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IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2017/0100**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50653930
Dated: 20 April 2017

Appellant:	**Christian Herman**
Respondent:	**(1) The Information Commissioner**
	(2) Chief Constable of Kent Police
Heard at:	**Snaresbrook Crown Court**
Date of Hearing:	**11 October 2017**

Representation:

Appellant:	**did not appear**
First Respondent:	**did not appear**
Second Respondent:	**Natasha Hausdorff**

Before

HH Judge Shanks

and

David Wilkinson and Melanie Howard

Date of decision: October 17, 2017

Subject matter:
Freedom of Information Act 2000 (FOIA)
Section 40(2) (personal information)

Case referred to:
Rodriguez-Noza v Information Commissioner [2015] UKUT 0449 (AAC)

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal dismisses the appeal.

REASONS FOR DECISION

1. The Appellant, Christian Herman, is a serving prisoner at HMP Swaleside. It is his case that the conviction which led to his incarceration was procured by the misconduct of three officers from the Kent Police.

2. On 20 and 21 August 2016 Mr Herman made requests to the Kent Police under FOIA seeking the service and disciplinary records of the three officers. The Kent Police refused to supply the information in reliance on section 40(2) FOIA on the basis that it was the personal data of the officers and its disclosure would involve a breach of the first data protection principle.

3. Mr Herman complained to the Information Commissioner. In a decision notice dated 20 April 2017 she rejected his complaint about the way the Kent Police had dealt with his request. He has appealed against that decision notice.

4. In his Notice of Appeal Mr Herman stated that he wanted an oral hearing and the Tribunal staff went to considerable efforts to arrange such a hearing in a secure court

at Snaresbrook. We were informed at the outset of the hearing that Mr Herman had refused to be brought from prison on the morning of the hearing and we therefore proceeded with the hearing in his absence, taking account of the written material put before us and the assistance we were given by counsel for the Kent Police, who in the event were the only party to attend the hearing.

5. Section 40(2) (read with section 40(3)) of FOIA says in effect that information which constitutes the personal data of anyone other than the requester is (absolutely) exempt from disclosure if its disclosure would contravene one of the data protection principles set out in the Data Protection Act 1998 (DPA). Section 40(5)(b)(i) also provides that there is no duty to confirm or deny whether such information is held at all if that confirmation or denial would itself contravene a data protection principle. The first data protection principle is as follows:

> **Personal data shall be processed [i.e. in this case, disclosed] fairly and lawfully and, in particular, shall not be processed unless:**
>
> **(a) at least one of the conditions in Schedule 2 is met;**
>
> **(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.**

The only possible relevant conditions in Schedule 2 in this case are conditions 5 and 6(1) which state:

> **5. The processing is necessary-**
>
> **(a) for the administration of justice**
>
> **…**
>
> **6. (1) The processing is necessary for the purposes of legitimate interests pursued by … the third party to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of the prejudice to the rights and freedoms or legitimate interests of the data subject.**

6. There can be no doubt that the information requested in this case constituted the personal data of the three officers in question. (Indeed, it is also likely that some of it amounted to "sensitive personal data" under the definition in section 2 of DPA since it

may have included, for example, information about the officer's health, whether s/he was a member of a trade union and whether s/he was alleged to have committed an offence). In the circumstances the requested information could only be disclosed under FOIA if such disclosure would not contravene the first data protection principle, and in particular if its disclosure was "necessary" for the administration of justice or for the purposes of legitimate interests carried on by Mr Herman.

7. Apart from being given a little detail on Mr Herman's complaints about the officers in the Kent Police's document at pp 15 to 17 of our bundle and told by Mr Herman in his Notice of Appeal that he has appealed to the Independent Police Complaints Commission against the rejection of his complaints by the Kent Police and that he has also sought to appeal against his conviction through the Criminal Cases Review Commission, we are given no indication in the papers at all as to how the disclosure of the officers' service and disciplinary records to Mr Herman was *necessary* for the administration of justice or the pursuit of any legitimate interest of his. Given that the IPCC and the CCRC both have ample powers to collect relevant information from the Kent Police (see: s17 of the Police Reform Act 2002 and s17 of the Criminal Appeal Act 1995) we doubt very much that disclosure to him could have been necessary for these purposes. We have briefly reviewed the service and disciplinary records which were provided to us by the Kent Police on a closed basis and nothing in them has caused us to change that view.

8. In the circumstances we are satisfied that none of the conditions in Schedule 2 was met and that disclosure of the records by the Kent Police to Mr Herman would have involved an infringement of the first data protection principle and that they were therefore entitled to rely on section 40(2) of FOIA to withhold the requested information. We therefore uphold the Information Commissioner's decision notice and refuse the appeal.

9. Before parting with the case we would make two observations arising from it:

    (1) The Commissioner in her Response suggested that the Kent Police ought to have relied on section 40(5)(b)(i) in relation to the disciplinary records

and to have refused to confirm or deny that such records were held at all. We can see the reason for her taking that position but at the hearing we clarified with counsel for the Police that it would not be appropriate to take it because in practice every police officer inevitably has a disciplinary record given the number of complaints raised by members of the public: disclosure of the existence of such a record does not therefore disclose anything that can be said to amount to personal data.

(2) In her decision notice in this case the Commissioner approached the issue in relation to the first data protection principle in the way she has traditionally done, namely (a) by first considering whether disclosure would be "fair" in a general sense and (b) by requiring the interest in disclosure to be a public interest. The general approach of the First-tier Tribunal in these cases (which is effectively endorsed by the Upper Tribunal decision in *Rodriguez-Noza v Information Commissioner* [2015] UKUT 0449 (AAC)) is to consider Schedule 2 (and in particular paragraph 6(1)) first and to ask whether disclosure to the applicant is *necessary* for the relevant purposes; and, further, the *Rodriguez-Noza* case is binding authority for the proposition that the relevant "legitimate interests" for the purposes of paragraph 6(1) are the interests personal to the applicant, not those of a notional member of the public. We would urge the Commissioner to follow the approach in *Rodriguez-Noza* in future.

10. This is a unanimous decision.

HH Judge Shanks

October 17, 2017

Promulgated:
October 18, 2017