



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

**Appeal No: EA/2012/0191**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No:**  
**FS50453780**

**Dated:** 23<sup>rd</sup>. August, 2012

**Appellant:** Richard Comotto

**First Respondent:** The Information Commissioner

**Determined on the papers:** 15<sup>th</sup>. January, 2013

**Before**  
**David Marks Q.C.**  
**Tribunal Judge**

**Anne Chafer**  
**Michael Hake**  
**Tribunal Members**

**Date of Decision:** 17th. January, 2013

**Subject Matter: Freedom of Information Act 2000 section 40(5)(b) (i)**

**Cases and authorities referred to: Young v IC EA/2009/0057 and 0089**

## **DECISION**

The Tribunal dismisses the appeal by the Appellant and upholds the decision of the Information Commissioner (the Commissioner) in the Decision Notice Ref: FS5043780 dated 23 August 2012.

### **Reasons for Decision**

#### **General**

1. This appeal concerns a request which in turn involves personal data and in particular whether sensitive personal data can properly be disclosed under the Freedom of Information Act 2000 (FOIA).
2. More particularly, the request is for disclosure of details concerning charges not proceeded with against a named individual for allegedly driving a vehicle driving without a valid MOT certificate. The public authority in question, namely the Crown Prosecution Service (the CPS) refused to disclose that information, relying upon section 40(2) of FOIA.
3. On 9 March 2012 the Appellant wrote to the CPS and made the following written request, namely:

“[Named individual] was being prosecuted for driving an unroadworthy vehicle without a current MOT certificate ... the CPS dropped the charges, apparently claiming there was insufficient evidence. Did [named individual] have a current MOT certificate or not at the time he was stopped? ...”
4. When the CPS responded on 10 April 2012 it refused to disclose the information relying on two exemptions in FOIA. The first was that set out in section 30(1)(c) (information held for the purposes of any criminal proceeding which the authority has power to conduct) and section 40(2) (personal data with third party). Nothing further need be said about the first exemption relied on since the Grounds of Appeal in this case by the Appellant do not raise any matters concerned with that exemption.

5. A decision was confirmed following upon an internal review which was relayed to the Appellant on about 20 June 2012.
6. In its exchanges with the Commissioner, the CPS was informed that the correct approach would have been for the CPS to neither confirm nor deny whether the information was held and cite the exemption provided by and set out in section 40(5) of FOIA. Further reference will be made to that subsection below.
7. The Commissioner maintained in his Decision Notice dated 23 August 2012 that the information covered by the request would constitute sensitive personal data in accordance with the relevant statutory definition afforded to that expression as set out in section 2 of the Data Protection Act 1998 (DPA). That in turn meant that it would be necessary for a condition as set out in and drawn from Schedule 3 of the DPA to be satisfied by reason of a confirmation or denial of the type indicated to the CPS by the Commissioner.
8. In his Notice, the Commissioner took the view that it was unlikely that a condition of the type set out in Schedule 3 would be satisfied through disclosure made under FOIA. It necessarily followed in the Commissioner's view that confirmation or denial should have been withheld with regard to the request that had been made. In the circumstances, the Commissioner turned to and considered section 40(5). In the event, the CPA was not required to take any remedial steps.
9. Section 40(5) provides that the duty to confirm or deny does not arise in relation to information which is personal data and its disclosure would be in breach of any of the data protection principles and of the relevant Schedules to the DPA. As the Decision Notice explains, consideration of this exemption involves a two-stage process. First, there has to be a consideration of whether confirmation or denial would involve disclosure of personal data, and second it has to be considered whether that disclosure would be in breach of any of the data protection principles.
10. Personal data is defined by section 1 of the DPA and in material part, the statutory provision is as follows, namely:

“ “personal data” means data which relate to a living individual who can be identified:

- (a) from those data, or
- (b) from those data and any other information which is in the possession of, or is likely to come into the possession of, the data controller.”

11. In his Decision Notice, the Commissioner took the view that it was clear from the terms of the request alone that confirmation or denial would disclose information that would both identify and relate to the individual named in the request. The Tribunal has no hesitation in agreeing with that view and approach.
12. The next step as indicated above is to address whether disclosure of that personal data would breach any of the data protection principles. The first principle which is set out in particular in Part II to Schedule 1 to the DPA (and which the Tribunal feels need not be set out in full), specifies that personal data are to be processed fairly and lawfully. In particular, what has to be considered is whether disclosure would be fair to the individual named in the request and whether there is overall fairness . This leads into taking into account the reasonable expectations of the data subject together with the consequences of disclosure upon that data subject and, in particular, whether there is a legitimate public interest in the disclosure generally.
13. The question of sensitive personal data is addressed by section 2 of the DPA. Included in the definition of the expression “sensitive personal data” in that section is that under section 2(g) which addresses “the commission or alleged commission by him of any offence” or that under section 2(h) addressing “any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.” There can be no doubt that the present request entails the application of, if not the first of those definitions, and certainly the second, and in all probability, both. Whether one or both definitions were sought by the present request is in any event immaterial.
14. The fact that sensitive personal data were here involved was therefore relevant with regard to a consideration of the relevant individual’s expectations about

disclosure and the consequences of such disclosure on that individual. In the Decision Notice, the Commissioner took the view that it was highly likely that the individual in question would hold a strong expectation that the information in question would not be disclosed by the CPS. The same individual might reasonably be assumed to have felt that the information sought would not release. He or she would also be likely to have expected to experience distress by virtue of disclosure in those circumstances. In any event, by its very nature, sensitive personal data would invariably be likely to have a detrimental or distressing effect on a data subject. In all the circumstances, the Commissioner determined that disclosure would be both unfair and in breach of the first data protection principle were there to be issuance of a confirmation or denial in answer to the request.

15. In conclusion the Commissioner found that a confirmation or denial would relate in the way set out above to the personal data of an individual other than the complainant and that disclosure of such personal data would be unfair and therefore in breach of the first data protection principle. The exemption provided by section 40(5) was therefore engaged. The CPS should therefore neither have confirmed nor have denied whether the requested information was held. In the circumstances, the Commissioner stated in his Decision Notice that it was not necessary to go on and consider or address section 30(1)(c).
16. The Grounds of Appeal will be referred to later in this judgment. In his written response to those Grounds, the Commissioner made a number of additional observations which the Tribunal gratefully adopts as to the effect of the determination in the Decision Notice.
17. First, the Commissioner contends that a court can in effect process sensitive personal data such as referring to the data subject and to the alleged commission of any offence in the course of court proceedings. This is because the court is able to rely on condition 6 and/or 7 of Schedule 3 to the DPA. Those conditions which need not be set out in full make express provision for such processing in the case of court proceedings and for the purposes of the administration of justice. In short, the court or any judicial tribunal would not be in breach of the DPA if the nature of the alleged offence or the charges or any outcome were discussed in open court. The Tribunal entirely accepts the correctness of these observations.

18. Secondly, the Commissioner points out that journalists can compile or make a report on court proceedings. This is because they are covered by what are called the “special purposes” provisions of the DPA. In practical terms this means that a journalist can refer to sensitive personal data in the course of reporting court matters and court proceedings without committing a breach of the DPA.
19. However, the Commissioner also points out again rightly in the Tribunal’s judgment that the CPS cannot process (in the sense of issuing a confirmation or denial) the type of information which falls within the scope of this particular request since the Commissioner has found in his Decision Notice that it would not be fair to do so and furthermore that the CPS has no Schedule 3 condition on which it can rely. This is why the Commissioner determined that section 40(5)(b)(i) is engaged. The position remains the same irrespective of whether the fact that charges have been brought and not proceeded with against the named individual is already in the public domain by other means such as having been reported in the media.
20. The Tribunal again endorses these propositions. In *Young v IC* (EA/2009/0057 & 0089) a similar approach was adopted by another tribunal. Although this Tribunal is not bound by other First-tier Tribunal decisions, it notes that in similar circumstances, the tribunal in that case accepted that section 40(5)(b)(i) was engaged, albeit that the same was on the basis that the requirements of Schedule 2, condition 6, rather than Schedule 3 as in this case, could not be met.
21. There are two Grounds of Appeal. In the first Ground, the Appellant focuses upon a passage in paragraph 7 of the Decision Notice which reads as follows, namely:

“Whilst it is evident from the wording of the request that the complainant was aware that the CPS was considering possible prosecution against the individual named in the request, and this was also the subject of media coverage, the view of the Commissioner is that the correct approach to this information request would have been for the CPS to neither confirm nor deny whether this information was held and cite the exemption provided by section 40(5) of the FOIA.”

22. Put simply, the Appellant claims that the possession of a valid MOT certificate “cannot cause distress or be detrimental”. He asks the question in his grounds of appeal: “How can the disclosure of law-abiding behaviour cause distress?” He claims that a data subject currently the subject of public suspicion “would presumably welcome the confirmation of his innocence”.
23. To a large extent this Ground of Appeal has been answered above. The issue of whether an individual using a vehicle which does not have a valid MOT certificate is inextricably bound up with the fact that failure to possess such certificate amounts to a criminal offence. Once that link is established, then as explained above, there exist sensitive personal data which is of the specific protection described above the DPA.
24. In those circumstances the Tribunal entirely accepts the Commissioner’s view that it was wholly reasonable for the data subject to expect that the CPS would not confirm or deny that it held any information in response to the request in the present case. Moreover, as also explained above, the Tribunal endorses the view taken by the Commissioner that it was reasonable in all the circumstances to conclude that the data subject would suffer distress were the information revealed. Section 40(5)(b)(i) was clearly engaged.
25. In any event, as also explained above, even if the Commissioner had reached a different conclusion in relation to fairness, the CPS could not confirm or deny whether the requested information was held in the present case since there was no Schedule 3 condition to permit such a response.
26. The second Ground of Appeal takes issue with the first sentence set out in paragraph 7 of the Decision Notice quoted above. The Appellant claims that when the Commissioner refers to “possible prosecution”, not only was the Commissioner, in the Appellant’s view “unaware that the CPS actually did launch a prosecution against the data subject” but also by bringing the said prosecution, the CPS disclosed that in the CPS’s opinion, the data subject did not have a valid MOT certificate for the vehicle. In other words, all the Appellant seeks is confirmation that such “disclosure” was correct, or in the alternative, evidence that the CPS made a mistake.



27. The Appellant goes on to say that his grounds of appeal are justified by the fact that a prosecution was “dropped” after several months which necessarily meant that either the CPS had made a mistake or that it did not make a mistake, in which case the CPS failed, as he put it “to perform their duty to uphold the law”.
28. The Tribunal again agrees with the Commissioner that the Appellant is in effect contending that there is a strong legitimate public interest in the disclosure here, irrespective of any reasonable expectation or distress that disclosure might cause.

The relevant balance to be struck in the Tribunal’s judgment is between any legitimate interest in what amounts to the promotion of transparency in general terms on the one hand, as against the reasonable expectation of what distress is caused to, in this case, the named individual on the other. One element that tilts the balance in favour of non-disclosure is the fact that sensitive personal data is involved. Such data are given particular protection by the law. The Tribunal has no hesitation in confirming the determination made by the Commissioner in his Decision Notice that the data subject in such circumstances would not reasonably expect such detail to be disclosed to the world at large and that disclosure would or would be likely to cause damage or distress. It follows that any legitimate public interest in the CPS confirming whether it held the information relating to whether or not the named individual had or used a vehicle without a valid MOT certificate is in this case outweighed by other factors such that it would not be fair to so confirm or deny.

29. The Tribunal also agrees with a further observation made by the Commissioner. The Appellant appears to suggest that there are only two reasons justifying a decision to “drop” charges against a named individual in the way outlined above. The Tribunal agrees with the Commissioner that it cannot be assumed that only those two reasons were in play in the present case. There may well have been a number of reasons for the decision eventually made by the CPS, e.g. withdrawal on the basis of some legal technicality or on some other evidential basis. Were that the position, it could not be said that the resultant legitimate interest was as weighty as the Appellant suggests.

30. Finally and for the sake of completeness and to confirm what is said above, even if the Commissioner had reached a different conclusion in relation to fairness, the Tribunal endorses the contention made by the Commissioner that the CPS is still unable to confirm or deny whether the requested information was held because there is no Schedule 3 condition to justify that confirmation or denial.
31. For all the above reasons the Tribunal dismisses the appeal and upholds the Commissioner's Decision Notice.

**David Marks QC**  
**Tribunal Judge**

Dated: 17<sup>th</sup> January 2013