



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

EA/2014/0111

ON APPEAL FROM:

Information Commissioner's Decision Notice: FS50516294

Dated: 26 March 2014

Appellant: NICHOLAS BENTLEY

Respondent: THE INFORMATION COMMISSIONER

Heard at: Bedford Magistrates Court

Date of hearing: 14 October 2014

Date of Decision: 30 October 2014

Date of Promulgation: 12 November 2014

**Before
Annabel Pilling (Judge)
Dave Sivers
Nigel Watson**

Subject matter:

FOIA – Absolute exemptions – Personal data s.40(2)

Representation:

For the Appellant: Nicholas Bentley

For the Respondent: Adam Sowerbutts

Decision

For the reasons given below, the Tribunal refuses the appeal and upholds the Decision Notice dated 26 March 2014.

Reasons for Decision

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 26 March 2014.
2. The Decision Notice relates to requests made by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to Staffordshire Police ('the Police') for information relating to police callouts and any cautions or prosecutions relating to a named children's home.
3. The home is run by a private company and accommodates up to three vulnerable young people at any one time. The home is located in a rural residential area and there have been reports that the behaviour of some of the residents has caused concern to local residents and councillors.
4. The Police responded by refusing to confirm or deny that it holds the information requested relying on the exemptions provided in section 30(3) [investigations and proceedings conducted by public authorities] and section 40(5) [personal information] of FOIA.
5. The Appellant complained to the Commissioner who investigated the way the request had been dealt with by the Police. During his investigation the Police provided the Appellant with the callout information¹.

¹ The Police provided the callout information for the period January 2012 to January 2014; the Appellant's request was for the information for the period June 2011 to June 2013. The

6. The Appellant explained that he wanted his questions answered in light of recent and ongoing events at the home. He wanted to make sure that the relevant public authorities were transparent about what they were doing on behalf of the public; that the police were exercising their duty and responsibility towards the children and the general public; he had concerns for local residents who were experiencing anti-social behaviour and he was concerned for the welfare and safety of the young people living at the home.
7. The Commissioner concluded that the Police acted correctly in relying on section 40(5) to neither confirm nor deny holding information about cautions or prosecutions.

The appeal to the Tribunal

8. The Appellant appeals against the Commissioner's decision. All parties agreed that this was a matter that could be dealt with by way of a paper hearing.
9. The Tribunal was provided in advance of the hearing with an agreed bundle of material, and written submissions from the parties.
10. We were also provided with a small closed bundle which was not seen by the Appellant and which contains two unredacted letters which appear redacted in the agreed bundle.
11. Aware of the guidance from the Supreme Court in *Bank Mellat v HMT (no.1)* [2013] UKSC 38, which was not a case about FOIA, and in *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC), in which the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA cases, we kept the issue of the closed material under

Police informed the Commissioner that the additional information would be provided and we have not been made aware that this has not been done.

review throughout the proceedings. We are satisfied that the small portions of these letters have been properly redacted.

12. Although we cannot refer to every document in this Decision, we have had regard to all the material before us.

The Issues for the Tribunal

13. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.

14. The section 1(1)(b) duty of the public authority to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions.

15. Where the information is subject to a qualified exemption, it will only be exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b)).

16. The exemption provided for in section 40 FOIA is an absolute exemption. The exemption in section 40(1) is engaged if the information constitutes personal data of which the applicant is the data subject. The exemption in section 40(2) is engaged if it is shown that disclosure of the personal data of third parties would contravene one of the data protection principles set out in Schedule 1 of the Data Protection Act 1998 (the "DPA").

17. Section 40(5) FOIA provides as follows:

"40(5) The duty to confirm or deny-

...

(b) does not arise ... if or to the extent that..-

(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.”

18. The data protection principles regulate the way in which a “data controller” (in this instance, the Police) must “process” personal data. The word “process” is defined in section 1(1) of the DPA and includes:

“disclosure of the information or data by transmission, dissemination or otherwise making available.”

19. The first data protection principle provides:

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, and*
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.*

20. The Appellant has been clear and consistent throughout his dealings with the Police, the Commissioner and the Tribunal; he submits that he is not seeking any personal data. He did not and does not ask for the names or identity of any individual to be disclosed, but sought confirmation whether any cautions or prosecutions have been brought against the children. He submits that his objective is to have clarification of any prosecutions to reassure his family and villagers as to what type of children are being cared for in this home.

21. Personal data means information from which a living individual can be identified, whether from that information itself or from that information

taken together with other information. Sensitive personal data includes information of the commission or alleged commission by an individual of any offence.

22. We agree with the Commissioner that although the Appellant has not requested the names of any child who received a caution or who has been prosecuted, the numbers of children resident at the home during the relevant period is very small indeed, only eight during the whole period covered by the request and a number were still residing at the home at the time of the request, and could lead to individual identification, whether by the Appellant or any other person.

23. We are satisfied that any confirmation or denial by the Police that it holds information falling within the scope of the request would constitute the sensitive personal data of the children involved.

24. There is an inherent tension between the objective of freedom of information and the objective of protecting personal data. It has been observed that section 40(2) of FOIA is a “complex provision”². There is no presumption that openness and transparency of the activities of public authorities should take priority over personal privacy. In the words of Lord Hope of Craighead in *Common Services Agency v Scottish Information Commissioner*³ (referring to the equivalent provisions in the Freedom of Information (Scotland) Act 2002 (the ‘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 to provisions of DPA 1998 must be understood in the light of the legislative purposes of that Act, which was to implement Council Directive 95/46/EC. The guiding principle is the protection of the

² *Blake v Information Commissioner and Wiltshire County Council* EA/2009/0026

³ [2008] UKHL 47

fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data....”

25. Notwithstanding the reasonable expectations of individuals or any distress caused to them by disclosure, it may still be fair to disclose personal data, or even sensitive personal data, if there is a more compelling public interest in releasing the information.

26. The Commissioner submits that we should first consider whether it would breach the first data protection principle, that is, would it be unfair to confirm or deny that the information is held. The following factors should be taken into account:

(1) that the children who have resided at the home are in care and are therefore likely to be vulnerable;

(2) that disclosure of information about any prosecutions or cautions may undermine the work being done by other public authorities and other agencies to resolve any issues the children may have. The work of such authorities and agencies could enable the children to have a better future and to lead to their being better able to contribute to society;

(3) that the Police were concerned that the provision of a confirmation or denial could result in the children becoming targets for individuals who wished to cause harm to them due to their vulnerability;

(4) that the Police were concerned that the provision of a confirmation or denial could reduce the opportunities for the rehabilitation of the children which, in turn, could increase the risk posed to the wider community.

27. The Appellant submits that the information should be disclosed for the following reasons:

- i) in order to ensure that in light of recent and on going events are the home he wanted to make sure that the relevant public authorities were transparent about what they were doing to deal with these events on behalf of the public.
- ii) it was paramount that the police did their part in addressing alleged issues at the home by fulfilling their duties to the children and the general public;
- iii) local residents are experiencing personal abuse and trespass to property;
- iv) the welfare and physical safety of the children at the home. He made specific reference to Ofsted Reports and the Care Provider reporting that the children at the home are very happy; this information would also highlight that these Ofsted Reports could be incorrect as to what is really happening at this home.

28. The Commissioner concedes that there is a public or legitimate interest in allowing local residents to understand how the police respond to issues relating to the children at the home. We consider that this is a not a matter of wider public interest to the general public rather than the interest to a small group of individuals, that is the Appellant, his family and the local community.

29. The Commissioner notes that even if a confirmation that information existed within the scope of the request was issued on the basis that it did in fact exist and any such information was then provided, it would not enable the general public to: (a) undertake any kind of assessment of the overall happiness of individual children and/or all the children who have resided at the home during the relevant period, or (b) verify any alleged claim as to the number of convictions or criminal incidents that may or may not have been secured against any children connected with the home. We agree.

30. We also consider that there is some legitimate public interest in the

disclosure of information concerning the spending of public money and in this case the provision of care to vulnerable children by a public authority.

31. However, we agree with the Commissioner that the safety and safeguarding of vulnerable children is of paramount importance. Disclosure of sensitive personal data is likely to have a detrimental or otherwise distressing effect on individuals, particularly vulnerable children.

32. We agree with the Commissioner that if the Police were to confirm or deny whether it holds information about the number of cautions or prosecutions this would reveal sensitive personal data about a small number of vulnerable children which could lead to their identification by the Appellant or others, and would be unfair, thus in breach of the first data protection principle. We find that section 40(5) FOIA is engaged.

33. We are unanimous in our conclusion that the Commissioner was correct: two of the Panel considered that there were strong reasons for reaching this conclusion; the third considered the decision was more finely balanced. We therefore uphold the Decision Notice and refuse this appeal.

30 October 2014