



**Tribunals Service**  
Information Tribunal

**Information Tribunal**

**Appeal Number: EA/2006/0047**

**Freedom of Information Act 2000 (FOIA)**

**Heard on Papers**

**Decision Promulgated on 27<sup>th</sup> March 2007**

**21<sup>st</sup> March 2007**

**BEFORE**

**INFORMATION TRIBUNAL DEPUTY CHAIRMAN**

**Mr David Marks**

**and**

**LAY MEMBERS**

**Anne Chafer**

**David Wilkinson**

**Between**

**LANCASHIRE COUNTY COUNCIL**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**Representation:**

**For the Appellant: Janet Kentridge, of Counsel**

**For the Commissioner: Anya Proops, of Counsel**

**Decision**

The Tribunal allows the Appeal of the Appellant and substitutes a fresh Decision Notice replacing the following paragraphs, namely paragraphs 6.1 and 6.2, presently forming part of the existing Decision Notice dated 26 June 2006 as follows:

6.1 The Commissioner requires that the Council shall within 30 days of the date of this Decision Notice as substituted by the Information Tribunal do provide the complainant

with a version as referred to and set out in paragraph 6.2 herein of the information the complainant requested on 27 July 2005.

6.2 The Commissioner requires that:

- (i) the information to be produced is set out in a schedule form in the form annexed hereto as Schedule A; the said Schedule to be prepared as a separate document by the Council;
- (ii) the said Schedule do contain at least the following information in the manner set out in the aforesaid Schedule, namely:
  - (a) the date or dates of all successful prosecutions requested;
  - (b) the date or dates on which the offence forming the basis of the said prosecutions occurred;
  - (c) the nature of the offence and the penalties, fine or other punishment and/or other order relating to each of the aforesaid prosecutions; and

for the avoidance of doubt, there shall not appear in the said Schedule the names, addresses, business or trading names, business or trading addresses, the description of any occupations, email addresses, telephone numbers and dates of birth of all or any individuals who were the subject of the said prosecutions, nor shall there appear in the said schedule any form of caveat, whether relating to the nature of the business, now or at any time, connected with the said individuals, or any of them, or any other way relating to the said individuals or any of them.

### **Reasons for Decision**

1. This Appeal has been determined by the Tribunal on paper, i.e. without an oral hearing. The Tribunal has, however, had the benefit of extensive written submissions by both parties, namely the Council and the Information Commissioner (the Commissioner) as well as evidence from the Appellant for which it is extremely grateful.
2. The principal issue concerns the extent to which personal information forming part of the subject matter of s.40 of FOIA can be properly protected by suitable redaction in respect of the personal data likely to be disclosed. Section 40 of FOIA constitutes an absolute exemption and provides in relevant part:
  - “(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 (i); and
  - (b) either the first or the second condition below is satisfied.
- (iii) the first condition is –
  - (a) in the case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(i) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise under this Act would contravene –
    - (i) any of the data protection principles ... “

It is common ground that part of the requested information would engage the operation of the data protection principles and the operation of s.40 since the information concerned is personal data. Reference will be made to this in further detail below.

- 3. The request, being one made in writing in accordance with s.8 of FOIA, was made by Mr Michael Hill, an Assistant Editor of the Lancashire Evening Post in a written communication possibly sent by email dated 27 July 2005. In it, after inviting the FOI Officer at the Appellant’s offices to contact him if the request was “too wide or too unclear”, Mr Hill stated:

“I request details of the successful prosecutions of traders for selling alcohol to under age children following investigations by Lancashire County Council’s trading standard officers since new powers were granted to trading standard officers in October 2003. In particular, names of the people and businesses prosecuted, full details of the offence and the punishment handed down by the courts.”

- 4. By reply dated 17 August 2005, the Council’s FOI officer, Mr Frank Loughlin, relied on s.40. He referred however to a recent practice of the Council to publish press releases about the subject of the request, but without containing the names of people convicted. He pointed out that previously, the Council had allowed for a journalistic reporting of the outcomes of court cases for a short period around the time of the case, but there had been no firm policy at the Council about the length of time that form of press release was kept on the website. He pointed out that it was no longer the practice for the Council’s team to publish the names of people convicted of offences. Such reporting was, in effect, a reference to s.32 of the Data Protection Act 1998 which provides for a public interest exemption when publication is thought to be in the public interest.

5. The Council then conducted an internal review of its decision in accordance with an invitation to do so by Mr Hill. The review was reported to Mr Hill in a further letter from Mr Loughlin of 5 January 2006 (wrongly dated 2005). In it, Mr Loughlin said that after careful consideration of the correspondence and the subject matter of Mr Hill's request, the Appeals Panel of the Council had concluded that the original decision should stand and that the request should be refused. He attached a detailed account of the deliberations of the Panel. He pointed out that the document contained a more "explicit statement" of the Council's policy in relation to the publication of information in this area. In effect, the document, in his words, was saying that the Council had felt that disclosures of the type requested "should be selective and contemporaneous". The appendix to the letter is a detailed review of the refusal notice in question. There is no need, the Tribunal feels, to cite this in full, but the relevant parts of the deliberations pointed to the fact that press releases were not issued on every case prosecuted by the Trading Standards officers in the Council since many were relatively minor, and reliance was being placed on s.32 on the basis that it was felt that the "determined effect" of publication on those responsible for running businesses was "the main factor of importance to the public interest". A number of conclusions were reached. The first was where resources allowed, a list of pending prosecutions would be produced. Secondly, the Council would continue to issue court case press releases as soon as practicable after the hearing to allow reasonable contemporaneous reporting. Thirdly, there would be selective issue of press releases, particularly where a case was important or news-worthy, and finally that such press releases were again to be used as a deterrent.
6. Mr Hill then contacted the Commissioner's office, which at an early stage expressed its belief that the Council would be contravening the data protection provisions if it released details of sole traders despite any redaction of the names of prosecuted individuals. The case officer at the Commissioner's office, however, stated that he doubted whether identification could be prevented on the basis that details of court cases would already have entered the public domain. The Tribunal however has not heard any evidence as to the latter point, and is not prepared to speculate further, or at all, on the likelihood of any such eventuality.
7. At this point it should be noted that as from 24 November 2005, prosecution in respect of selling alcohol to under age children could be brought for the first time against corporate bodies, as well as individuals. Prior to that point, it followed that a business could not be the subject of such a prosecution. The relevance of this point will become apparent below.

### **The Decision Notice**

8. The Decision Notice is dated 26 June 2006. In section 4, it recites and invokes s.40 of FOIA. At paragraph 4.3 and following, the following passages occur, namely:

“4.3 The Council considered all the requested information to be exempt under s.40 of the Act as it contains personal information about those prosecuted. The Commissioner has examined the withheld information. Those prosecuted include shop assistants as well as shop proprietors. It is the Commissioner’s view the removal of names and dates of birth of those prosecuted from the information would mean that its disclosure would not breach the data protection principles.

4.4 The Commissioner recognises that in the normal course of events some businesses may have changed hands since the prosecutions took place. He is mindful, therefore, of the risk of the reputations of current proprietors being damaged as the result of the disclosure of information about businesses that used to trade from the same address. Accordingly, he has advised the Council to attach a caveat to the release of information pointing out that a different business may now be trading from the address listed. He has further advised that the caveat should state that some of the staff who were prosecuted at the time may no longer be associated with the premises in question.

4.5 In the Commissioner’s opinion, disclosure of the information in anonymised form, i.e. with the personally identifiable information removed, will not breach the data protection principles. Therefore s.40 of the Act provides not basis for exempting the anonymised information from disclosure.”

In the section headed “Action Required”, the Commissioner therefore required that the Council within 30 days of the date of the Notice provide the complainant, i.e. Mr Hill with an anonymised version of the information requested. This meant that the names and dates of birth of individuals be redacted, coupled with a caveat pointing out that a different business might now be trading from the address listed and that some of the individuals were prosecuted at the time might no longer be associated with the premises in questions.

### **The Evidence**

9. Signed statements have been provided by Mr James Henry Potts, the Council’s Chief Trading Standards Officer and Mr Frank Loughlin who describes himself as an Information Security Manager. Mr Potts’ responsibilities include the investigation and prosecution of offences committed in connection with the sale of certain goods, such as

alcohol and tobacco. He confirms the Council's occasional practice of providing press details of pending prosecutions and, albeit occasionally, conviction details without personal details relating to the individuals concerned. He stresses that the public interest in highlighting such matters is in part to act as a deterrent, a point already referred to. He also states that a similar public interest exists with regard to the provisions of all relevant statistical information, e.g. as to the number of prosecutions, the level of fines, etc. In particular, he emphasises that it was difficult for the Council itself properly to categorise the individuals who had been convicted in the sense of being unable to discriminate between those who had a certain responsibility for the business concerned and those who had, for example, only a temporary or passing employment. He also added that it was equally problematic to ensure that in the case of, for example, a small "corner shop" type business, no enquiries such as those which might be made by a journalist would not in due course elicit the names and/or addresses of those who had been convicted. The Tribunal notes in effect it is on account of Mr Hill's request that the Council has reviewed its procedures.

10. Mr Loughlin, in his witness statement, refers to a telephone conversation he had in mid-August 2005 in which Mr Hill apparently made it clear that the only information Mr Hill was seeking related to the names and addresses of the individuals who had been prosecuted with a view to employing this information on a "human interest basis" in the context of the enquiries he was making. Indeed, Mr Loughlin goes so far as to say that Mr Hill had made it clear that he wished to publish the story in which those who had been prosecuted were in effect being "named and shamed".

### **The Appeal**

11. The principal ground of the Council's appeal is that it is beyond his powers for the Commissioner to require a public authority to provide information that had not been requested. The claim is therefore one based on an error of law. The basis for this contention is that the Council, at no material time, had information on businesses on account of the state of the law which prevailed for the period in question, namely the period between October 2003 and July 2005.
12. The second distinct ground of appeal admittedly described as a related ground is that the Commissioner failed to take into account, as it is put in the Council's submissions, "the relevant consideration that the Council did not hold some of the information specified in the request."
13. The third and final ground is that the Decision Notice as presently formulated by the Commissioner still allowed for the identification of individuals thereby constituting personal data which in turn attracted a possible breach of s.40 of FOIA.

### **The First Ground of Appeal**

14. As the Commissioner properly recognises, the first ground of appeal is whether the terms of Mr Hill's initial formal request can be regarded as excluding a request for information about the, or any business, which employed the individuals who were successfully prosecuted. The Tribunal has little hesitation in rejecting any such argument. The briefest of glances at the terms of Mr Hill's initial request of 27 July 2005 recited above in full at paragraph 3 is enough to show that the request was addressed to the case of "traders", a term then clearly and expressly expanded to include individuals, as well as businesses. Admittedly, Mr Loughlin in his written statement refers to the conversation he claims to have had in August 2005 in which Mr Hill allegedly "gave no indication that he wanted to know any details about the names and addresses of the businesses" where the relevant individuals worked, but the Tribunal is not concerned with requests or clarifications of requests which are not set out in writing as prescribed by FOIA. In *Barber v Information Commissioner* (Appeal EA2005/0004: 14 October 2005), the Tribunal emphasised, particularly at paragraphs 8 and 9, that a public authority cannot pick and choose which request it responds to. The Tribunal agrees and feels that overall a common sense approach should be taken *vis-à-vis* the content of a request. Even if the Tribunal is wrong in finding that Mr Hill's request is plain on its face, it agrees with the contention that the Council should at least have considered exercising its obligations under section 16 of FOIA to provide advice and assistance to Mr Hill in an attempt to crystallise his request.

### **The Second Ground of Appeal**

15. The second ground reflects the somewhat elusive contention that the Commissioner made an error of law because he did not take into account, properly or at all, the fact that information about the prosecution of business was not in fact held by the Council. There is a clear overlap with the first ground of appeal in this respect. In the Tribunal's view, the Commissioner addressed the reality of the situation, namely that s.40 was engaged with regard to the information which the Council in fact did possess, namely personal data, attracting the operation of the absolute exemption in s.40.

### **The Third Ground of Appeal**

16. In the Tribunal's view, the issues raised by what are called policy issues raise by far the most important features of this Appeal. These represent a further argument that the Commissioner erred in law in alleging that the terms of the Decision Notice as presently drafted were still not sufficient to ensure that the absolute exemption in s.40 was observed. In particular, it is alleged that the provision of the addresses of businesses or

trading premises which would be subject to the caveats imposed by the Commissioner, would still at least entail the risk of personal detail being disclosed.

17. The Commissioner, apart from relying on the caveat set out in the Decision Notice refutes any suggestion of the kind referred to by Mr Potts that a publication of addresses could lead to the identification of the individual. Reliance is placed by the Commissioner upon the terms and effect of the Rehabilitation of Offenders Act 1974, in particular, section 4(2) which allows for the refusal to respond to questions relating to spent convictions. The Tribunal feels in practice it is highly unlikely that the proprietors and employees of the types of business concerned would be aware of the existence let alone the terms of the 1974 Act.
18. Next, the Commissioner relies on the contents of the disputed information themselves, copies of which were produced to the Tribunal. The information in question consists of a series of sets of relevant details, broken down into various sections, each described as "Details", e.g. Offence Details, Defendant's Details (incorporating the address of the premises where the offence occurred as well as the date of birth of the offender), Prosecutions Details and other information which is perhaps not so material. The disputed information which the Commissioner contends should remain on the face of such documents, subject to the caveats, includes the trading address. However, somewhat curiously, the said information is defined in a document which accompanies all the relevant disputed information and which is headed "Key" and which reads as follows:

"Information is in dispute because: ...

(b) Consists [sic] of details relating to the business which could, with other information, enable the requestor to identify the individual prosecutor."
19. The Commissioner therefore contends that the need to obtain such "further information" in effect acts as a sufficient, if not total guarantee, ensuring that the identification of the person convicted would be protected. The Tribunal respectfully disagrees and indeed is somewhat puzzled by this contention with its reliance upon the definition afforded to the disputed information set out in the above document headed "Key". Moreover, the Tribunal notes that although the address of the particular business should be removed if the Council's contentions were accepted, neither party has removed, let alone addressed, other information relating to the premises in the section headed "Defendant's Details" ie telephone numbers and the email addresses of the relevant businesses as well as what are sometimes known as "eastings" and "northings" being grid coordinates which by means of a relatively straightforward internet enquiry could easily elicit the locations and the addresses of the premises in questions. That fact, coupled with the apprehension expressed by Mr Potts that Mr Hill could instruct one of his reporters to make appropriate

enquiries at the relevant premises which might in the result prove to be a small family run business or corner shop, in the Tribunal's view raises a serious risk that the prohibition imposed by s.40 could be gravely impaired, if not breached.

20. The Tribunal bears in mind the Data Protection Act 1998 definition of data which means data relating to a living individual who can be identified from the data themselves or from the data or any other information that is in the possession of a data controller (see generally section 1 of the 1998 Act). If data is to be anonymised for the data protection legislation not to apply, then it must in the Tribunal's view at least follow that the data subject is no longer identifiable. In this case, it cannot be said with any certainty that the removal of the individuals' names and dates of birth would of themselves achieve such a result.

### **Other Issues**

21. The above findings are sufficient to entitle the Tribunal to exercise its powers under s.58 of FOIA and not only allow the Appeal, but also amend the Decision Notice in the way set out in the passage headed "Decision" above.
22. However, the Commissioner has raised a number of other issues some of which admittedly trespass upon the three grounds of Appeal already dealt with.
23. First, it is suggested that the Council should or could itself have formulated more strongly worded caveats which laid to rest any risks that inferences could be drawn from the information otherwise ordered to be produced that the businesses identified were in fact the employers of the individuals prosecuted. The Tribunal again respectfully disagrees. The critical question in the Tribunal's view is whether from the data which remains after redaction, the individuals in question could be identified. The only course is to reduce the information disclosed in the information prescribed by the terms of the schedule appended to the Amended Decision Notice referred to above.
24. The Commissioner also placed reliance on the press releases which the Council already employs. However, the Tribunal fails to see the relevance of that practice which on the Council's own admission, falls to be regarded under a separate regime under the data protection legislation, i.e. s.32 of the 1998 Act. In any event, the Tribunal remains impressed by the Council's contention expressed by Mr Potts as well as by Mr Loughlin that the prevailing public interest inherent in the Council's use of press releases is to provide a deterrent primarily aimed at businesses and the owners, rather than individuals.
25. Finally, the Tribunal would like to add that had reliance been placed by the Council on other FOIA exceptions, e.g. s.31 being an exemption relating to law enforcement in respect of Mr Hill's initial request, in the Tribunal's view and based only on the

considerations aired in the present Appeal, there would have been in all probability strong arguments maintainable by the Council in invoking the qualified exemption contained in that provision.

26. The latter point, however, does not arise for consideration. For the reasons otherwise set out in this judgment therefore, the Tribunal allows the Appeal and substitutes the original Decision Notice in the manner indicated in the section headed "Decision" at the top of this judgment.

Signed

David Marks

Deputy Chairman

Date: 27<sup>th</sup> March 2007

SUCCESSFUL PROSECUTIONS BY LANCASHIRE COUNTY COUNCIL UNDER SECTION 169A (1) OF THE  
LICENSING ACT 1964

1	PROSECUTION REFERENCE NO	000696	000689	There are a further 25 entries in the disputed information that should be completed in accordance with the first two entries given as examples on the left
2	HEARING DATE	07/04/2005	17/03/2005	
3	NAME OF DEFENDANT	Redacted	Redacted	
4	ADDRESS OF DEFENDANT	Redacted	Redacted	
5	PREMISES REFERENCE	R07GEP125A/2	R06GEY72HA/1	
6	AREA	Pendle	Burnley, Whittlefield-with-Ightenhill	
7	DATE OF OFFENCE	22/08/2004	08/08/2004	
8	FULL DETAILS OF OFFENCE	The licensee sold intoxicating liquor, namely a bottle of Reef to a person under the age of 18 years namely 14 years	The licensee sold intoxicating liquor to a person under the age of 18 years namely 14 years	
9	PUNISHMENT  Prosecution Details	£250 fine	[this is not clear from the relevant page of the disputed information]	
10	UNIT	FTE - fair trading enforcement	FTE - fair trading enforcement	
11	OFFICER	NMI - Nicholas McNamara	NMI - Nicholas McNamara	
12	OPEN DATE	28/04/2005	30/03/2005	
13	DATE CLOSED	04/05/2005	30/03/2005	
14	ACTION	AP - Prosecution	AP - Prosecution	
15	COSTS	£150	£150	