



Neutral Citation Number

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2014/0243

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50540688

Dated: 4 September 2014

Appellant: Mr. Steve Sanders

Respondent: Information Commissioner

Additional Party:

Heard at: Field House, London

Date of hearing: 16 June 2015

Date of decision: 7 July 2014

Before

Angus Hamilton

Judge

and

Pieter De Waal

and

David Wilkinson

Subject matter: Freedom of Information Act 2000 ss 40(1) – personal data of applicant, 40(2) – personal data of others and 32 – court records.

Cases considered: None

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal for the reasons given below.

REASONS FOR DECISION

Introduction

- 1 s.1(1) of the Freedom of Information Act provides that:
Any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request, and if that is the case, to have that information communicated to him.

- 2 s.40(1) of the Freedom of Information Act (FOIA) provides that:
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.

- 3 s.40(2) of FOIA provides that:
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 [set out in s.40(3) and (4) respectively] is satisfied.

- 4 s. 32 of FOIA provides that:
Information held by a public authority is exempt information if it is held only by virtue of being contained in —

(a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,

(b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or

(c) any document created by—

(i) a court, or

(ii) a member of the administrative staff of a court,

for the purposes of proceedings in a particular cause or matter.

The Request from Mr Sanders

5 On 25 September 2013 the appellant wrote to Barnet County Court and submitted a mixed complaint and request for information. This arose out of civil proceedings before that court to which Mr Sanders was a party.

6 Mr Sanders submitted a further mixed complaint and request for information to the court on 30 September 2013. The two emails of complaint and request are quite lengthy and are attached to this judgement at Annex A.

7 The Ministry of Justice (MOJ) provided a substantive response on 23 October 2013. The MOJ indicated that it considered what might be termed the 'complaint parts' of Mr Sanders' emails as not relating to recorded information and thus not falling within the scope of a freedom of

information request. In respect of recorded information the MOJ confirmed that it held some of the information requested but stated that it was exempt from disclosure relying on ss 40(1), 40(2) and 32 of FOIA. The MOJ's response also advised Mr Sanders how to make a subject access request to the MOJ (this being pertinent to the exemption claimed under s40(1)) and how to obtain court transcripts (this being pertinent to Mr Sanders' request for a recording of a court hearing). The MOJ response denied holding any recorded information in relation to the number of times the District Judge in Mr Sanders' case had pressed the panic alarm or ordered a party to leave court as compared to other District Judges (the 'panic alarm information').

- 8 The complainant was dissatisfied with the MOJ response and sought an internal review on 24 October 2013. The outcome of that review was provided to Mr Sanders on 2 December 2013. In relation to point 7 of the request of 25 September 2013 the MOJ now provided Mr Sanders with documentation relating to judicial complaints procedures. However in relation to Mr Sanders' request for the disclosure of the court's administrative complaints procedures and 'pre-set phrases' the MOJ noted that a similar request made by Mr Sanders was already the subject of an investigation by the ICO and it was not prepared to consider disclosure until that investigation was concluded. In relation to the panic alarm information the MOJ clarified that there was no legal or business need to record such information but that nonetheless a search had been

carried out at Barnet for such records and none could be found. The MOJ also added that on review it considered that s40(2) FOIA in addition to s.32 FOIA applied to Mr Sanders' request for a 'copy of the manuscript version of any order made by the judge and a copy of the audio recording of the purported hearing' (item 4 of the request in the email of 25 September 2013).

- 9 The complainant complained to the Commissioner on 11 May 2014. That complaint resulted in the Decision Notice of 4 September 2014. That Decision Notice stated that in the Commissioner's view the MOJ were right to withhold the sought information under s40(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*]. The Commissioner took the view that where an applicant sought disclosure of information that contained a mixture of both his personal data and that of other people then the s40(1) exemption allowed both to be withheld – in other words it was not necessary to consider additionally the s40(2) exemption which relates to the personal data of people other than a FOIA applicant. [*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 in s40(3) or (4) is satisfied.*] The Commissioner also did not find it necessary to consider the s.32 exemption.

The Appeal to the Tribunal and the Scope of the Commissioner's Investigation – preliminary issues

- 10 The appeal hearing took place on 16 June 2015. Only Mr Sanders attended the hearing. The Commissioner relied on written submissions. The MOJ was not joined as a party. A preliminary issue was raised by Mr Sanders at the appeal hearing as to the extent of the withheld information that was properly the subject matter of the appeal. This required an examination of Mr Sanders' two requests for information (mixed with elements of complaint) and his Grounds of Appeal.

- 11 On 2 October 2014 the Appellant submitted his appeal to the Tribunal (IRT). It is fair to say, even taking into account his status as a litigant in person, that the Grounds of Appeal are quite hard to follow. It does not appear, however, that Mr Sanders was contending in his Grounds of Appeal that the Commissioner's analysis in relation to the scope of withheld information which the Commissioner actually considered (our emphasis) is incorrect. Rather Mr Sanders was contending in his Grounds of Appeal that the Commissioner failed to consider all of Mr Sanders' requests for recorded information and limited himself to considering only a fairly restricted number of requests. To that extent Mr Sanders contended

in his Grounds of Appeal that the resultant Decision Notice was flawed.

12 The Tribunal noted that at the start of the Commissioner's investigation Mrs Jarman, a Senior Case Officer, wrote to Mr Sanders on 3 July 2014 explaining her preliminary analysis of the issues in the case and indicating that her investigation would look at whether the MOJ were entitled to rely on ss 32, 40(1) and 40(2) in relation to item (4) in the email of 25 September and items a), b), c) and d) in the email of 30 September 2013. Mr Sanders was invited to respond to Mrs Jarman by 18 July 2014 if he disagreed with the matters she was proposing to investigate.

13 It is correct that Mr Sanders responded within the set time limit but he did so by making very generalised comments which were, in the Tribunal's view, less than helpful and which failed to identify specific items of withheld information which were not covered by the items which Mrs Jarman proposed to consider or which Mr Sanders wished to add. Mr Sanders also in his response appeared to some extent to seek to recast points which, in his original mixed request and complaints emails, were clearly complaints as requests for some generalised information.

- 14 Mr Sanders' comments on the scope of the investigation cross-referenced the numbering and lettering in his original emails of 25 and 30 September 2013 and commented as follows:

3 MOJ ... are likely to hold information as to the procedure and the status of the Order etc

6 insofar as the MOJ ... are likely to hold information on wasted costs from the public purse

7 the MOJs... response (or at least part thereof) was inadequate, unlawful, inaccurate/untrue and incomplete

8 to the extent such information may be held

10 some of the requested information i.e. improvements to the procedures must be expected to have been held

11 to the extent that such information may be held

(e) not convinced the response was correct/complete

- 15 The unhelpfulness of this response is well-illustrated by considering Mr Sanders' original 'request' at item 6 of his email of 25 September 2013 – *'also ask you for your proposals to meet my wasted costs. The purported hearing was contrary to any proper public perception of the administration of justice. Justice was neither done nor seen to be done'*. In the Tribunal's view, and apparently the Commissioner's, this is palpably not a request for recorded information. In his response to Mrs Jarman Mr Sanders appears to ask that this point be treated as some form of request for information on wasted costs generally. The Tribunal took the view that this

was not a reasonable re-interpretation to place upon the original point. To be fair to Ms Sanders he did, upon reviewing his original request/complaint and his response stated above at paragraph 9 before the Tribunal, readily accept that he was quite unclear as to what additional recorded information he considered to be withheld and fell to be investigated by the Commissioner.

- 16 Given the rather unhelpful nature of Mr Sanders' response to Ms Jarman it was, in the Tribunal's view, unsurprising that the Commissioner largely confined himself to the areas identified by Ms Jarman. The Commissioner did not however wholly confine the investigation to the points originally identified by Ms Jarman - the Tribunal noted from the Decision Notice that the Commissioner did in fact investigate whether on the balance of probabilities the MOJ were correct to assert that it did not hold the 'panic alarm information' (point e) in the email of 30 September 2013).

- 17 On the Tribunal's analysis there was one item of requested but withheld information which was not apparently considered by either the MOJ or the Commissioner. At item 7 in his email of 25 September 2013 Mr Sanders asked – *'Kindly also supply up to date copies of all applicable complaints procedures (both judicial and administrative) including your internal complaints handling manuals, all pre-set phrases you are provided with for use when corresponding with court users and the identity of the authors of those documents. I also seek the same information and*

documentation as would have been current between 1998-2012.'

- 18 Mr Sanders was provided with information relating to past and present judicial complaints procedures (the Tribunal did not investigate exhaustively whether the disclosed procedures covered the precise period 1998-2012 because when he appeared before the Tribunal Mr Sanders did not pursue this point) but was not provided with any information relating to administrative complaints procedures or the 'pre-set phrases' for any part of the period 1998-2012.
- 19 The initial reason given for not disclosing such items was that a similar request by Mr. Sanders was already being investigated by the Commissioner and a decision on the point was awaited. Having raised this initial quite valid point this particular request then seems to have been put to one side.
- 20 Mr Sanders' separate request for similar information was ultimately considered by the First Tier Tribunal (FTT) in EA/2013/0283 on 14 May 2014. The judgement in that case states that the subject matter of the appeal was: *a request made by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to the Ministry of Justice ('the MOJ') for the complaints handling manual and standard phrases recommended for use by complaints handlers at Her Majesty's Court Service.*

- 21 The similarity with the request at item 7 in the email of 25 September 2013 in this appeal is obvious. The difference is that the request considered in EA/2013/0283 at least by implication related to the then current complaints handling manual and standard phrases whereas the request at item 7 in the email of 25 September 2013 seeks such information for the period 1998-2012.
- 22 The Commissioner's investigation and Decision Notice in EA/2013/0283 resulted in the MOJ disclosing redacted copies of the then current (apparently 2010) complaints handling manual or procedures. The Commissioner held that parts of the procedure were properly withheld by the MOJ relying upon section 31(1)(c) (prejudice to the administration of justice), section 40 (unfair disclosure of personal data), and section 42(1) (legal professional privilege).
- 23 The FTT in EA/2013/0283 upheld the Decision Notice and rejected Mr Sanders' appeal. The Tribunal in this current appeal was of the view that it was not open to Mr Sanders to effectively argue the same point before a different FTT and, if unhappy with the first FTT's decision his remedy lay in an appeal to the Upper Tribunal.
- 24 However as has been pointed out above Mr Sanders' request in relation to the complaints handling procedure and 'standard phrases' in the current appeal does appear to be wider than the request considered in EA/2013/0283 as it seeks such information for the period 1998-2012

rather than just for 2010.

25 The Tribunal felt that Mr Sanders bore a large responsibility for any claimed failure on the part of the Commissioner to differentiate between the subject matter in EA/2013/0283 and the similar request in the current appeal. When asked by Mrs Jarman to clarify whether she had correctly identified the matters to be investigated by the Commissioner, Mr Sanders replied in relation to this particular point: *'the MOJs... response (or at least part thereof) was inadequate, unlawful, inaccurate/untrue and incomplete'*. If, as Mr Sanders argued before the Tribunal, he was aggrieved by the failure to consider older and newer complaints procedures and standard phrases he could have easily made this point clearly to Ms Jarman at the relevant time.

26 In any event even if the Tribunal had some sympathy with Mr Sanders' complaint here (which it did not) the Tribunal has no power to direct the Commissioner to reopen or broaden the scope of his investigation. Effectively in a case such as this the Tribunal's only jurisdiction is to consider whether the Commissioner has correctly applied the relevant exemptions to the withheld information as identified by the Commissioner. If Mr Sanders is aggrieved by any apparent limitation placed on the scope of the Commissioner's investigation then his remedy lies in either making a fresh complaint to the Commissioner or, if appropriate, a fresh FOIA request to the MOJ followed, if necessary, by a complaint to the

Commissioner.

- 27 The Tribunal noted with some concern that Mr Sanders contended in EA/2013/0283 that the Commissioner had in that case unreasonably restricted the scope of his investigation. The Tribunal in that case also carefully explained to Mr Sanders the scope of its jurisdiction and its inability to direct the Commissioner to conduct a different investigation. In the Tribunal's view Mr Sanders needs to accept this point rather than seeking to run the same argument before different FTTs.
- 28 Mr Sanders also sought to argue that his request for a recording of a court hearing had unreasonably been re-interpreted as a request for a transcript of the hearing by both the MOJ and the Commissioner. The Tribunal did not accept that this was the approach adopted by the Commissioner – for example, at paragraph 23 of the Commissioner's Response to the appeal it is quite clear that the Commissioner considered what exemptions applied to Mr Sanders' request for a copy of the audio recording. In any event, although a recording and a transcript of a recording are self-evidently different items, for the purposes of considering the MOJ's response to this particular request and the Commissioner's analysis of any applicable FOIA exemptions the Tribunal could draw no material difference between a recording and a transcript of a recording.

Other Appeal Issues

29 After clarifying that his principal complaint lay with the manner in which, in his view, the Commissioner had restricted his investigation Mr Sanders accepted that, in relation to the withheld information that the Commissioner actually considered, he was not contending that the Commissioner had incorrectly applied the exemptions relied on in the Decision Notice. Mr Sanders also accepted that he had no information that might lead to a conclusion that the Commissioner had erred in finding on the balance of probabilities that the MOJ did not hold the 'panic alarm information'. This being the case it was inescapable that the appeal would be dismissed and this decision is inevitably unanimous.

30 For the benefit of the Commissioner the Tribunal would comment that they doubted the correctness of the Commissioner's approach in only considering the s40(1) exemption in relation to information containing a mixture of the applicant's personal data and that of other people. In the Tribunal's view it is necessary in such cases to distinguish between and consider both the s.40(1) exemption in relation to the applicant's personal data and s.40(2) in relation to the personal data of other people. For the purpose of handling a request for information under FOIA, s.40(1) and (2) provide distinct and different exemptions. This is demonstrated by the (reverse) operation of subject access requests in such cases. If the applicant were to make a subject access request to a public authority under the Data Protection Act 1998 in relation to such 'mixed' information

then he would most likely receive the information (to the extent that it constitutes his personal data) but with the personal data of third parties redacted. If he then sought disclosure of that data under FOIA the public authority would have to justify the redaction by reference to s40(2) (or another applicable exemption). The public authority would not be able to rely on the s40(1) exemption to withhold such third party data in that scenario.

Signed:

Angus Hamilton DJ(MC)

Tribunal Judge

Date: 7 July 2015

Promulgated 8 July 2015