



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

Appeal No: EA/2015/0028

BETWEEN

RICHARD TURNER

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

COMMISSIONER OF THE METROPOLITAN POLICE

Second Respondent

Tribunal

**Brian Kennedy QC
Jean Nelson
Nigel Watson**

Hearing: 8 May 2015.
Location: Chesterfield, Derbyshire.
Decision: Appeal refused.

Date of Decision: 8 June 2015
Date of Promulgation: 10 June 2015

Subject Matter: The Freedom of Information Act 2000 ("FOIA") and reliance by the Public Authority in this case, the Metropolitan Police Service ("the MPS") on section 40(5)(b)(i) FOIA to neither confirm nor deny holding the requested information.

Introduction:

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("FOIA"). The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice ("the DN") dated 27 January 2015 (reference FS50566283), which is a matter of public record.
2. A Case Management Note dated 5 March 2015 confirms that the Second Respondent, the MPS, was joined as a second respondent at their request. A paper hearing took place on 8 May 2015. The Tribunal has been provided with a paginated (1-51) and indexed Open Bundle ("OB"). Included in the OB are the usual pleadings including the DN, the Grounds of Appeal and the Response on behalf of the Commissioner and the Response on behalf of the second named Respondent.

Background:

3. On 8 December 2014 the Appellant requested from the MPS this information: *“Can you please confirm from your records whether or not any newspaper cuttings were seized during the search of [name redacted] home and whether or not he was questioned on this matter.”*
4. The Commissioner in his Response states; *“The individual whose name has been redacted above was a suspect in a high-profile murder investigation, who's been convicted and is currently imprisoned. He is named in the grounds of appeal. In this response he is referred to as the Data subject. It is respectfully suggested that, unless the tribunal considers it necessary to do so that that subject need not be named on any decision of the tribunal in order to protect his privacy that of the appellant.”*
5. The Tribunal agrees and as it is not necessary, the Data subject need not be named in these proceedings. We continue with the statement and Analysis of the substance of the Commissioners Response to the Grounds of Appeal.
6. Again the Commissioner in his response informs the Tribunal that the Appellant in his request indicated that he was the brother of the Data Subject, and that he sought the information in order to correct certain newspaper reports, asserting the Data Subject had retained newspaper cuttings which discussed another crime (“the Reports”), which the Appellant considers are inaccurate or fabricated. In his request for a review the Appellant also indicated that he had his brother's permission to make the request.
7. The MPS did not confirm nor deny holding the information, pursuant to s. (40)(5) FOIA. They explained that (a) FOIA obliged them to consider whether the Data Protection Act (“DPA”) would be infringed by any disclosure, (b) that disclosure under FOIA was disclosure into the public domain, and (c) that if an individual sought their own personal Data, that Data was obtainable by a subject access request under the DPA. The MPS maintained its position following the Appellant's request for a review.
8. Following a complaint by the Appellant, the Commissioner investigated. He upheld the MPS' reliance on section 40 (5), since:
 - a. The Information, if disclosed, would effectively confirm or deny whether the requested information is held in connection with the Data Subject. It was therefore personal data: see DN/9.
 - b. The information related to the commission or alleged commission by the Data Subject of an offence, and was therefore sensitive personal data: see DN/10.
 - c. It was therefore necessary to consider whether disclosure of the data would breach the data protection principles: see DN/11.
 - d. *The first data protection principle required consideration of whether processing (here, disclosure), would be fair and lawful: DN/11. Cases where it would be fair to disclose sensitive personal data into the public domain were likely to be “extremely rare”, since such disclosure would be likely to have a “detrimental or distressing effect on the data subject”: DN/12. In this case:*
 - i The fact that the Appellant had indicated that he was enquiring on behalf of the Data Subject did not alter matters, since FOIA is disclosure to all the world. If the*

Appellant had the Data Subjects explicit consent, the appropriate route of the enquiry was a subject access request under the DPA: DN/13;

ii The Appellant had indicated that he was dissatisfied with information published in the media. Since FOIA disclosure is general, "confirmation or denial as to the existence of any of the requested information would have to be considered suitable for general disclosure and such disclosure could obviously include the press". It was likely that such disclosure would not accord with the Appellant's intentions, particularly since "a response which did not give the answers which the complainant is seeking could in turn fuel" further press attention: DN/14.

iii Accordingly, confirmation or denial would be unfair and so would breach the first. Principle protection principle: DN/15.

9. The Appellant's grounds of appeal indicate he fails to understand the Commissioner's reasoning and states that he cannot understand how it is that the information, which is already in the public domain cannot now be released to him.

The Legal Framework:

10. S. 40(5)(b)(i) FOIA provides:

*"(5) The duty to confirm or deny –
.....*

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

(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 or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded ...".

11. Since section (40)(1)-(3) confer absolute exemptions (s.2(3)(f) FOIA), the decision whether to confirm or deny is likewise not subject to the s.2 FOIA public interest balancing test.: s.2(1)(a) FOIA (cf. *The Rt. Hon Frank Field MP v Information Commissioner EA/2009/005 at [24]*). However consideration, of contravention of the data protection principles or s. 10 DPA may in some circumstances involve consideration of the public interest.
12. By s. 1 DPA, personal data is data, which relate to a living individual identifiable from those data alone or in combination with other information available to the data controller. By s. 2DPA "*sensitive personal data*" means personal data consisting of information as to, inter-alia, "*the commission or alleged commission by him [the data subject] of any offence.*"
13. The data protection principles ("DPP") are set out in Schedule 1 DPA. The relevant DPP in this case is the first DPP. This provides:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless - .

It accepted that its initial response to the Appellant, referring to a partnership agreement, may have been confusing; but that by its further response on 28 August

2014 it had clarified to the Appellant that it did not hold cost breakdowns first sprayed markings.

- a. *at least one of the conditions in Schedule 2 is met, and*
 - b. *in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met”.*
14. The relevant Schedule 2 conditions in this case are:
- a. Schedule 2 Para 1: Consent; and
 - b. Sch.2 Para 6: That the disclosure is *“necessary for the purposes of legitimate interests pursued by ... the third party or parties to whom the data are disclosed, except where the [disclosure] is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject”.*
15. The relevant Schedule 3 condition is:
- a. “Sch. 3 Para 1: Explicit consent.”

Analysis:

16. There can be no serious dispute but that (a) the information sought is the Data Subject’s sensitive personal data (being data that concerns the alleged commission by him of a criminal offence), and (b) confirming or denying that the information was held would involve processing it (otherwise section 40(5)(b)(i) FOIA would be without meaning).
17. Applied to the facts of this case, therefore the Commissioner considered that confirmation or denial as to whether the MPS holds the relevant information would contravene the first DPP in two respects:
- (a) Fairness; and
 - (b) Lack of consent.
- Fairness:
18. Sensitive personal data is identified and given special treatment in the DPA as being that of particular sensitivity and personal importance to individuals. Accordingly, in the Commissioner’s view circumstances in which they allege disclosure of such information is legitimate are likely to be extremely rare.
19. While this case does not concern disclosure, but the duty to confirm or deny, the Commissioner argues the same high bar is present given the particular context of the request: namely, the media interest referred to above.
20. The Reports assert that the Data Subject retained certain newspaper cuttings and was questioned about them by police following a search of the Data Subject’s home: the Information sought is whether the newspaper cuttings were found in a police search of the Data Subject’s home and whether the Data Subject was questioned about them. In this case, therefore, confirming or denying whether the information sought is held would come close to confirming or denying the accuracy of the reports (the Commissioner’s emphasis). At the very least, such confirmation or denial would be very relevant to the accuracy of the reports and would, given the significant previous media interest leading to the Reports, potentially lead to further such media interest. Such an outcome would, in the Commissioner’s submissions, not be fair for the Data Subject.

21. The Commissioner notes the Appellant's assertion that the Data Subject desires the disclosure of the information to the Appellant. However, as the Commissioner points out, the test under s.40(5)(b)(ii) is whether confirmation or denial to "*a member of the public*" would infringe the DPA. This accords with the wider principle that a FOIA disclosure is a disclosure to all the world, including potentially interested media organisations. There is, as recognised in the DN, a route by which the Data Subject or the Appellant (if he evidences the Data Subject's formal consent) can obtain the Information without such general disclosure: through a subject access request under s.7 DPA.
22. Pausing here, it seems to the Tribunal, that this is the crux of the resolution to the Appellant's mis-understanding of or, difficulty in understanding the DN.

Lack of Consent:

23. Since this case involves sensitive personal data, it is necessary that both a schedule 2 and a schedule 3 condition be satisfied. In the Commissioner's view, the only potentially applicable schedule 3 condition is explicit consent.
24. In this case the Appellant has informed the Commissioner that he is the Data Subject's brother and has the Data Subject's consent. While the Commissioner has no specific reason to doubt the Appellant on either of these two matters, the Appellant has not provided any evidence of this. In the circumstances, the Commissioner would also consider that confirmation or denial of holding of the information requested would also breach the first DPP in that there would not be compliance Schedule 3 Para.1.
25. The Commissioner continues and argues, for the avoidance of doubt, even were the Appellant to provide evidence of that consent; the Commissioner nonetheless submits that disclosure would not be fair for the reasons he had already given.
26. The MPS in its Response adopt the reason given in the DN and the Commissioner's Response in their Response to the Grounds of Appeal. They expand on the fundamental Legal Framework citing appropriate authorities.
27. The MPS emphasises that disclosure as requested would in fact be to the whole world and not just the Appellant. They also confirm that the Appellant was told at the time of the request why s.40(5) applied and that he could consider an application under the DPA.
28. Particularly pertinent to this appeal, the MPS helpfully submits that the following factors indicate that it would not be Fair to confirm or deny holding the Information sought in the request:
 - (a) Confirming or denying the request would inevitably be taken as relevant to the accuracy of the existing press reports (even if it could not provide a formal response either way);
 - (b) Even where information has already been placed in the public domain unofficially, a response which carries an 'official' status when will inevitably carry greater credence or currency;
 - (c) Such information in the public domain would create a fresh news story, generating a risk of the reprise of the original story which generated the request and the MPS's response;

- (d) Any distress harm suffered by the Data Subject or members of his immediate family from the original report would only be exacerbated by its repetition and garnering of fresh impetus;
 - (e) Just as significantly, if not more so, fresh press coverage would be highly likely to cause particular distress to third parties. In particular, the families of the data subject's victims and the family and friends of the (now deceased) individual and the data subject is said to have deliberately befriended, will be especially likely to be distressed by further information being placed into the public domain;
 - (f) There is no general interest in transparency and accountability involved in this information. The appellant is concerned about the actions of a former officer of the MPS who acted in a personal capacity after his retirement in speaking to the press;
 - (g) Sensitive personal data should only be the subject of consented release into the public domain in the most exceptional circumstances, which do not apply here;
 - (h) To the extent that the Appellant and/or the Data Subject wish to obtain official information from the MPS concerning the investigation and prosecution of the Data Subject, a subject access request under the DPA provides the appropriate forum.
29. The MPS agrees with the ICO that no condition in Schedule 2 can be properly identified as being met. No consent has been given by the Data Subject so as to meet condition 1. As for condition 6, the processing cannot be said to be either reasonably necessary to achieve any (unarticulated) legitimate aim, nor strike a fair balance between the interests of the Data Subject, the MPS and public disclosure via the Appellant. The Appellant cannot satisfy the principles laid out in detail in *Goldsmith international Business School v The information Commissioner and Home Office [2014] UKUT 05563 (AAC) at [34] – [34]*.
30. The MPS further agrees that no condition in Schedule 3 can be properly identified as being met.
31. The MPS in its response concludes, (and generally in agreement with the Commissioner) that no consent had been provided by the Data Subject at the time of the request, and so any subsequent provision of consent is irrelevant to the Tribunal's decision. In the alternative, they argue, even consent from the Data Subject would not materially affect the unfairness of the disclosure to the world, such that confirming or denying whether the information was held would be a breach of the first DPP.
32. The Tribunal accepts the reasoning of the Respondents generally and as indicated at paragraph 22 above we find the reasons given in the Grounds of Appeal demonstrate how the Appellant has failed to grasp the significance of "disclosure to the world rather than to an individual". We also find that the alternative access through the DPA is or would have been the correct approach for him to follow.
33. The Appellant has failed to persuade us that the Commissioner was wrong in his DN.

REASONS

34. The Tribunal accepts and adopts the Commissioner's reasoning throughout the DN. In fact the Appellant does not appear to argue to any significant degree that the Commissioner is flawed in his reasoning. Rather he seems to indicate that he cannot

understand why he cannot get a definitive answer to his question even with the Data Subject's alleged consent. In that regard we accept and adopt the submissions made by both respondents as set out above.

Brian Kennedy QC

8th June 2015.