IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Appeal No. EA/2016/0070

BETWEEN:

DESMOND BAZIL

Appellant

-and-

INFORMATION COMMISSIONER

First Respondent

-and-

THE COMMISSIONER OF THE METROPOLITAN POLICE

Second Respondent

Before

Brian Kennedy QC
Jean Nelson
David Wilkinson

Date of Hearing: 26 August 2016 at Field House, London.

DECISION

Subject matter: Application of section 40(5) of the Freedom of Information Act 2000 ("FOIA").

The Tribunal allows the appeal and will provide a substituted Decision.

REASONS

Introduction:

[1]. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA") The appeal is against the decision of the Information Commissioner ("the Commissioner") and the Commissioner of the Metropolitan Police Service ("MPS") contained in a Decision Notice dated 28 January 2015 (reference FS50604076) which is a matter of public record.

[2]. The Tribunal Judge and lay members sat to consider this case on 26 August 2016. .

Factual Background to this Appeal:

[3]. Full details of the background to this appeal, Mr Bazil's request for information and the Commissioner's decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of whether details of the employment status and any criminal record of named individuals is personal information and whether MPS were correct in their refusal to either confirm or deny under s40(5) FOIA whether they held the information.

Chronology:

[4]. 29 July 2015 Appellant's request for details of named individuals

13 Aug 2015 Police refusal, citing s40(5) FOIA neither confirming nor denying holding the information

11 Sept 2015 Internal review upholds original position

5 Nov 2015 Appellant complains to the Commissioner

Relevant Legislation:

[5] ***s40 FOIA Personal information.***

(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 (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 paragraphs (a) to (d) of the definition of "data" in section 1(1) of the M1Data 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, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the M2Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the M3Data Protection Act 1998 ("the DPA") the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

(5) The duty to confirm or deny –

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either –

(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 or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

Sch II – Conditions for Data Processing.

(1) The data subject has given his consent to the processing.

(2) The processing is necessary –

(a) for the performance of a contract to which the data subject is a party, or

(b) for the taking of steps at the request of the data subject with a view to entering into a contract.

(3) The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

(4) The processing is necessary in order to protect the vital interests of the data subject.

(5) The processing is necessary –

(a) for the administration of justice,

(aa) for the exercise of any functions of either House of Parliament,

(b) for the exercise of any functions conferred on any person by or under any enactment,

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or

(d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

Commissioner's Decision Notice:

[6] In order to comply with section 1(1)(a) of FOIA (i.e. to either confirm or deny holding the requested information) would put into the public domain information about the existence or otherwise of the complainant's arrest; this would constitute a disclosure of personal data that would relate to the complainant. Should the appellant wish to access his personal data he should do so through DPA, as FOIA disclosure is to the world at large. Disclosure would be a breach of s40(5)(a) and it is not necessary to consider a reliance upon s40(5)(b)(i).

Appellant's Grounds of Appeal:

[7] Failure to disclose this information would be a breach of the Appellant's Art.6 rights. Organisations that are publically funded should be accountable, as in the USA. It is an offence to alter or destroy records that are held, and as the law is retrospective the police must disclose all information that came into existence at any time. The Appellant alleges that the two named individuals took part in an illegal search of the Appellant's home, seizing valuable property without offering compensation and causing the Appellant severe anxiety

NB *the Appellant was arrested and property was seized in 2006. He did not lodge any civil proceedings regarding this. The Appellant argues that the Commissioner was deliberately 'playing for time' and therefore the limitation period does not expire until 2019, but provides no explanation as to how he has come to this date.*

Case Management Notice 23 March 2016 – the Panel is not convinced that the information requested necessarily contains the Appellant's personal information.

Commissioner's Response:

[8] As the Appellant's request details the circumstances of his arrest, any confirmation or denial from MPS as to the information would be confirmation or denial of the veracity of the Appellant's claims regarding his arrest. The requests explicitly mention his arrest, and so identify and relate to the Appellant. S40(5)(a) is not subject to the public interest test.

Appellant's Reply:

[9] The DPA cannot be used to conceal criminal activity, and the information is necessary in regards to the Appellant's conviction arising from the arrest. DPA and FOIA do not trump Art.6, 10 and 13 ECHR. Raises parallels with the Hillsborough disaster and child sex abuse cover up. Appellant goes on to give the history of Freedom of Information laws back to 1766 in Sweden.

MPS Response:

[10.] MPS adopts the submissions of the Commissioner.

Discussion:

[11] S16 FOIA places a duty upon public authorities to provide advice and assistance to those making requests. This assistance extends to a duty to assist in the reformulation of requests so as to maximise the amount of relevant information that can be disclosed.

[12] There is no evidence before us that the Police, or the Commissioner, gave the Appellant advice on how to reformulate his request so as to prevent his own personal information being released to the world at large.

[13] That said, the information is still not disclosable. The Police in their initial refusal to confirm or deny holding the information cited the rights of serving police officers to have their privacy protected under the DPA. The requested information clearly relates to identified living individuals, who the Appellant believes to be, or have been, police officers. By its nature the request identifies those individuals and that information, if held, would constitute their personal data. Information about employment will usually be inherently 'private' and police officers etc. will have a high expectation that such matters will not be placed in the public domain, as disclosure must be considered as being made to the world at large. As such, their reasonable expectation would be non-disclosure. Disclosure of information could prove detrimental to any police employee or to a member of the public and could cause unnecessary and unjustified damage or distress to the individuals concerned. Junior members of staff have a greater expectation of privacy than would more senior employees. In this matter, the police confirmed that none of its then senior employees fell within the scope of the information request. Confirming or denying the holding of the information would be an unjustified breach of privacy.

[14] The Commissioner did not note this ground for refusal in his DN, and as such the Tribunal hereby will exercise its powers to correct the DN and institute a substitute DN. It is not considered that the decision was so fundamentally flawed that it cannot be corrected, as this is only to be considered in exceptional circumstances, and the Commissioner was correct to consider the issue of the release of personal information, albeit for the wrong party.

[15] Accordingly the Tribunal finds that decision notice FS50604076 dated 28 January 2016 is not in accordance with the law to the extent that the MPS was not entitled to rely on section 40(5)(a) to refuse to confirm or deny whether the requested material was held.

[16] However, the Tribunal notes that the MPS had initially sought to rely on section 40(5)(b)(i) and set out arguments in support of that exemption albeit the Commissioner had not considered this exemption in light of her finding on section 40(5)(a). The Tribunal finds that the MPS was entitled to rely on section 40(5)(b)(i) to refuse to confirm or deny whether it held the requested information. Accordingly, the Tribunal substitutes the Commissioner's decision notice to that extent.

[17] No substitution is required in relation to the steps as the Tribunal finds that the MPS is not required to confirm or deny whether the requested information is held albeit in reliance on an alternative exemption.

Brian Kennedy QC 14th December 2016.