



**IN THE FIRST-TIER TRIBUNAL**  
**GENERAL REGULATORY CHAMBER**  
**INFORMATION RIGHTS**

**Case No. EA/2011/0308**

**ON APPEAL FROM:**

**The Information Commissioner's  
Decision Notice No: FS50409302**

**Dated: 13<sup>th</sup> December, 2011**

**Appellant:**

**Roy Gibson**

**Respondent :**

**The Information Commissioner**

**Determination: 20<sup>th</sup>. April, 2012**

**Date of Decision: 17th. May, 2012**

**Before**

David Farrer Q.C.(Judge)

and

Alison Lowton

and

Anne Chafer

This appeal was determined on written submissions.

**Subject matter:** Duty to confirm or deny.  
Personal data  
The first data protection principle.  
FOIA s. 40(5)(b)(i)

**Cases:** *Young v ICO EA/2009/0057 & 0089*  
*Butters v ICO EA/2008/0088*

### **DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal dismisses the appeal.

### **STEPS TO BE TAKEN**

No steps are required to be taken by the Prisons and Probation Ombudsman for England and Wales (“the PPO”)

Dated this 17<sup>th</sup>. May, 2012

Signed David Farrer Q.C.

Tribunal Judge

## INTRODUCTION

1. The background to this appeal can be shortly stated and the issues are clear.
2. Mr. Gibson is a prisoner serving his sentence, at the date of the Decision Notice, at HMP. Full Sutton, York. He then intended to instigate civil and/ or criminal proceedings against a prison officer. Whether he has since done so we do not know and is irrelevant anyway.
3. On 4<sup>th</sup>. February, 2011, he addressed the following request to the PPO –  
  
*“Can you please supply the number of complaints filed against ( a named officer) in the last three years ?”*
4. On 27<sup>th</sup>. May, 2011 the PPO refused to confirm or deny that it held the requested information, placing reliance on FOIA s.40(5)(b)(i). It maintained that position by letter dated 22<sup>nd</sup>. June, 2011, following an internal review. Mr. Gibson complained to the ICO.
5. The ICO issued the Decision Notice on 13<sup>th</sup>. December, 2011, stating that –
  - The information requested was the personal data of the named prison officer;
  - Its disclosure would or could be unfair, hence would breach the first data protection principle.
  - The PPO was therefore entitled to rely on s.40(5)(b)(i), hence to refuse to confirm or deny that it held such information.
6. Mr. Gibson appealed to the Tribunal by notice dated 26<sup>th</sup>. December, 2011. In his grounds of appeal he disputed that the information was personal data or that disclosure would be unfair. He asserted that the information was needed for litigation for which he would not receive public funding. In his subsequent replies to the ICO` s response and further representations he made the following submissions :-

- (i) The data requested was not personal data because no details were sought beyond the number of complaints.
- (ii) Disclosure would not be unfair, both because the named officer was a notorious delinquent in the prison service and because it would be for the limited purposes of specific litigation, not to the world at large.
- (iii) He already held information as to various complaints made against this officer, by himself and others. He merely wanted an exact figure.
- (iv) Disclosure would be for the purpose of legitimate research conducted for the purposes of this litigation. Hence a Schedule 2 condition was satisfied.

## THE ISSUES

7. They are –

- (i) Is the requested information “personal data” as defined in s.1 of the DPA 1998 ?
- (ii) If so, would disclosure breach the first data protection principle ?

Question (ii) involves a decision as to whether disclosure would be fair and lawful and, if so, whether condition 6(1) of Schedule 2 to the DPA 1998 is satisfied.

## THE LAW

8. So far as material, sections 1 and 2 of FOIA provide –

1 (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,*

*(2) Subsection (1) has effect subject to the following provisions of this section and to*

*the provisions of sections 2, 9, 12 and 14.*

*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.*

9. Section 40(5), so far as material, provides –

*“The duty to confirm or deny- . . . . .*

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

*(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 . . . . .”*

10. Schedule 1 to the DPA, 1998 recites the first data principle, which, so far as material here reads –

*“ 1. 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,”*

11. Condition 6 (1) of Schedule 2 requires that -

*“ 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”.*

12. Section 40(5) is a provision to which s.2(1) applies, hence the duty to confirm or deny pursuant to s.1(1)(a) does not arise if confirmation or denial would breach the first data protection principle.

#### THE CONCLUSIONS OF THE TRIBUNAL

13. We have no doubt that information as to whether complaint has been made against a prison officer is his personal data. As the ICO rightly acknowledges, care must be taken to avoid treating as personal data information as to an individual which relates exclusively to his or her professional duties. However, complaints of misconduct by a prison officer clearly go well beyond criticism of technical aspects of his work performance and may reflect to a high degree on his qualities as a humane and reasonable individual. We unhesitatingly take the same view as the Tribunal, differently constituted, in *Young v ICO EA/2009/0057 & 0089* as to the nature of such information. The fact that the object of the request was the number not the nature of any complaints is quite immaterial. The number may, without more, be treated by some as a reflection on his character, for good or ill.
14. We turn to consider whether disclosure of such personal data, hence confirmation or denial, would be fair and lawful.
15. A complaint may be justified or frivolous and malicious. Of itself it reveals nothing of its subject. The same applies to a sequence of complaints unless, perhaps, a large number of complainants are shown to be wholly independent and unaware of each other. Questions of accountability and transparency do not arise. There is nothing for which the individual concerned is called to account.
16. Where findings of misconduct have been made, the position is obviously quite different. The public is entitled to know that an identified police or prison officer

is proved to have breached accepted standards and to ask whether he should remain in post.

17. Disclosure of information is disclosure to the public at large, not to the requester for his individual purpose<sup>1</sup>. There are some provisions of FOIA where the identity of the requester is, for entirely unrelated reasons, relevant<sup>2</sup> but they do not include s.40(2). So far from strengthening Mr. Gibson's case the personal motive of obtaining disclosure for the purpose of litigation may rather weaken it. Contested disclosure of documents and other information for a trial is a matter for determination by the judge, not this Tribunal. Some might see the use of the Tribunal's jurisdiction as amounting to an abuse of its process. However, this appeal will not be decided on that basis.
18. An officer has no expectation that unproven complaints or their existence will be made public. The unsubstantiated allegation that this officer is a "bad lot" makes no difference.
19. In our opinion, disclosure of the requested information would be plainly unfair. If, which we incline to doubt, s.40(5) requires a consideration of the balance of public interests<sup>3</sup>, the interest in non - disclosure clearly predominates. It follows that there is no duty on the PPO to confirm or deny that it holds such information..
20. That being so, the exception to condition 6(1) would almost certainly be material, even if the condition were otherwise fulfilled. It is not, however. Legitimate interests are legitimate public interests, such as research. Moreover, even in the context of private interests, it is doubtful whether the purposes of litigation are "legitimate", where the appropriate and lawful procedures are those laid down by the Civil or Criminal Procedure Rules, as the case may be.

## OUR DECISION

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<sup>1</sup> See *Butters v ICO* EA/2008/0088

<sup>2</sup> E.g., ss.14, 21, 40(1)

<sup>3</sup> As suggested in *Young v ICO* at para.13

21. For these reasons we dismiss this appeal.

22. Our decision is unanimous.

Signed

David Farrer Q.C.

Tribunal Judge

Dated 17<sup>th</sup>. May, 2012