

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice dated 2 October 2013
FS50496436**

Appellant: GR JAMES

First Respondent: Information Commissioner

Heard at Field House London on 11 April 2014

Date of Decision: 1st May 2014

Date of Promulgation: 6th May 2014

Before
John Angel
(Judge)
and
Suzanne Cosgrave and Gareth Jones

Subject matter: s.40(2) personal information

DECISION

The appeal is upheld in part only.

REASONS FOR DECISION

Background

1. Mr James made a request for information to the Chief Constable of Cumbria Constabulary (CC) relating to three vehicles which he believed had been conducting surveillance of him and his family at specific times and dates in the Carlisle area. There is a long history as to why Mr James

considered he and his family might be under surveillance which began with his position as Chairman of Astra Holdings plc back in the 1980s.

2. Mr James asked by letter on 24 October 2012 for the names of the owners and the names of the drivers of the vehicles in question. Mr James provided the registration details of the vehicles along with their make, model and colour. He further specified the time and date on which he was concerned with the vehicles. CC responded by letter dated 29 November 2012 that the vehicles did not belong to the Constabulary and that Mr James and his family were not the subject of any surveillance operations.
3. On 7 December 2012 Mr James formalised the questions that had been raised in earlier correspondence with CC. The request is set out in full at §4 of the Decision Notice dated 2 October 2013 (DN) which is the request for the purposes of this appeal.
4. After several reminders from Mr James the CC responded on 25 February 2013 stating that it “does hold information relating to the registered keepers of vehicles, by virtue of being able to access records owned by the DVLA, via the Police National Computer.” The request was refused citing section 40(2) FOIA (personal information) (the Refusal Notice).
5. Mr James sought an internal review, the outcome of which was notified to him on 29 April 2013 confirming that the CC holds information relating to registered keepers, but upholding the original refusal and CC’s reliance on section 40(2).
6. A complaint was made to the Commissioner on 30 April 2013 that the request had been refused and that the CC had initially responded to the request outside the time limit of 20 working days.
7. During the course of the Commissioner’s investigation, the CC changed its position in relation to the request in July 2013. By letter to Mr James dated 26 July 2013 it stated –

“With regards to the identity of the drivers of the vehicles, on the dates specified Cumbria Constabulary does not hold this information. As per the previous response to you dated 29th November 2012, the vehicles in question do not belong to Cumbria Constabulary and as such no record as to the identity of the drivers on those dates is held.

With regards to the identity of vehicle owners in general, this information is held by the Constabulary by virtue of being accessible via the Police National Computer, albeit the records are actually owned by the DVLA. I can advise you that the Constabulary does not hold details of the owners of the following vehicles:

- Hyundai, colour black (on 14 November 2011)
- Rover 25, colour grey, reg no (on 21 September)

I can confirm that information relating to the owner of a vehicle with the registration numberis held by the Constabulary, by virtue of being accessible via the Police National Computer, albeit the colour of

the vehicle is slightly different to that described in your request. With regards to the identity of the owner of this vehicle, Cumbria Constabulary is not obliged to provide you with this information.”

[registration numbers deleted]

8. The Commissioner issued his DN where he found that a) there had been a breach of sections 10(1) and 17(1) FOIA by failing to comply with the request within 20 working days [DN§12], b) that the CC correctly relied on section 40(2) for the details of the registered owner of the first vehicle [DN§§33-40] and c) the remainder of the requested information was not held by CC [DN§§13-32].
9. In addition to the request for information under FOIA, Mr James also made a request to CC under the provisions of the Data Protection Act 1998 (DPA). The issues about the DPA request are outside the scope of the appeal in this case.

Legislative Framework

10. Under section 1(1) of FOIA a person who has made a request to a ‘public authority’ for information is, subject to other provisions of the Act: (a) entitled to be informed in writing whether it holds the information requested (section 1(1) (a)) and (b) if it does, to have that information communicated to him (section 1(1) (b)).
11. Although we are not bound by other decisions of the FTT or the former Information Tribunal we note that in determining a dispute as to whether information is ‘held’ within section 1 FOIA in *Linda Bromley and Information Commissioner v Environment Agency* (EA/2006/0072) at paragraph 13 the Tribunal found

“There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority’s records...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...Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.”

We consider that this is the test we should adopt in this case.

12. In so far as is material to this case section 40 FOIA provides for an absolute exemption for:
 - “(2) Any information to which a request for information relates is...exempt information if—
 - (a) it constitutes personal data which do not fall within subsection (1) ,
 - and
 - (b) either the first or the second condition below is satisfied.

- (3) The first condition is—
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—
- (i) any of the data protection principles, or
- ...
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

Does the CC hold the requested information?

13. The CC states that the vehicles are not its own cars and that it did not have Mr James under surveillance at the times in question.
14. CC’s Refusal Notice states that it holds details of the registered keepers of the three cars involved. This is by virtue of its access to the DVLA database through the Police National Computer (PNC). On investigation we find that this database is part of the PNC’s “Vehicle File”.
15. The CC continued to maintain this position following its internal review of its decision to refuse access to the requested information.
16. It is only some 6 months later that the CC states that it does not hold details of two of the vehicles involved. At this stage there is some confusion between the terms “registered keepers” and “owners” of vehicles.
17. As we understand it a registered keeper will always be an individual although that individual may not be the owner. So some registered keepers will be owners and some will not. The DVLA database does not hold details of drivers. The CC advised that the only way it would hold that information is if it had specifically collected it, for example, if it stopped the vehicle or the vehicle was under surveillance or caught on CCTV. There is no evidence in this case that there was such information.
18. We would point out that under FOIA there is no requirement for a public authority to create information which it does not hold, only to disclose information it does hold at the time of the request subject to exemptions. This means the CC are not required to go and find out the names of drivers it does not hold following a FOIA request.
19. Mr James and his son explained to us why they considered they were under surveillance. This was because of the history mentioned above and their suspicions that these cars were involved in surveillance of the James family. However, they could not provide any specific evidence that these vehicles belonged to the CC or were driven by either police officers or someone they would know.

20. We therefore find on a balance of probabilities that the CC does not hold any information on the drivers of the vehicles.
21. As far as the owners are concerned the CC does not distinguish between registered keepers and owners. However in its Refusal Notice and internal review it maintains that it holds the registered keepers details of the three vehicles as a response to a request for owner information. We could surmise that this response is one based on a general statement that it holds all registered keeper details via the PNC and that it had not undertaken a specific search for the three cars involved. But this is not what the CC said in its Refusal Notice or internal review where it said that it “does hold information relating to the registered keepers of the vehicles”.
22. Therefore the only evidence we have at the time of the Request is that CC said it held the information on the registered keepers and it does not distinguish between such keepers and owners of the three cars despite being asked on at least two occasions for owner information. We therefore find on a balance of probabilities that the CC held the information. The fact that the CC later stated that they did not hold the information on two of the vehicles is in our view not material to the consideration of what was held at the time of the request because this statement was made some 6 months later and there may be reasons why the information was no longer held. Neither the CC or the Commissioner has provided evidence to suggest otherwise.
23. We would point out that if after the date of the request the information was no longer held then this could affect any decision on remedies but as will be understood from the rest of our decision this is not relevant in this case.
24. We therefore consider that the Commissioner was wrong to decide that the CC only held “owner” information on just one of the vehicles at the time of the request. However the Commission was correct to find that the CC did not hold information on the drivers of the vehicles.

Should the names of owners be disclosed?

25. Under the DPA the names of living individuals are personal data. This would cover registered keepers or owners of vehicles. Under section 40(2) FOIA such information is absolutely exempt from disclosure if one of the data protection principles (DPP) is infringed. From the evidence the relevant DPP in this case is –
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.
 - b.
26. Under Schedule 2 there is only one condition which could be relevant –
- 6(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third part 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 interest of the data subject.

27. This is a balancing test. In the context of this case Mr James argues that he is pursuing a legitimate interest, namely that if the owners' identities are disclosed this will help him to find out whether surveillance was being carried out on his family and by whom. If he could do this maybe it would help to stop such activity which is placing an undue burden on his family.
28. When we asked him if he had the information how he would be able to use it for the above purposes he was rather vague but indicated it would be able to assist him. We note that he had already tried the obvious approach to discovering any irregularities by asking the CC for information and this had not helped him.
29. Condition 6 requires that the processing is "necessary" to achieve Mr James' purposes. However there were only two occasions to which the request relates. The first on 14 November 2011 which involved two of the three cars for approximately one hour and the second on 21 September 2012 where only another of the three cars was identified. There was no evidence of other sightings of these cars. Mr James did not report the first occasion until some 11 months later. Clearly there could be other explanations as to why the cars were at the same locations as Mr James' wife and son.
30. The CC suggested that Mr James approach the DVLA direct as the manager of registered keeper information but he had not sought to pursue this avenue.
31. It is difficult in our view for Mr James to meet the test of "necessity" when the main sighting was not reported for almost a year and has not pursued all avenues. Also there is no corroborated independent evidence to substantiate his view that he was under surveillance. Mr James did not confront the drivers or check to see if there was any CCTV footage at the time with the CC, other local public body or private organisations who might have retained such footage..
32. In contrast the legitimate privacy right of an individual not to have his/her personal data disclosed, as protected by the DPA which in turn implements two European Conventions, is very high indeed.
33. We appreciate from Mr James' grounds of appeal and other evidence that he would appear to have had a great wrong done to him and his family. However when considering the Condition 6 balancing test on the basis of the evidence in this case we are unable to find that Mr James satisfies the test which would require the information to be disclosed.

34. Even if we had found differently details of the registered keepers of two of the vehicles seem to no longer exist so we would have found it difficult to order disclosure for these cars.

Conclusion

35. We find the requested information as to registered keepers/owners only was held by CC at the appropriate time in this case and to that extent it is necessary to substitute a new Decision Notice reflecting this finding. However we find section 40(2) is engaged for the information and that it would breach the first DPP if the personal details of the registered keepers was disclosed and therefore to that extent the DN is upheld and the appeal dismissed.

Signed

Judge John Angel
Dated 1st May 2014