



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights**

Tribunal Reference:	EA/2013/0158
Appellant:	Benjamin Gaule
Respondent:	The Information Commissioner
Judge:	NJ Warren
Member:	A Lowton
Member:	D Sivers
Hearing Date:	23 October 2013
Decision Date:	14 November 2013

DECISION NOTICE

1. In 2009, after pleading guilty to a number of serious offences, Mr Gaule was sent to prison for a substantial period of time. He was legally represented at court. The evidence against him included a transcript of a long interview between himself and the police. A feature of the transcript is that on about fifty occasions something is described as “indecipherable” and twice the typist has queried whether the tape was faulty. Nothing was said about this issue then although this year Mr Gaule has tried without success to interest the Court of Appeal and the Criminal Cases Review Commission in his sentence and his conviction.
2. In July 2012 Mr Gaule wrote to the Crown Prosecution Service (CPS) asking for details of any criminal convictions recorded against five named police officers who had been involved in his case. Mr Gaule told us that he knew of nothing to suggest that any of the officers had a criminal record. The request was prompted by his view that “if by some chance” one of them did, then that might assist him to argue that there had been “unsafe questioning” in the interview. The request was made under the Freedom of Information Act (FOIA).

Appellant: Benjamin Gaule**Date of decision: 14 November 2013**

3. The CPS refused the request invoking exemptions under FOIA relating to personal data and to information relating to criminal proceedings. On review, the CPS altered its stance to one of refusing to confirm or deny whether the information was held. Mr Gaule complained unsuccessfully to the Information Commissioner (ICO) and now appeals to the Tribunal against the ICO decision.
4. This refusal to confirm or deny derives from Section 40(5) FOIA and applies if the very statement that information is held might contravene a data protection principle. This type of request causes difficulty for a public authority. On the face of it, it would be a simple enough matter, if no convictions were recorded, for the authority to simply state that it does not hold the information requested; but this very statement is revealing something about the person concerned, even if it be to their credit. Moreover, such an approach would lead the public authority to invoke the exemption only in those cases where they did have knowledge of a criminal conviction. The use of the exemption would then betray the fact that a conviction existed. In these circumstances, it is reasonable for public authorities to adopt the approach of “refusing to confirm or deny”.
5. This may sometimes lead to a certain artificiality in ICO investigations or on appeal but it cannot be helped. We have not thought it necessary to ask the CPS to supply any information which they hold because we are satisfied that we can decide this case without the use of closed material.
6. Whether or not you have a criminal record is part of your personal data; if you do have one it is part of your sensitive personal data. The effect of Section 40 FOIA, therefore, is to require consideration of this case under the Data Protection Act (DPA). In particular, would disclosure breach the Data Protection Principles?
7. In particular we need to consider Schedule 1 Part 1 Principle 1 and Schedule 2 para 6 of the DPA.
8. We do not accept that Mr Gaule has any legitimate interest in disclosure of the personal data. Even at the date of his request, it was fanciful. It could have no bearing on the offences to which Mr Gaule pleaded guilty or on the sentence which

Appellant: Benjamin Gaule**Date of decision: 14 November 2013**

he received. Moreover there are criminal procedure rules which permit disclosure, for the purpose of those proceedings, of any witness's criminal convictions. It is very difficult to see how disclosure under FOIA could therefore be necessary for the purpose of criminal proceedings. To the extent that we should look at any other public interest in disclosure the ICO suggests that there may be a legitimate interest in prompting transparency by allowing the public to see that those individuals who police society are fit to serve in that capacity. Such transparency, however, would be demonstrated by a publication of a police force policy on recruitment and misconduct. It would not be assisted by the disclosure of the private data of five named individuals.

9. We have concluded therefore that disclosure of the data would breach schedule 2 para 6 DPA. It would be neither lawful nor fair. For the reason given at para 4, the obligation to confirm or deny does not arise.
10. This appeal must therefore fail.

NJ Warren

Chamber President

Dated 14 November 2013