Neutral Citation Number:

IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2015/0250**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:
The Information Commissioner's
Decision Notice No: FS50591863
Dated:14th October 2015

Appellant:	**Frank Richardson**
Respondent:	**The Information Commissioner**
Second Respondent	**The Commissioner of the Metropolitan Police Service**
Heard at	**Norwich Magistrates' Court**
Date of Hearing:	**3rd March 2016**

Before

David Farrer Q.C. Judge

and

Marion Saunders and Henry Fitzhugh

Tribunal Members

Date of Decision:	**29th March 2016**
Date of Promulgation:	**1st April 2016**
Attendances:	**Mr. Richardson in person**
	Mr. Christopher Knight on behalf of the Metropolitan Police Service
	The Information Commissioner did not appear but submitted a written response to the Grounds of Appeal

Subject matter: Freedom of Information Act 2000 sections 40(5) and (2)

Whether the MPS was entitled neither to confirm nor deny that it held the requested information. (hereafter "to NCND the requests)

Whether, if not so entitled, it would breach any of the data protection principles by disclosing it.

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed, in as much as the MPS was not entitled to NCND the requests. However, it could rely on the exemption provided by s.40(2) of FOIA as justifying a refusal to disclose the information. The Tribunal therefore substitutes for the ICO's decision a decision that the MPS could, rely on the exemption provided for in s.40(2) and refuse to disclose the requested information. The Tribunal does not require the MPS to take any steps consequent upon this decision.

Abbreviations

The DN	The ICO's Decision Notice
ICO	The Information Commissioner's Office
FOIA	The Freedom of Information Act, 2000
The DPA	The Data Protection Act, 1998
The UT	The Upper Tribunal
MPS	Metropolitan Police Service

The Relevant Statutory Provisions

FOIA 2000

1.— General right of access to information held by public authorities.

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

. . . . .

2.— Effect of the exemptions in Part II.

(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,

section 1(1)(a) does not apply.

. . . . .

40.— Personal information.

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also 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,

. .. . . .

(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

. . . . . .

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(7) In this section—

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

Data Protection Act 1998

2 In this Act “sensitive personal data” means personal data consisting of information as to-

. . . .

(g) the commission or alleged commission by him of any offence . .

Schedule 1 The data protection principles

Part I The principles

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) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

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Schedule 2 Conditions relevant for purposes of the first principle: processing of any personal data

. . . . . .

6.—

(1) 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.

…..

Schedule 3 Conditions relevant for purposes of the first principle: processing of sensitive personal data

. . . . .

6 The processing -

(a) is necessary for the purpose of, or in connection with any legal proceedings (including prospective legal proceedings),

(b) is necessary for the purpose of obtaining legal advice, or

(c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.

7(1) The processing is necessary –

(a) for the administration of justice,

Authorities

MC v ICO and the Chief Constable for Greater Manchester [2014] UKUT 0481 (AAC)

Goldsmith International Business School v the ICO and the Home Office [2014] UKUT 563 (AAC)

Farrand v the ICO and the London Fire and Emergency Planning Authority [2014] UKUT 0310 (AAC)

REASONS FOR DECISION

The Background

1. In 2008 the Information Tribunal, following a request for information by the investigative journalist, Heather Brookes, ordered the disclosure of redacted expenses claims made by MPs. Its decision was upheld by the High Court on further appeal.

2. In 2009, the Daily Telegraph, having received leaked copies of the documents supporting these claims, anticipated the disclosure of redacted versions by publishing a large number of highly questionable claims for expenses made by MPs over a number of years. Their disclosure provoked a major public outcry, leading to resignations, dismissals and several criminal convictions and prison sentences for members of both Houses.

3. A series of cases relating to claims in respect of second homes was investigated by The Parliamentary Standards Commissioner ("the PSC"), who reports, if appropriate, to The Parliamentary Committee on Standards. That Committee adjudicates on the question whether the applicable expenses rules have been breached and, if they have, determines the parliamentary penalty. That does not preclude a police investigation and, if appropriate, a prosecution, as is apparent from §2.

4. Maria Miller MP was the subject of Parliamentary Committee on Standards 10th. Report, published in the 2013 – 4 session, which followed an investigation by the PSC into claims that she had made after her election in 2005. Suffice it to say that

the issues included the identification of her primary and second homes and the amounts of mortgage interest claimed and recovered.

5. Public interest was increased by Ms. Miller's position as Secretary of State for Culture, Media and Sport and Minister for Women and the Disabled.

6. The Committee Report exonerated Ms. Miller as regards any deliberate violation of the expenses rules but severely criticized her attitude towards cooperation with the PSC in the course of her investigation. It ordered her to repay mortgage interest inadvertently overclaimed and to apologise on the Floor of the House for her conduct and attitude towards the PSC.

7. Ms. Miller resigned from her ministerial offices as a result of these events.

<u>The Request</u>

8. On 9th. March, 2015, after earlier exchanges, Mr. Richardson ("FR") requested from MPS the following information –

"1 The MPS's 2012 document in which the decision was made not to lay charges against Maria Miller MP.

2 Any documents laying out the MPS's reasons why Maria Miller MP was not to be charged.

3 Any letters or emails sent in response to people/ organisations like Thomas Docherty MP and John Mann MP, requesting that the Miller case be reopened by the MPS.

4 Any recorded information, such as emails, meeting minutes, research or reports, relating to MPS's engagement with the Parliamentary Standards Commissioner in connection with her investigations in the Miller case.

5 In the light of the Parliamentary Standards Commissioner 's investigation or any other circumstances, any documents providing details of any review by MPS of its 2012 decision not to lay charges against Miller."

9. MPS responded on 5th. May, 2015, confirming that it held information within the scope of the request but refusing disclosure in reliance on s.30(1)(a) (information held for the purposes of a criminal investigation) and s.40(2). It held to that position following an internal review.

10. FR complained to the ICO on 3rd. August, 2015.

11. In the course of the ensuing investigation MPS radically altered its position. It indicated reliance on s.30(3) and s. 40(5) of FOIA, that is to say that it asserted rights to NCND these requests because confirmation or denial would, of itself, undermine the protection provided by the relevant exemptions. Such a stance is, of course, inconsistent with MPS's initial response and was intended to supercede it. When invited to respond to this development, FR, unsurprisingly, argued that MPS's original response was in the public domain and that it was too late to NCND his requests. Furthermore, he relied on a letter which he had received from the office of the PSC, clearly implying that MPS held relevant information. This letter, he said, also placed the information that MPS held such material in the public domain.

The DN

12. The ICO rejected the argument that such information was in the public domain, whether as a result of the initial response of MPS or of the PSC's letter. He refused even to take account of this argument on the ground that MPS was entitled to "revise its position" so that he should ignore any earlier correspondence. As to the PSC letter, it was a letter written to FR personally and the writer merely said that she "understood" that MPS officers had assessed relevant information as to Ms. Miller.

13. He observed that the personal data of Ms. Miller related to a possible criminal investigation and were therefore "sensitive personal data", disclosure of which required compliance with one of the conditions set out in Schedule 3 to the DPA. He considered the reasonable expectations of Ms. Miller and her correspondents as regards request 3. He made passing reference to "a limited legitimate interest" in disclosure but concluded that those reasonable expectations and the potential distress which either answer to the request would cause Ms. Miller and her

correspondents would result in unfairness. MPS was therefore entitled to rely on s.40(5). The parallel claim to NCND based on s.30(3) was not addressed.

The case for FR

14. As to NCND, FR reiterated the arguments advanced during the investigation. The information was published generally; any damage as regards personal data was done and could not be undone.

15. As to any issue of unfair processing of personal data, if it arose, there was a powerful public interest in possible abuse of MPs' rights to expenses and public confidence was at a low ebb. The public was also deeply concerned over any appearance of favourable treatment given to MPs, as compared with other members of the public. FR, a member of the public, had a legitimate interest in knowing whether such a suspicion was justified in the case of Ms. Miller, a government minister. The requested information was necessary to any sensible pursuit of that interest. Ms. Miller's expectations as to confidentiality and distress over further publicity did not outweigh such public interests so as to make disclosure unwarranted.

The Respondents' cases

16. Both respondents submitted that MPS was entitled to NCND the requests despite its earlier response, largely for the reasons indicated above.

17. MPS made alternative submissions to cater for a finding that MPS could not NCND the requests. Mr. Knight argued that the exemption provided by s.40(2) applied. The appeal must fail, whatever the Tribunal's findings as to general unfairness and satisfaction of condition 6 of Schedule 2. Ms. Miller's personal data were "sensitive personal data" as defined in s.2(g) of the DPA, disclosure of which cannot be fair unless a Schedule 3 condition is met. These requests could not satisfy any such condition. None had been identified as applicable in written submissions.

The Tribunal's findings.

18. We consider first the respondents' claims that MPS was entitled to NCND these requests, having first relied on specified exemptions.

19. It is plain that the NCND response cannot be available where the fact that the public authority, the object of the request holds or does not hold the requested information

is in the public domain. As Judge Turnbull observed in *MC v ICO and the Chief Constable for Greater Manchester [2014] UKUT 0481 (AAC)* at §22 –

"In my judgment it is a nonsense to say that the public interest demands that a public authority give a "neither confirm nor deny" response when the fact that the information exists is already in the public domain."

The question is, therefore; was such information in the public domain when MPS first produced its NCND response ?

20. In our judgment, this is a question, the answer to which depends on the facts of the particular case. There will be instances, such as *Foster v ICO and the Nursing and Midwifery Council EA/2013/0176* in which disclosure (of part of the requested information) had been made to the Appellant in informal private correspondence, where limited circulation justified a finding that the information was not in the public domain, even though the recipient was free to communicate it to others. That is far from this case.

21. Here, MPS informed FR that it held some or all of the requested information in the form of a response pursuant to FOIA s.1(1)(a). The ICO began his investigation on the footing that MPS relied on two exemptions in respect of information which it held. The Tribunal considers that such a communication is a matter of public record because the disclosure that the information is held is made to the public at large, just like disclosures ordered by the ICO or the Tribunal.

22. The DN draws a comparison with the right of a public authority to switch to reliance on a different exemption whether in responding to the DN or later before the First – Tier Tribunal. The analogy fails. Any disclosure of information in response to a FOIA request is a disclosure to the public at large. By responding in accordance with s.1(1)(a), citing exemptions, a public authority unilaterally alters the factual background to the request. Information, once provided to the public, cannot be recalled and poured back into the bottle. On the other hand, an exemption engaged but initially ignored remains engaged. Its relevance is unaffected by the failure to cite it at the outset.

23. The logic of this conclusion simply underlines the force of Judge Turnbull's dictum. To profess to hide what you have already revealed is absurd.

24. It is clearly arguable that the letter from PSC to FR dated 4th. March 2015, indicating the MPS position as to investigation of Ms. Miller's case also placed the information in the public domain. We find unconvincing the ICO's argument in the DN that the letter did not spell out the MPS stance unequivocally. However, it is unnecessary to rule on this, given our conclusion as to the effect of the initial MPS response.

25. That finding leads to the question raised by the initial response of MPS.

26. There is considerable force in FR's submission that his request raises issues of substantial public interest. Decisions as to the prosecution of public figures for alleged misuse of public funds are a legitimate concern of the whole community. FR argued his case on this point cogently and realistically.

27. There is though no doubt that each of the requests involves the personal data of Maria Miller and request 3 those of the individuals who asked for a review of MPS's decision to take no action.

28. Disclosure of the requested information would involve the processing of those personal data, which cannot take place unless it is fair and lawful. To be fair it must, quite apart from general considerations, satisfy a condition of Schedule 2 to the DPA. Condition 6(1) is the only possible candidate for compliance.

29. As to condition 6(1) of Schedule 2, the correct approach has been set out by the UT in *Goldsmith International Business School v the ICO and the Home Office [2014]UKUT 563 (AAC)*and *Farrand v the ICO and the London Fire and Emergency Planning Authority [2014] UKUT 0310 (AAC)*-

(i) Has the requester a legitimate interest in disclosure ?

(ii) If so, is disclosure necessary to the pursuit of that interest ?

(iii) If so, is it nevertheless unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject ?

30. Additionally, the personal data under consideration are unquestionably "sensitive personal data" by virtue of s.2(g). Disclosure further requires, therefore, the satisfaction of a condition stipulated by Schedule 3 *(DPA Schedule 1 Part 1 §1(b)).*

31. When asked at the hearing which Schedule 3 condition was satisfied, FR cited conditions 6(a) and (c) and 7(1)(a) as candidates. None of those conditions nor any other in Schedule 3 is met on the facts of this case. Public awareness of the matters covered by the requests was in no way necessary for the purpose of or in connection with any prospective legal proceedings; any decision as to prosecution of Ms. Miller would be entirely unaffected by public knowledge and reaction. No other proceedings were in contemplation. Nobody had any right or prospective right which could be established, exercised or defended as a result of disclosure. None was identified at any stage of this appeal. The administration of justice was quite independent of any disclosure.

32. This appeal must therefore fail, regardless of whether disclosure would be fair or a Schedule 2 condition satisfied for the purposes of s.40(3)(a)(i).

33. That inevitable conclusion does not detract from the good sense of FR's submissions nor the skill and good humour with which he presented the whole of his case.

34. A short closed annex is attached to this decision. Its principal purpose is to record the reason why this appeal could not be compromised in a manner which would have saved public funds and probably satisfied all the parties. It contains nothing relative to the issues identified to in this decision.

35. Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge

29th March, 2016