IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2015/0245**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Information Notice No: RFA0588741
Dated: 27 October 2015

Appellant: **Tallington Lakes Leisure Park Limited**

Respondent: **The Information Commissioner**

Heard at : Fox Court London – telephone hearing

Date of Hearing: **7 March 2016**

Before

Chris Hughes

Judge

and

Dave Sivers and **David Wilkinson**

Tribunal Members

Date of Decision: **26 March 20**

Date of Promulgation **31st March 2016**

Attendances:

For the Appellant: Mr N Morgan – Company Director

For the Respondent: Christopher Knight

Subject matter:

Data Protection Act 1998

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the information notice dated 27 October 2015 and dismisses the appeal. The Appellant must within 30 days of this decision provide the information specified.

REASONS FOR DECISION

Introduction

1. The Appellant, Tallington Lakes Leisure Park Limited ("the company") is registered with the Respondent Information Commissioner ("the ICO") to process personal data in connection with "financial, mortgage and insurance services".

2. On 8 July 2015 an individual [name redacted "Mr. A"] received an email from "Tallington Lakes" headed *"application to set aside statutory demand – debtor [name redacted "Ms B"]*". The email included previous emails and a witness statement of 6 July 2015 by Mr Morgan (a director of the company) giving details of a transaction between Ms B and the company and the subsequent dispute and litigation. The witness statement contained some information about her health. One email contained within this communication was seeking to relist a hearing from 10 August (when Mr Morgan would be away), to dates in the last week of August and the first week in September.

3. Mr A wrote to the ICO:-

   "I received the below email to my personal and private email account earlier today. This title of this email leads me to believe the data concerned does not relate to me and is potentially sensitive in nature. I am concerned and distressed that this data has been sent to me as I have no right to receive this data nor any involvement in the matter.

   I have sought advice from the Information Commissioners Office helpline and following their advice I have included them in this email such that they will consider whether it is appropriate to take any further action and raise a case under Data Protection legislation.

This email will be deleted without interrogation of its contents."

4. On 12 August the ICO wrote to Mr. A to acknowledge and to set out the steps it proposed to take:-

".. As I understand the situation, you received a quantity of information about another individual to your private email address.

You wrote to the organisation to explain what had occurred, attaching the information you received in error.

Next steps

We will contact the organisation and pursue this matter as a security compliance issue…"

5. On 14 August the ICO wrote to the company secretary of the company setting out the ICO's functions, detailing the complaint he had received, and stating:-

"It is my conclusion, based on the evidence we have on this case, that Tallington Lakes has not met its obligations under the DPA on this occasion.

This is because Mr A received third party data in error.

Please prioritise this matter and respond to the ICO in the timescale below with the following information:-

- *Explain how this incident occurred*
- *Clarify what Tallington Lakes died [sic] to address this matter*
- *Explain what Tallington Lakes will now do to improve data handling in future*

Response Timescale By close of business on Fri 4 Sept 2015"

6. While it is possible to criticise the ICO on the wording he adopted, (a conclusion appearing to be reached before hearing an account from the company) the request clearly asked for the company's explanation of what had occurred and the way was open to it to rectify any misapprehension of the true state of affairs.

7. On 11 September the company again sent an email with witness statements attached to Mr A, who responded "

"Dear Mr Morgan,

I have previously returned an email from yourself which was delivered to me advising that I had no right nor interest in the matters you are discussing…

…

I will submit this email, as a matter of transparency and compliance to the information commissioner to add to their existing information."

8. There was no reply from the company to the ICO and on 24 September the ICO rang the company and spoke to a manager at the company explaining the matter was urgent and asking for a response by the following day as the matter was now urgent. The ICO wrote to the company the same day attaching the previous correspondence, confirming the complainant had contacted the ICO again about a further communication and asking the individual to:-

"ring me on the number below with your initial findings by Friday 25.9.15."

9. There was no response and on 7 October the ICO rang the company again emphasising the need to respond, explaining that the data controller needed to prioritise the matter and respond explaining:- *"how it had happened, why, what was done and what will be done to improve data handling."*

10. On 8 October Mr Morgan rang the ICO. The note of the conversation kept by the ICO indicates that he was unhappy that the ICO was repeatedly trying to discuss the issue with managers at the company, the officer of the ICO explained the background of the complaint, Mr Morgan is reported as saying this was rubbish, the data was in the public domain, the situation was not serious at all. He was angry and became confrontational.

11. On 12 October the ICO wrote asking for a reply to certain questions concerning the complaint and the company's policies and procedures. The letter required an answer to the questions and indicated that if no reply was received by 23 October the ICO would consider using formal powers under Section 43 of the DPA to serve the company with an Information Notice.

12. Mr Morgan rang the ICO in 13 October. He maintained that the company was not a data controller, he asked the ICO's officer to define "personal data" and "processing" and asked for copies of the relevant legislation demonstrating that the company was a data controller. He argued that the information sent by the company was publicly

available through the courts system. He argued that the person to whom the information had been sent was not a third party since he was Ms B's son. The company had been cleared of allegations made against it in court. Mr A had raised concerns about a number of things and he found it disappointing that the ICO had chosen to engage. He found the ICO's contact with him "astonishing", he had "no clue" why the ICO were pursuing the issue and it was "pointless bureaucracy".

13. The ICO wrote a detailed letter the following day providing answers to Mr Morgan's

14. questions, links to different parts of the ICO website giving information on data controllers and processing of data, the letter set out definitions of data, personal data, a data controller. The letter explained that information held by the company about individuals contacting it, if it identified the individuals, would be personal data under the DPA. It provided a link to an explanation of the company's obligations with respect to the security of data and explained that individuals, even if they are related are separate data subjects under the DPA. It explained that to send personal data about one individual to another might not be in compliance with the DPA:-

"even if those individuals are related, unless you have permission or it is reasonable in all circumstances to do so.

This is why we have asked for an explanation of why the information was sent and for details about the company's security procedures"

The letter made clear that a written response was required by 23 October.

15. Mr Morgan rang the ICO on the same day. He disputed that he had been sent the information that he had asked for, he disputed that the company was processing personal data, he did not appear to understand that the company was registered with the ICO. He indicated that the ICO "*would have to issue a court summons for any further information…he made various comments about his perception of me and the ICO and I politely brought the call to a close.*"

16. He emailed the ICO disputing that the company was a data controller, or processed data, arguing that the witness statement was not personal data "*it is a publicly available document which forms part of a public process.*" The recipient was involved in the proceedings and was the son of the other party in the proceedings and had deleted the material. The email concluded by criticising the conduct of the ICO.

The Information Notice

17. On 27 October 2015 the ICO served an Information Notice on the company requiring information to be provided to the ICO within thirty days:-

An explanation of how the witness statements and third party information came to be sent to Mr. A's personal e-mail address on 8 July 2015 and 11 September 2015

Details of the steps taken by the data controller to address the situation when Mr A made it aware of the disclosures on 8 July 2015 and 11 September 2015.

Details of the security measures the data controller has put in place to protect the personal data it processes.

Copies of any data protection policies relating to security or confirmation that no such policies exist."

18. On receiving this notice Mr Morgan made an obscene and personally abusive telephone call to the ICO's officer (bundle page 49).

The appeal to the Tribunal

19. In the notice of appeal the company repeated the arguments advanced in Mr Morgan's email and further argued that the ICO should have exercised his discretion differently, arguing that there were no proper grounds or justification for issuing the notice and it was "disproportionate, wholly unreasonable and completely unnecessary." He made offensive and defamatory comments about the ICO and his staff.

20. In his response to the notice of appeal the ICO set out the history and the statutory basis upon which he relied. In addressing the ICO's exercise of discretion to issue an Information Notice he denied that the decision was motivated by *"vindictive, spiteful and bullying bureaucrats without any proper grounds or justification" as the company had alleged"*. The ICO submitted that the background demonstrated why issuing the notice was lawful and reasonable. He had repeatedly sought information and these requests had been ignored, refused and had met with obstruction and abuse, the Information Notice was the only way to obtain answers to the basic questions asked. The Information Notice was not misleading or untruthful and there was no requirement to provide all correspondence between the parties in the Notice – it was a request for the information which had not been provided. The ICO had assisted the company by providing answers to the questions in its 14 October email; however the

company did not like the answers provided. The ICO provided an analysis of the statutory framework. In response to this the company provided a document annotating this reply with its comments. In his arguments in the tribunal Mr Morgan, on behalf of the company repeated these claims.

The questions for the Tribunal

21. In this case the ICO has exercised his power under section 43(1)(b) of the DPA:-

Information notices.

(1)If the Commissioner—

(a)has received a request under section 42 in respect of any processing of personal data, or

(b)reasonably requires any information for the purpose of determining whether the data controller has complied or is complying with the data protection principles,

he may serve the data controller with a notice (in this Act referred to as "an information notice") requiring the data controller, to furnish the Commissioner with specified information relating to the request or to compliance with the principles.

22. The role of the tribunal is set out in section 49 of the Data Protection Act:-

Determination of appeals.

(1)If on an appeal under section 48(1) the Tribunal considers—

(a)that the notice against which the appeal is brought is not in accordance with the law, or

(b)to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice or decision as could have been served or made by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2)On such an appeal, the Tribunal may review any determination of fact on which the notice in question was based.

(3)If on an appeal under section 48(2) the Tribunal considers that the enforcement notice ought to be cancelled or varied by reason of a change in circumstances, the Tribunal shall cancel or vary the notice.

(4)On an appeal under subsection (3) of section 48 the Tribunal may direct—

(a)that the notice in question shall have effect as if it did not contain any such statement as is mentioned in that subsection, or

(b)that the inclusion of the statement shall not have effect in relation to any part of the notice,

and may make such modifications in the notice as may be required for giving effect to the direction.

(5)On an appeal under section 48(4), the Tribunal may cancel the determination of the Commissioner.

23. The company has argued that the Information Notice is not in accordance with law, that discretion should have been differently exercised and the content of the notice was misleading and untruthful

Whether the notice was in accordance with the law

24. The company argues that they are not data controllers, do not process data, the witness statement is not personal data, Mr A was involved in the litigation, and deleted it without reading.

25. Section 1 of the DPA sets out the basic interpretations of the terms used in the Act.

26. Section 1(1) defines a data controller as "a person who either alone or jointly or in common with other persons determines the purposes for which and the manner in which any personal data are, or are to be, processed". The email to Mr A was sent from the company's email address by a Director of the company, Mr Morgan. The company was therefore determining the purpose for which the email was sent and was therefore a data controller.

27. Section 1(1) defines processing as " in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including— (a) organisation, adaptation or alteration of the information or data, (b)retrieval, consultation or use of

the information or data, (c)disclosure of the information or data by transmission, dissemination or otherwise making available, …" The data about Ms B in witness statement was held by the company and disclosed by the company to Mr A, it was therefore processing the data. Despite Mr Morgan's claim that processing means a recurrent, repeated operation; that is not in the statutory definition. In any event, the company repeated its act by sending further information to Mr A when he had asked it not to do so.

28. Section 1(1) defines personal data:- "data which relate to a living individual who can be identified (a)from those data, or (b)from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual"; the information about Ms B was personal information. It gave details of her indebtedness, and her health. It was personal information about her and remained personal information. The question of whether or not it was in the public domain does not go to the issue of whether it is personal data. The tribunal is by no means satisfied that this information was in the public domain.

29. Mr A has indicated that he is not a party to the litigation, the information giving rise to the Information Notice does not disclose that he is and the ICO is entitled, until the contrary is proved, to accept this; indeed it was open to the company to explain the issue fully but it has failed so to do. The question of whether Mr A destroyed the information does not affect the issue of whether the information was incorrectly processed by being transmitted to him if it should not have been.

30. The ground of appeal that the Information Notice was wrong in law therefore fails.

The exercise of discretion

31. By the time that the ICO sent the Information Notice to the company, the ICO had repeatedly asked for answers to some basic questions and had asked for them to be in writing. Some (but my no means all) of the information which ICO was seeking was provided during the course of the appeal as assertions of fact concerning the relation between Mr A and Ms B which provides an explanation of why the information was sent. There was no explanation of steps taken in response to Mr A's request not to receive such communication, indeed the basic assertion of the company (in an

annotation to point three of the ICO's response) is "we can send emails to who we bloody well like and completely within our proper discretion" amounts to a clear rejection of the statutory framework for which the ICO is responsible. There was no provision of the policies and other procedures which the ICO had repeatedly asked for.

32. The position of the company appears to be that it knows that Mr A and Ms B are acting together against the company in long running and clearly difficult litigation. It claims that there have been repeated complaints against the company to various agencies which the company has successfully disposed of and the ICO is wrong and out of step because he has continued with his investigation. There are substantial difficulties with this position. Throughout the period leading up to the service of the notice (and indeed subsequently) the company produced no written evidence of the relation between these two or of any role of Mr A in the litigation. The ICO's first contact with the company was by letter of 14 August, there is no evidence that the company even began to address the issues raised before the ICO's note of a telephone conversation of 13 October and Mr Morgan's email of 14 October which contain the assertion of the relationship, do not prove it and do not address the issue of whether Mr A was authorised to receive the information. The fact that a document has been filed in court does not necessarily make the information it contains public.

33. Mr Morgan (on behalf of the company) argued that the ICO should have realised from the start that the complaint from Mr A was suspicious. The tribunal considered but rejected this argument. The complaint was on its face a reasonable request to a statutory regulator to investigate what appeared to be an inappropriate transmission of personal information. Such emails are a normal part of the ICO's activities and the ICO is entitled to start from the position that a complaint is made in good faith, investigate and keep the overall position under review through the course of the investigation. Mr Morgan appears to be aggrieved that the ICO did not know everything he knew, when he had not told the ICO what he knew.

34. By the time that the ICO issued his Information Notice he had spent more than two months trying to get to the bottom of the complaint and had met delay then obstruction and abuse. He had gone to considerable lengths to provide information to help the company understand the legal framework but his help had been rejected and the company had refused to provide the basic information which would enable the

ICO to determine the extent that there were grounds for concern. In exercising his discretion to issue an Information Notice the ICO had no practical choice.

35. The discretion was properly exercised by the ICO and this ground of appeal fails.

The content of the Information Notice

36. The purpose of the Information Notice is to identify the information the ICO requires for his investigation. The Notice does this, there is no requirement to provide all copies of correspondence. The ICO had prior to the issuing of the Information Notice made considerable efforts to explain his powers and duties to the company. This ground of appeal is entirely fallacious and appears largely to be a vehicle for abusive comments.

Conclusion and remedy

37. For the reasons stated above this appeal is dismissed.

38. The company, in its notice of appeal, asked the tribunal to quash the notice and award compensation to the company for wasted time and work. The tribunal has upheld the notice and has no power to award compensation.

39. The ICO indicated in his response to the appeal that he reserved his position an application for costs "to reflect the unreasonable bringing of this appeal and the unreasonable conduct of it through the wholly inappropriate tone and content of the notice of appeal filed by the Appellant".

40. The company, in its annotations to the response to the notice of appeal, "claims its costs for having to bring this appeal".

41. The tribunal has the power to award costs under Rule 10 of the General Regulatory Chamber's Rules if the Tribunal considers that a party has acted unreasonably in bringing, defending or conducting the proceedings. The tribunal directs the ICO to provide details of the costs he has incurred and any arguments he may wish to advance with respect to this issue by 15 April, the tribunal will then make directions for the timetable for the company to respond on the issue of costs.

42. Our decision is unanimous

Chris Hughes, Tribunal Judge

Date: 26 March 2016