Neutral Citation Number:

IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2012/0032**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50402861
Dated: 16th. January, 2012

Appellant: **HOWARD GRAY ROBERTS**

First Respondent: **THE INFORMATION COMMISSIONER**

Second Respondent: DYFED POWYS POLICE AUTHORITY

Heard at : Birmingham Civil Justice centre

Dates of Hearing: **16th. and 18th. July, 2012**

Before

DAVID FARRER Q.C.

Judge

and

PAUL TAYLOR

and

MALCOLM CLARKE

Tribunal Members

Date of Decision: **25th. August, 2012**

Attendances:

The Appellant appeared in person.

For the First Respondent: Christopher Knight

For the Second Respondent: Eleanor Grey Q.C.

Subject matter:

FOIA s.40(1) and 40(2)

Data Protection Act 1998 s.7

Cases: *Birkett v DEFRA & ICO [2011] EWCA Civ.1606*

Durant v Financial Services Authority [2003] EWCA Civ 1746.

Common Services Agency v Scottish Information Commissioner [2008] UKHL 47

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal to the extent indicated in the Annexes to this Determination and substitutes the following decision notice for the decision notice dated 16th. January, 2012.

SUBSTITUTED DECISION NOTICE

Dated: 25th. August, 2012

Public authority: **DYFED - POWYS POLICE AUTHORITY**:

Name of Complainant: **HOWARD GRAY ROBERTS**

The Substituted Decision

For the reasons set out in the Tribunalôs Decision, to the extent indicated and particularised in the Closed Annex, the public authority failed to deal with the Appellant`s request in accordance with the requirements of the Act. It should have communicated to the Appellant the information identified in that Annex. It correctly withheld the other information requested.

Action Required

The Commissioner requires that the information identified in that Annex should be communicated to the Appellant within thirty days of promulgation of this Decision.

Dated this 25th. day of August, 2012

David Farrer Q.C.
Judge
[Signed on original]

REASONS FOR DECISION

Introduction

In this Decision the Appellant is identified as "HGR", the first Respondent as" the ICO" and the Second respondent as "DPPA". H.M. Inspectorate of Constabulary is designated "HMIC".

1. On 28th. March, 2008 the Appointments Committee of DPPA conducted assessments, including interviews, of the two candidates for appointment to the office of Chief Constable of Dyfed - Powys. One was HGR, the other Ian Arundale, who was, in the event, appointed.

2. The decision lay with the seven members of the committee, representing the public in Dyfed - Powys. However, the prescribed procedure requires the attendance in an advisory capacity of a representative of HMIC, to provide assessments of the candidates and information and assistance on policing and professional issues which might require expert input. Such assessments are sent to members with the candidates` applications. They are an indirect form of sifting, since the short - listing committee for the appointment is unlikely to put forward a candidate whose assessment indicates that he is unsuited to it.

3. The HMIC representative on this occasion was Kate Flannery, who had also prepared the assessment of HGR which members had received.

4. Both candidates were duly interviewed in the course of three assessment sessions lasting a full day. Then, in the absence of the candidates, members expressed their provisional opinions and preferences.

5. At this juncture, Kate Flannery delivered a very critical appraisal of HGR, which was clearly in sharp contrast to her written assessment. Members were, not surprisingly, shocked and deeply disturbed by this development, which appeared to undermine their conduct of the selection process and to cast doubt on the value of the whole selection process which they had just conducted. They may well have felt that they were left with no choice as to their selection.

6. They duly appointed Ian Arundale. It is accepted on all sides that he was an excellent candidate and that any shortcomings in the selection procedure do not reflect in any way on his suitability for this high office. That, however, does not dispel grave concerns as to what took place.

7. Such concerns were ventilated promptly in letters from committee members to Sir Ronnie Flanagan, HM Chief Inspector of Constabulary, to the Home Secretary and to each other. They did not pull their punches.

8. The general nature of what had taken place became public knowledge. It was agreed at the hearing that the following information was generally available before HGR`s request was made : -

   - The date of and procedure for the selection process.
   - The identities of the candidates
   - The fact of a significant irregularity in the selection process involving the HMIC representative.
   - The identity of that representative.
   - The identity of the committee members.
   - The authorship of certain letters and e mails from members to HMIC and to the Home Office.

9. As a result of an error in the Home Office, some of the letters referred to in paragraph 7 appeared on the ñWhat do they know?ò website and were subsequently referred to and commented upon in press articles. Such publications do not, of course, affect the tribunal`s determination of the issues raised by this appeal.

10. The Home Office acknowledged, in one of those letters dated 20th. May, 2008, that the procedure had been mishandled and that Kate Flannery`s conduct was open to question.

The request for information

11. Not surprisingly, HGR was deeply concerned as to whether his case for appointment had been fairly handled. He became aware of certain specific letters and of the existence of related correspondence. On 11th. October, 2009, he made a request for information to DPPA in the following terms ; -

"(a) I seek a copy of the letter dated the 3rd April or thereabouts, from [a named individual] to the Home Secretary.

(b) I seek a copy of the holding reply of the Home Office of 7th May 2008, or thereabouts.

(c) I seek a copy of the reply of the 20th May 2008 of Mr Andrew Wren of the Home Office.

(d) I seek copies of all correspondence exchanged between HM Chief Inspector of Constabulary and the Chair-person of Dyfed Powys Police Authority on this matter, the existence of which I understand is referred to in the letter of the 20th May 2008 above.

(e) I seek copies of all letters, notes, memoranda, e-mails, faxes or other records relating to myself held by Dyfed Powys Police Authority, including all of the above that related to myself and which were recorded prior to, in the course of the assessment for the post of Chief Constable, or subsequently to that assessment."

12. DPPA provided some information within (e). On 25th. January, 2010, having taken time to consider its response, it provided the holding reply (b) without redaction. It provided a redacted version of (a), invoking s.40(1) in respect of the excluded material and s.40(2) as to part of it. It denied any duty to disclose under DPA s.7(1) (subject access requests). It supplied a redacted version of (c), relying again on the s.40(2) exemption.

13. As to (d), DPPA provided redacted copies of three letters. It took the same position as with the redactions in (a) and as to DPA s.7(1).

14. As to (e), DPPA identified four documents within this request. One was provided in full; as regards the others, it took the same stance as with (a) and (d).

15. Following a request for an internal review, DPPA identified five more documents responsive to the request. It disclosed one in full, two with redactions and withheld two entirely, relying, as before, on s.40(1) and (2).

16. The outcome of the review was the disclosure on 29th. June, 2010 of some further information but, for the most part, a confirmation of the DPPA`s original position.

17. This is a convenient point at which to identify the redacted documents, which were treated for the purposes of this appeal as within the scope of the request and, to the extent of the redactions, withheld. They are the seven redacted documents identified by the ICO at paragraph 5.1 of his Open Response and identified in the open bundle as disputed information. HGR, in a helpful coloured schedule produced at the hearing and evidently accepted by all parties, described four further documents as accepted by DPPA as being within the scope of the request. Three of them appear redacted in the open bundle. However, they do not, in fact, appear to be in scope and are seemingly included as part of the history rather than as responsive documents. All four are identified in the open annex for the avoidance of uncertainty.

18. The position was complicated by the fact that HGR made subsequent subject access requests under DPA s.7 which apparently produced further information, though we do not know the exact content of the data disclosed. Such requests are, of course, outside the jurisdiction of the Tribunal. The helpful schedule of redactions and disclosures in the closed bundle, prepared by counsel for DPPA when advising as to disclosure, has to be read with that complication in mind.

The complaint to the Information Commissioner

19. HGR complained to the ICO by letter dated 25th. August, 2010.

20. The ICO indicated that the application of the s.40(1) exemption was not within the FOIA but the DPA jurisdiction, since it involved subject access requests under DPA s.7. So the central issue for him, as for the Tribunal on appeal from his decision, was whether, in relation to each item of withheld requested information, s.40(2) was properly invoked. In his response to the Grounds of Appeal, the ICO very frankly acknowledged a change of stance. He now argued that, save as to one of the seven documents, all the withheld information was covered by s. 40(1), that is to say that it was all HGR`s personal data and hence to be dealt with by reference to DPA s.7. Alternatively, it was the data of the various third parties identified in paragraph 21

and therefore within s.40(2) of FOIA. We shall return to this modification of the ICO`s case later in this decision.

21. He concluded that the request related to three categories of person, once HGR had been discounted, namely the successful candidate, committee members and the HMIC member. He ruled that the information at issue was their personal data. As to each, he determined that disclosure of such data would be unfair and would thereby infringe the first data protection principle. His reasoning was largely reflected in his submissions to the Tribunal and need not be detailed here. Having made that determination, he did not make any finding as to whether any condition (but presumably, if any, then condition 6(1)) set out in Schedule 2 to the DPA was satisfied. Contrary to some earlier practice, this sequence of analysis mirrors that of the ICO in a number of recent appeals

22. In passing, the Tribunal observes that the ICO, in his Decision Notice, wrongly described the HMIC Representative as forming part of the selection committee. That error was candidly acknowledged in the his Response. The Tribunal has reached its decision fully aware of the true status of Ms. Flannery.

The appeal to the Tribunal

23. HGR appealed to the Tribunal. His grounds were fully and carefully set out and formed the basis for his oral and written case at the hearing. He accepted that disclosure of the personal data of Ian Arundale, the successful candidate would be unfair, a concession that he maintained at the hearing.

24. He objected to the late reliance by the ICO on s.40(1).

25. At the centre of his argument as to s.40(2) were the twin propositions that the HMIC representative had been guilty of ñwrongdoingò at the hearing and that there was a strong public interest in the exposure of such misconduct in the context of the selection process for a most important public office. If what occurred amounted to wrongdoing, or indeed to a significant irregularity, neither Respondent questioned the public interest in its disclosure.

26. He submitted that the wrongdoing was rooted in a vendetta waged against him by HMIC, resulting from an earlier incident and evidenced by other subsequent dealings

with him. He submitted a body of evidence in support of this contention, as well as material relating to his record as a senior police officer. He exhibited Ms. Flannery`s assessment of him which was submitted to the selection committee. He adduced further material demonstrating that the selection procedure had not followed accepted guidelines and press comment on the selection procedure and on his subsequent and quite separate claim against Nottinghamshire Police Authority and its Chief Constable, following its failure to extend his appointment.

27. HGR`s argument extended to the personal data of committee members, even though they were not alleged to be directly complicit in the asserted wrongdoing. He claimed that, in so far as they wrote about the assessment to each other, to HMIC or to the Home Office, they placed the communicated information in the public domain and effectively consented to its public disclosure, thereby waiving their rights to privacy under the DPA. It was in the public interest that the views that they expressed should be disclosed, given the circumstances that arose.

28. Given the importance of the issues raised, the Tribunal made an order joining DPPA as Second Respondent.

29. There was a large measure of agreement as to the reasonable expectations of HMIC and committee members of publication of their role in this process. Senior members of the public service should expect some exposure as to their conduct of their professional duties. Membership of the committee is a matter of public record.

30. Central to the submissions of both Respondents was the claim that judicious and extensive disclosure had already been undertaken by DPPA and that the possible distress both to committee members and to Ms. Flannery involved in the further disclosure sought was disproportionate to any public interest served, given that no additional information of any consequence to the public would emerge. That being so, disclosure was clearly unfair and condition 6 could not be satisfied, if for no other reason, then because it was not ñnecessaryò to any legitimate purpose.

The questions for the Tribunal

31. The first matter for determination is HGR`s objection to the ICO`s belated introduction of s.40(1). It is understandable that he should feel some vexation at the

emergence of this argument after he had presented a careful and detailed case in answer to the claim to exemption under s.40(2), both before the decision notice and in his grounds of appeal. His protest that he cannot judge the strength of the argument because he has not seen the requested information applies, of course, equally to the issue as to s.40(2).

32. However, in this case, unusually, it is the ICO, not the public authority, who has changed tack since the decision notice; DPPA did not support his new submission. If it is well founded, then ignoring it on account of its late introduction or for any other reason would breach the rights of data subjects under the DPA. Plainly, the Tribunal would be bound to have regard to the s.40(1) argument, even without the authority of *Birkett v DEFRA & ICO [2011] EWCA Civ.1606*, which, whilst not directly applicable, impliedly reinforces the requirement to do so.

33. The second matter is whether s.40(1) applies to the information contained in the six documents identified by the ICO at paragraph 2.1 of his closed submission. He argues that the withheld information relates to the selection meeting, that HGR was one of the candidates with whom the meeting was concerned and that the information is therefore his personal data as well as the personal data of third parties. It is therefore subject to the absolute exemption provided by s.40(1) and any request is to be dealt with under DPA s.7, which, where the personal data of a third party is involved, includes the restriction provided for in s.7(4). It should be added that, aside from this general contention, certain specific items of information may engage s.40(1) because they focus directly on HGR.

34. If the general submission fails, then the exemption under s.40(2) for the personal data of a third party falls to be considered. The only real issues are then whether disclosure of the withheld information would be fair and, if so, whether condition 6 of Schedule 2 to the DPA is satisfied. To relate these to HGR`s principal submission, what is in the public interest is not the issue, though it bears upon the issue. The question for the Tribunal is how far the public interest is relevant to an assessment of what constitutes fair processing of personal data and to fulfilment of condition 6 of Schedule 2.

Evidence

35. The evidence before the Tribunal consisted principally of documents contained in the open and closed bundles. HGR adduced evidence in the form of witness statements from himself and the former Chief Constable of Nottinghamshire, Stephen Green, under whom HGR served as Deputy for five years and (previously) Assistant for two. Mr. Green strongly commended HGR`s performance of his duties as Deputy Chief Constable and supported his aspirations to the office which he applied for in Dyfed ï Powys. However, the relevance of such evidence to the Tribunal`s task was limited. It must be emphasised that we are not concerned with the fairness of the selection process, let alone with the question whether HGR `s rights were breached by what occurred. That may be for another forum. Our duty is to determine whether requested but withheld information, in the form of excisions from letters, should be disclosed, notwithstanding the inclusion of personal data. Such laudatory assessments could only be material to the assertion of a vendetta underlying the selection procedure, which would strengthen the public interest in disclosure of all relevant information.

36. No witness statement was served by either Respondent.

37. It was inevitable, though, as ever, regrettable, that some argument be heard in closed session because our determination turns on the precise wording of the documents in question.

The Tribunal`s determination

38. As with the Respondents` submissions, it is inevitable that our findings are expressed in fairly general terms in this open decision. They are related to particular redactions in the closed annex to this decision.

The exemption in FOIA s.40(1)

39. S.40(1) provides an absolute exemption for information constituting personal data of which the applicant (here HGR) is the data subject.

40. As indicated above, the ICO`s justification for invoking s.40(1) generally as to six documents is that the withheld information indirectly relates to HGR because of his role in the proceedings. It is an approach which could be applied to almost any detail of the proceedings, as, for example, how long the discussion took or at what hour the

members dispersed. We were reminded in written submissions of the approach to ñpersonal dataò expounded by Auld L.J. in *Durant v Financial Services Authority [2003] EWCA Civ 1746 at paragraph 28.* The first test is whether the data was *"biographical in a significant sense"*, which, in our opinion was not the case here.

"The second (test) is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, . . ."

41. Though this case is not as clear cut as *Durant*, we find that s.40(1) cannot be relied upon in the manner for which the ICO now contends. The general focus of this information was not HGR but the HMIC `s role at the meeting. The ICO`s argument would extend the scope of personal data, in the context of the record of a meeting or similar event, to an unacceptable extent.

The exemption in FOIA s.40(2)

42. It was common ground that every item of information involved was the personal data of one or more of the third parties already identified and that, as mentioned earlier, the disclosure of the personal data of Ian Arundale would breach the first data protection principle.

43. Given that the data here in question is personal data and does not fall within s.40(1), the effect of the material provisions of s.40(2) and (3) is that the information is absolutely exempt, if disclosure would contravene any of the data protection principles set out in part 1 of Schedule 1 to the DPA 1998.

44. The only relevant principle is the first which, so far as germane, requires that ï

"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;"

. . . . .

45. Schedule 2 condition 6(1) reads -

"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"

46. This appeal will therefore succeed, as regards any item of requested and undisclosed information, only if the Tribunal find that it is more likely than not that disclosure is ï

    - Fair
    - (Lawful ï which is not in issue here)
    - For the purposes of HGR`s legitimate interests
    - Necessary for such interests
    - Not unwarranted by reason of prejudice to the rights etc. of the committee members or the HMIC representative, as the case may be.

    In relation to the s.40 exemption, the normal FOIA burden of proof does not apply, since the primary concern of the DPA 1998 is to protect the privacy of the data subject ï see *Common Services Agency v Scottish Information Commissioner [2008] UKHL 47*

47. There can be no question as to the substantial public interest in the integrity of the selection procedure for any public office but most particularly an office as responsible and politically sensitive as that of Chief Constable. That public interest is of considerable weight in deciding whether disclosure is fair. It does not decide the question, of course, but it weighs heavily in favour of disclosure in a case where distress to the data subject might in other circumstances preclude it.

48. It has a bearing on the legitimacy of the interests involved.

49. As with the issue of fairness, for the purposes of condition 6(1), it may justify prejudice to the rights of the data subject, where, absent such interest, that prejudice would be unwarranted.

50. The other factors affecting fairness are well known and expounded in Tribunal decisions and MoJ Guidance. In the context of this appeal they include the reasonable expectations of the data subject as to future disclosure and the degree of distress likely to result from disclosure.

51. In our judgement, the members are in a materially different position from the HMIC representative in two linked respects :

(i) They were present as unpaid representatives of the public. No question arises as to their professional duties or performance. They knew that their membership of the committee, hence participation in the selection, was a matter of public record. However, they had a reasonable expectation that the expression of their views in the course of discussion would remain confidential. Ms. Flannery occupied a senior position in HMIC and was performing a particularly significant and sensitive task. Her assessment was a record that would be retained by DPPA.

(ii) Subject to a very minor criticism made by HGR, which we find unjustified, no fault is imputed to the members in the conduct of this selection. The fault lay with the HMIC representative and they suffered its consequences, in that their role in the selection process was undermined.

52. Ms.Flannery, the HMIC representative, should, we think, have expected that publicity would be given to any significant flaw in her performance of the demanding duties which she was deputed to perform, especially if they involved a blurring of the distinction between her role as adviser and that of the members as selectors. Such publicity would plainly include the impact of her conduct on the members as subsequently reported by them.

53. We should add that, on the evidence, any fault in her performance lay in allowing HGR to be put forward as a suitable candidate, when, rightly or wrongly, that was not her true assessment of him. The desirability of a contest for the office, if that was her motive, could not possibly justify such a course, leading, as was inevitable, to a dramatic volte face at the stage of the committee`s discussion and the unnecessary exposure of HGR to a time-consuming and stressful process.

54. It follows that, in so far as we need to determine the matter, we do not accept that HMIC or anybody within HMIC, was intent on victimising HGR in the course of this selection.

55. Bearing all these matters in mind, we conclude that, as to the committee members, further disclosure of their personal data would be unfair and would serve no legitimate purpose for HGR or anybody else. It would therefore fail to satisfy condition 6 of Schedule 2. We accept that nothing significant would be added, so far

as the public interest is concerned, to what has already been disclosed by DPPA. A member is entitled to expect that his or her contribution to the decision will be kept confidential, unless he is guilty of malpractice, which was clearly not the case here. We relate that reasoning to the relevant information in the closed annex.

56. As to Ms. Flannery, having regard to the matters rehearsed above, we do not consider that disclosure of her personal data, as contained in the relevant redactions, would be unfair and we think it in most cases necessary for the purposes of HGR`s legitimate interest in discovering exactly what happened, given his central role in the selection. In our view, he is entitled, as is the public, to see just what part Ms. Flannery played and how she performed it in the eyes of those who were present. We adjudge that, save as to two redactions, disclosure adds something substantial to what is already apparent. That redacted information will be withheld because its disclosure is not necessary for HGR`s or the public`s purposes.

57. We assess that any further distress to her, beyond that which she has doubtless already experienced, will be minor. We do not consider that unwarranted prejudice to her interests will result.

58. Again, we relate this general approach to the withheld information in the closed annex.

59. We find in two instances that information constitutes the personal data both of Ms. Flannery and of HGR and that, so far as her rights are concerned, it should be disclosed. Nevertheless, we have no power to make an order under DPA s.7 so as to grant subject access to HGR. We shall invite further written submissions on this matter from all parties.

60. Accordingly we order that the information identified as disclosable in the closed annex should be disclosed in accordance with the substituted decision.

61. Our decision is unanimous

David Farrer Q.C.
Judge
[Signed on original]

Date: 3rd. September, 2012