IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2010/0132
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50285356
Dated: 5 July 2010

Appellant:	**Jaine Wild**
Respondent:	**Information Commissioner**
Additional Party:	**The Chief Constable of Hampshire Constabulary**
Heard at:	**68 Lombard St. London**
Date of consideration:	**9th November 2010**
Date of decision:	**6th December 2010**

Before

Christopher Hughes OBE
Judge

and

Alison Lowton and Elizabeth Hodder
Members

Appearances: The hearing was conducted on the papers.

Subject matter: FOIA S.40 release of personal data.

Cases: Bowbrick v IC and Nottingham City Council (EA/2005/0006)
R V Parole Board ex p Bradley [1991] 1WLR 134 Divisional Ct.
The Corporate Officer of the House of Commons v Information Commissioner and Mr Baker (EA/2006/0015 and 0016)
Common Services Agency v Scottish Information Commissioner [2008] 1 WLR 1550

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal rejects the appeal and upholds the decision notice dated 5 July 2010.

Signed

Christopher Hughes
Judge

Dated this 6th day of December 2010

REASONS FOR DECISION

Introduction

1. The Appellant is concerned as to whether the provisions of the Hunting Act 2004 are being complied with in the Isle of Wight and how these provisions are being enforced by the Hampshire Police.

The Request for Information

2. On 7 October 2009, the Appellant requested the following from the Chief Constable of Hampshire Constabulary ("Hampshire Police"):

> ***"dates of pre-hunt meetings in last 5 years and names of officers attending pre-hunt meetings with Isle of Wight hunt".***

3. In this context "pre-hunt meetings" are meetings between the organisers of hunts and the police officers responsible for supervising hunts ("hunt liaison officers"). On 26 October 2009, Hampshire Police responded, providing the dates requested since November 2007 (before which date it stated that no information was held concerning pre-hunt meetings) however it refused to disclose the names of the officers in attendance. In doing so it placed reliance on some of the qualified exemptions provided for by sections 31 and 38 of the Freedom of Information Act 2000 (FOIA).

4. The Appellant was dissatisfied by this response and on 26 October 2009, she requested an internal review of the refusal to disclose the officers' names. On 17 November 2009, Hampshire Police communicated the outcome of the internal review which was to maintain its refusal.

5. On 8 December 2009, the Appellant complained to the Information Commissioner about Hampshire Police's refusal to disclose the officers' names. In her letter she asserted that she had strong evidence that the Hampshire Police were allowing criminal activity to take place at the Isle of Wight Hunt and it was therefore in the public interest that there should be disclosure of this information.

The Commissioner's Investigation and Decision

6. On 1 April 2010, the Information Commissioner contacted Hampshire Police about the Appellant's complaint. He asked for reasoning in support of its reliance on sections 31 and 38 FOIA, and further inquired asked whether the Hampshire Constabulary wished to rely on section 40(2). On 26 April 2010, Hampshire Police responded to the Commissioner and confirmed that it did wish to rely on section 40(2). It provided reasoning and supporting evidence for its reliance on exemptions it had previously raised.

7. The Information Commissioner considered the application of S40(2) of FOIA to this case. In his decision notice dated 5th July 2010 he concluded that the names of officers attending the meeting would be personal data and therefore in considering the potential disclosure it was necessary to consider whether it would be in accordance with the data protection principles embodied in the Data Protection Act 1998. He concluded that the disclosure would result in a breach of the first such principal that data should be processed fairly and lawfully. He accepted the evidence and representations of the public authority that the disclosure may lead to the harassment of the officers identified and consequently the disclosure would be unfair to those officers. In the light of this finding he did not further consider the other exemptions cited by the public authority.

The Appeal to the Tribunal

8. In a Notice of Appeal dated 11th July the Appellant appeared to query whether reliance could be placed on s40(2) at a late stage in the proceedings and raised two further distinct points.

9. The first was that the principle of "fairness" in this case related to whether any person was misled as to the purposes for which the data was to be processed. In the absence of this the question of fairness was not engaged.

10. The second issue raised was, if fairness were indeed engaged then
    - She knew the names of the hunt liaison officer and his deputy and any person attending a hunt was entitled to ask for the name of any officer present
    - She merely wished to see if any other officers attended hunt meetings
    - She had seen no evidence of harassment of officers involved in hunt liaison work and doubted this was true.

- She claimed a public interest in gathering evidence of illegal hunting protected by "maverick officers".

11. The Information Commissioner affirmed his right as regulator of both the DPA and FOIA to raise S40(2) as an issue even where the public authority did not initially do so. He responded to the other substantive issues raised by the Appellant.

12. In his response to the argument as to the ambit of "fairness" he argued that in determining fairness the guidance principle set out in paragraph 1(1) of Part II to Schedule 1 of the DPA was not exhaustive and a proper consideration of fairness needed to take account of the consequences of the disclosure.

13. In response to the specific points raised by the Appellant he noted that the argument with respect to the first two points appeared to be that the gap between what she knew and what she sought was small therefore the incremental consequences of such a small disclosure must also be small. The Information Commissioner disagreed with this conclusion and noted the distinction between the attendance at a hunt – a public event and a pre-hunt meeting – a private event. Much of the publicly available information and information known to the Appellant related to the public and not the private event.

14. With respect to point (3) the absence of evidence of harassment the Information Commissioner stated that he had been provided with relevant evidence on this point and was satisfied by it in coming to his conclusion.

15. The Information Commissioner did not comment on the merits of point (4) – alleged police complicity in breaches of the Hunting Act; but noted that since the allegation of misconduct related to the conduct of officers at actual hunts, rather than meetings prior to hunts, it was difficult to see how disclosure of names would assist in supporting such an allegation, the officers identified would be exposed to harassment and such an allegation could be more appropriately pursued through the Independent Police Complaints Commission.

16. In its response the Hampshire Constabulary supported the Information Commissioner's reasons and drew attention to points made in the Information Commissioner's decision notice:-

- There was a distinction to be drawn between uniformed officers attending a hunting meeting with collar numbers rendering them clearly identifiable and providing a public presence and the different circumstances of where they attended a private meeting relating to a highly sensitive area of policing where revealing their identity may have wider implications.

- In an island community such as the Isle of Wight the ability for police officers and their families to remain anonymous within their communities, if they so wished, would be compromised.

  "In short, it is much more difficult for officers (and their families) to partition their professional and personal lives and this issue is heightened where they are involved in policing activities that are high-profile, controversial and potentially dangerous."

The Legal Framework

18 Under section 1(1) FOIA a person who has made a request to a public authority for information is, subject to other provisions of FOIA: (a) entitled to be informed in writing whether it holds the information requested, and (b) if it does, to have that information communicated to him.

17. Under sections 2(2) and 2(3)(f) FOIA, section 1(1)(b) does not apply to the extent that information falls within the absolute exemption under section 40. Although section 40 was not identified by the Hampshire Police in their initial decision-making the decision of the Tribunal in *Bowbrick v IC and Nottingham City Council (EA/2005/0006)* affirms that it is proper for the Information Commissioner to consider any exemption which seems relevant to the case even if it is not initially identified by the public authority.

18. So far as is relevant to this appeal, section 40 FOIA provides that:

> ***"(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 all 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 the 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..."***

19. Personal data is defined in section 1 of the Data Protection Act 1998 ("DPA"):-

> ***"personal data" means 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."***

20. By section 40(7) FOIA, the data protection principles are those set out in Part I of Schedule I DPA. The first data protection principle is that:

> ***"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 …"***

21. Condition 6(1) of Schedule 2 DPA states -

> ***"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"***

22. The interaction between FOIA and the DPA has been repeatedly considered by the Tribunal and an analysis of this interlocking framework can be found in the decision of the Tribunal in *The Corporate Officer of the House of Commons v Information Commissioner and Mr Baker* (EA/2006/0015 and 0016) -

> ***"If A makes a request under FOIA for personal data about B, and the disclosure of that personal data would breach any of the data protection principles, then the information is exempt from disclosure under the Act: this follows from section 40(2) read in conjunction with section 40(3)(a)(i), or (when applicable) section 40(3)(b) which does not apply in these appeals. This is an absolute exemption - section 2(3)(f)(ii) FOIA. Hence the Tribunal is not required to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure under section 2(2). However… the application of the data protection principles does involve striking a balance between competing interests, similar to (though not identical with) the balancing exercise that must be carried out in applying the public interest test where a qualified exemption is being considered." (para. 28)***

23. It must be emphasised that there is no presumption under FOIA in favour of the disclosure of personal data. In *Common Services Agency v Scottish Information Commissioner* [2008] 1 WLR 1550 Lord Hope stated at paragraph 7 (referring to the equivalent exemption in the Freedom of Information (Scotland) Act 2002 ("FOISA"):-

> ***"In my opinion there is no presumption in favour of the release of personal data under the general obligation that FOISA lays down. The references which that Act makes the provisions of DPA 1998 must be understood in light of the legislative purpose of that Act, which was to implement Council Directive***

95/46/EC. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data…"

25 This decision brings into focus the third relevant legislative instrument – the European Convention of Human Rights. In interpreting both the DPA and FOIA it is necessary to ensure that the fundamental rights and freedoms enshrined within the Convention are respected. The relevant provision of the Convention is Article 8 which provides:-

"Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

26 In considering the question of whether the proposed processing is lawful it is therefore necessary to weigh the competing claims:-

"*of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed".*

In other words the access to information which the Appellant seeks using FOIA and which she would argue is:-

"in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

On the other side of the balance is the exception argued by the Information Commissioner and the Hampshire Constabulary:-

"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"

since the data subject or subjects in this case – each serving Police Officer whose identity might be disclosed

"has the right to respect for his private and family life, his home and his correspondence"

27 A decision requiring the weighing of competing rights is not an abstract decision – it depends crucially on the circumstances of the case and the alternative consequences of giving effect to the request for disclosure and not giving effect to it. Such an assessment requires a consideration of the risks arising from exercise of either of these alternatives; in coming to that assessment of the risk to the rights of the relevant police officer or officers identified the challenge is considering what is the extent of risk which means that the disclosure would prejudice "*the rights freedoms and legitimate interests of data subjects*".

28 In *R v Parole Board ex p Bradley [1991] 1WLR 134 Divisional Ct*. Stuart-Smith LJ in considering the risks associated with the release of offenders stated:-

"the precise level of risk is not (surely cannot be) spelled out"

In considering how to approach the question of the test to be to the question of risk he continued:-

"it seems inevitable that one can say really no more than this: first, that the risk must indeed be "substantial" …, but this can mean no more than that it is not merely perceptible or minimal. Second, that it must be sufficient to be unacceptable in the subjective judgement of the Parole Board to whom Parliament has of course entrusted their decision… Third, that in exercising their judgement as to the level of risk acceptable, the Parole Board must clearly have in mind all material considerations."

The evidence

29 The Appellant in her arguments and the documents she has submitted to the Information Commissioner and the Tribunal has sought to identify a public interest in exposing what she claims is police misconduct and has denied that there is any countervailing interest in non-disclosure. However the misconduct she is alleging relates to police decisions or conduct at the site of Hunt meetings – ie at public events. These matters have been taken up with the Police and IPCC which are appropriate routes for their investigation. The allegations do not relate to the private meetings. The Tribunal shares the conclusion of the Information Commissioner that the disclosure would not assist in the resolution of these allegations.

30 The Information Commissioner and the Hampshire Police both draw attention to the smallness of the Isle of Wight, the likelihood that the police officers will be resident on the Island and the ease with which it may be possible for officers, their homes and families to be identified. At paragraph 19 of the decision notice the Information Commissioner stated:-

"The public authority has also advanced evidence that hunt liaison officers have suffered harassment thought to be linked to their professional lives at their home addresses. The public authority believes it to be the case that officers have been harassed as a result of their status as hunt liaison officers being known and suggest that naming other hunt liaison officers may lead to the other officers being subjected to similar harassment."

31 The Information Commissioner also concluded that while there were various possible means of gathering the information that the Appellant sought that did not preclude the possibility that the undesirable consequence of harassment of individuals would flow from the disclosure.

32 The Tribunal has reviewed evidence submitted by the Hampshire Police which is consistent with that statement.

Striking the balance

33 In coming to its decision the Tribunal has sought to balance of the legitimate interests of the Appellant and of the prejudice to the rights of the police officer or officers whose identity might be disclosed.

34 In this case the legitimate interest of the Appellant is for information held by a public body to which, under FOIA she wishes to have access.

35 The rights of the officer (or officers) is to the *"enjoyment of respect for his or her private and family life"*. From the evidence of the Hampshire Police (which it has shown at various times to the Information Commissioner and to the Tribunal) the Tribunal is satisfied that harassment of Hunt Liaison Officers has occurred which is likely to be linked to that part of their professional duties. The Tribunal is satisfied that the identification of a further (or further) Hunt Liaison Officer(s) would expose such individuals to a substantial risk of such harassment and so an infringement of the Article 8 right.

36 Such an infringement of the Article 8 right may be, and frequently is, justified. To be justified it needs to satisfy the conditions in Article 8(2):-

> ***"There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."***

37 In this case there exists a clear framework of law (FOIA) which could (if certain criteria are met) justify the interference by the public authority (in this case the Hampshire Police, the Information Commissioner or the Tribunal) in disclosing the information and so compromising the right.

38 However the Tribunal is not satisfied that the second criterion *"necessary in a democratic society"* is met. To meet the threshold of "necessity" is a significant burden and there has been no substantial evidence or argument upon which the Tribunal could conclude that the specific disclosure sought in these circumstances could claim to be necessary *"for the*

prevention of disorder or crime" or any of the other aims which the Convention recognises as a legitimate reason for an infringement of rights.

39 Accordingly the Tribunal is satisfied that the Decision Notice of the Information Commissioner is correct and upholds that decision.

Permission to appeal

40 An appeal against this decision must be submitted to the Upper Tribunal. A person seeking permission to appeal must make a written application to the Tribunal within twenty-eight days of receipt of this decision. Such application must identify the error or errors of law in the decision and state the result the party is seeking. Relevant forms and guidance for making an appeal can be found at the Tribunal's website at www.informationtribunal.gov.uk

Signed:

Judge Christopher Hughes OBE
6th December 2010