusion on this part of the case, therefore, is that the Public Authority would only have been entitled to have given a "neither confirm nor deny" response to requests 2, 4 and 5. FOIA section 40(5)(b)(i) had no application to the other requests.

33. We have reached our conclusions without reference to the Appellant's argument to the effect that the statutory provision should have been ignored as being inconsistent with the general principle of openness reflected in FOIA section 1 and with obligations imposed by the European Convention on Human Rights. We think he was wrong on both points.

Our decision on the Public Authority's alternative arguments

34. In light of our conclusion in respect of FOIA section 40 we have next to consider the alternative arguments which the Public Authority preserved, but did not propound in detail, in its Response. It has been necessary, therefore, to examine the more detailed exposition of those arguments in the correspondence between the Public Authority, on the one hand, and the Appellant and the Information Commissioner on the other. It is evident from that correspondence that the arguments fell into the following three categories:

    a. Some parts of the information request dealt with information that the Public Authority did not hold because it was held by another government department;
    b. Much of the information was not recorded information and not therefore covered by the disclosure obligation set out in FOIA section 1; and
    c. Several of the requests were vexatious within the meaning of FOIA section 14.

We will deal with each of these arguments in turn.

Information held by another department and not the Public Authority

35. This reason for non-disclosure was applied to requests 7, 10, 18 and 19, all of which concerned legal aid payments. The Public Authority said that it was information that was held by the Legal Services Commission and not by the Public Authority itself. Although the Appellant challenged the point he did not put forward any evidence or argument that would suggest that the position is not as the Public Authority stated. Accordingly we find that, on the balance of probabilities, the Public Authority did not hold the information at the relevant time and that it was accordingly entitled to give the response that it did to these parts of the information request.

Not recorded information

36. For the purposes of FOIA section 1 the word "information" is defined in FOIA section 84 as "information recorded in any form". The Public Authority's obligation was to disclose to the Appellant information that it held in recorded form at the time of the request. It was not required either to create information that it did not already hold, or to express an opinion.

37. On the question of whether requested information is held by a public authority we were referred to the Tribunal decision in *Bromley v Information Commissioner and Environment Agency* (EA/2006/0072). The following extract from that decision, while not binding us, does set out a test in terms with which we agree. It reads:

> *"There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere with a public authority's records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information. However, it argued (and was supported in the argument by the Information Commissioner) that the test to be applied was not certainty but the*

balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner's findings of fact are reviewed. We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the bias of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not be brought to light. Our task is to decide, on the basis of our review of all of those factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."

38. The Public Authority relied on this argument as justification for having refused to disclose the information sought in the following requests:

  a. Request 1. We consider that the Public Authority's statement that it did not hold any information falling within the scope of the request is entirely credible, despite the Appellant's view that a formal policy document must have existed. The judge was exercising his general discretion in the management of the case before him and it is no surprise that no recorded criteria, policy document or rule should exist to guide him on the exercise of that discretion in respect of the particular procedural issue before him. On the balance of probabilities, therefore, the Public Authority did not in our view hold the requested information at the time when the request was made.
  b. Request 2. We were satisfied that there was no reason to believe that the Public Authority would have recorded the requested information.
  c. Request 4. We were satisfied that there was no reason to believe that the Public Authority would have any recorded information on the qualifications of noting counsel.
  d. Request 6. The Public Authority was entitled to refuse the request because it was not a request for recorded information but for clarification by the judge of the content of his summing up.
  e. Request 8 (identity of advocate's client). The Appellant put forward no evidence or reasons as to why the Public Authority might retain

information on who a particular advocate represented, beyond that recorded in the transcript of the hearing at which he or she appeared. We conclude, on the balance of probabilities, that no further recorded information was held by the Public Authority.

f. Request 8 (assumption behind Judge's question to advocate). The request seeks justification of the Judge's personal opinions or reasons for the Judge's judicial decisions. It might well have been regarded as a vexatious request, but the Public Authority was content to rely on its argument that the request was not for recorded information it held, which we think is correct and justified refusal.

g. Requests 9, 13, 16, 17, 20- 23 and 27. Each of these requests probes for the thinking behind particular remarks of the Judge during the trial, which is not information that the Public Authority will have held in recorded form. The Appellant did not place before us any evidence pointing in the opposite direction. In his skeleton argument he argued that he was entitled to the information "as of right" and that he required it to pursue a particular appeal, which he described in some detail. However, as we have concluded that, on a balance of probabilities, the requested information was not held by the Public Authority at the relevant time, no disclosure obligation under FOIA section 1 is capable of arising, no matter how great the need for it perceived by the party requesting it. The same reasoning applies to request 19, to the extent that the justification by the Legal Services Commission may have been made known to the Public Authority.

h. Requests 11, 14 and 15 (gaps in transcripts) - the Public Authority's argument to the effect that it did not hold any recorded information on gaps in transcripts, is entirely credible and we conclude, on the balance of probabilities, that it did not hold the requested information at the relevant time. The fact that the transcript may have been paid for from public funds, as the Appellant asserted, does not create an entitlement that the transcript should capture every word spoken, without gaps or errors.

i. Request 12 – the Public Authority relied in correspondence on a statement that the Deputy Court Manager at Southwark Crown Court had explained to the Appellant, before he made his information request, that it was not the Court's practice to draw up the type of order that the Appellant requested. We find that the Public Authority's statement that it did not hold a copy of the requested document, is entirely credible and we conclude, on the balance of probabilities, that it did not hold the requested information at the relevant time.
j. Request 24 – Despite the Appellant's concern that he had not been provided with the information, which he felt would have enabled him to reject an allegation of hostility to court staff, we accept the statement by the Public Authority to the effect that it does not have recorded information falling within the scope of the request.
k. Request 25 – We accept that there was no recorded information on policy in respect of decisions to ban defendants from telephoning personnel in the relevant part of the Court's administration.
l. Request 26 – We accept that there is unlikely to be any recorded information in respect of any decision about the despatch of a court order to those affected by it.

Vexatious request

39. FOIA section 14 provides that the obligation to disclose information under section 1 does not arise if the request is vexatious. The Public Authority drew attention to the fact that several of the requests appeared to target the judge in question and that both the requests and other correspondence from the Appellant have been hostile in tone. It invited us to conclude that the purpose of the information request was to cause distress.

40. The Public Authority relied on this exemption in respect of the following requests:
    a. Request 2 – the Public Authority argued in correspondence that any question directed at the Judge's personal life should be regarded as

vexatious and, separately, that the whole tone and nature of the information request and correspondence from the Appellant demonstrated that his purpose was to cause distress to the Judge.

b. Request 3 – the Public Authority argued that it was vexatious to pose this question, as the information was already public and had no relevance to the conduct of the trial.

c. Request 6 – it is legitimate, in other contexts, to question the logic applied by a judge during his summing up, but we were invited to conclude that the manner in which the criticism had been included in what purported to be an information request rendered it vexatious.

d. Requests 9, 16 and 17, 19, 20, 21, 22 and 28 – the requests probed for the thinking behind a particular remark or decision of the Judge during the trial. The Public Authority drew particular attention to requests 22 and 28, which also included accusations of corruption and bias against the judge or others. However, we regard the request to have been vexatious, even without the inclusion of that material.

41. Although the Public Authority sought to apply section 14 selectively, we think that it very arguable that it applied to the whole of the information request, the purpose of which appeared to be to reopen issues that had been determined at trial, which were not issues having a direct bearing on the Appellant’s conviction, and to embarrass or cause distress to all of those who played any role at the time. We think, in particular, that the requests that sought information about gaps appearing in various transcripts were vexatious, as was request 29, seeking information about the regularity of the Judge’s attendance at a particular court. However, even limiting ourselves to the particular requests that the Public Authority identified, but considering them in the context of the information request as a whole, we have no hesitation in concluding that each was a vexatious request and that the Public Authority was entitled to refuse them on that basis.

Conclusion

42. For the reasons we have given we have concluded that the Public Authority was entitled to refuse each of the requests for information. The conclusion reached by the Information Commissioner in his Decision Notice was therefore correct, although in respect of most of the information requests we reached our conclusion for different reasons.

43. Our decision is unanimous.

Chris Ryan

Judge

14 September 2012