



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0181

Determined, by consent, on written evidence and submissions

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Ms Anne Chafer
and
Mr Malcolm Clarke

Between

Paul Saunders

Appellant

And

The Information Commissioner

Respondent

DECISION AND REASONS

INTRODUCTION

1. The appellant is appealing against the Decision Notice of the Information Commissioner (the Commissioner) dated 26 July 2017.

2. The appeal arises following the appellant's request to the Chief Constable of West Yorkshire Police (the chief constable), for information as to whether a specific individual was employed by West Yorkshire police in September 2016.

BACKGROUND AND DECISION MAKING

3. The appellant became concerned about an unusual amount of helicopter activity near him and his premises following a complaint he had made to the Civil Aviation Authority about a helicopter operated by the National Police Air Service (NPAS). In particular the appellant says that a helicopter flew over his business premises on 8 September 2016 and landed in a field next to Park Meadow Farm.
4. The appellant says that he spoke to the owner of the field who said that he had been approached for permission to land the helicopter on his premises to enable two businessmen to attend a meeting at Thames Business Park. The appellant thinks this is not who the men were and that the helicopter contained two West Yorkshire police officers whose aim was to provoke the appellant into making a complaint. The appellant says that he actually spoke to the two men when they returned to the helicopter. One of the men answered a telephone call with his name which the appellant says he heard as Paul Clune or Paul Clunes.
5. This led to the information request by the appellant received by the chief constable on 3 October 2016 for information as follows: -

On any date during September 2016, did West Yorkshire Police (inclusive of the NPAS) have a policeman by the name of Paul Clune or Paul Clunes in their employment?

6. On 24 October 2016 the chief constable refused to confirm or deny whether that information was held, and cited s40(5) FOIA. Appendix A to the decision stated that: -

To give a statement of the reasons why neither confirming nor denying is appropriate in this case would itself involve disclosure of exempt information, therefore under section 17(4), no explanation can be given. West Yorkshire Police have determined that in all circumstances of the case the public interest in maintaining the exclusion of the duty to neither confirm nor deny outweighs the public interests in confirming whether or not the information is held.

7. The chief constable confirmed this decision upon review on 9 December 2016. The appellant complained to the Commissioner on 29 January 2017 about the decision neither to confirm nor deny that the information was held, saying that 'I am appealing for the reason being that, as a member of the public, I have simply requested West Yorkshire Police to admit or deny to their having a police officer by the name of Paul Clune or Paul Clunes in their employment during September 2016'.
8. After obtaining further information from the chief constable, the Commissioner's decision notice was issued and dated 26 July 2017.
9. The Commissioner comments that under s1(1)(a) FOIA a public authority is obliged to advise an applicant whether or not it holds the information requested, but that this duty to confirm or deny does not always apply if the public authority can properly rely on one of the exemptions from the duty in FOIA. Thus, the exemption in s40(5) FOIA states that the duty to confirm or deny whether or not the information is held does not arise if providing the requester with confirmation or denial would itself contravene any of the data protection principles. Section 40 FOIA, materially, reads as follows: -

40. – Personal information.

(1) ...

(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 Data 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 Data 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 Data Protection Act 1998 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) ...

10. The decision notice concludes that providing confirmation or denial would itself involve a disclosure of personal data because the requested information relates to an identified individual whom the appellant believes to be a police employee.

11. The Commissioner goes on to consider whether that disclosure would breach any of the data protection principles, and notes that the chief constable's case is that confirmation or denial would breach the first data protection principle.

12. The first data protection principle requires that personal data is processed (which includes disclosure) fairly, and the Commissioner states that she takes into account the following factors in deciding on the question of fairness: (a) the individual's reasonable expectation as to what will happen to their information; (b) whether disclosure will cause unnecessary or unjustified damage or distress to the individual concerned; (c) the balance between the rights and freedoms of the data subject and the legitimate interests of the public.

13. In essence the Commissioner's reasoning in relation to this request is that:
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 - (a) Police officers have a high expectation that their privacy will be respected and their private information will not be placed in the public domain;
 - (b) In addition, 'disclosure of information relating to employment status or other association with the police could prove detrimental to any police employee or to a member of the public if it were placed into the public domain via FOIA' (paragraph of the decision notice).
 - (c) A confirmation or denial in the circumstances of the current case would reveal to the public at large information which is not presently in the public domain;
 - (d) Senior officers would have less of an expectation of privacy than junior officers, and the Commissioner has received confirmation from the chief constable that no 'senior employees' fell within the scope of the information request.

- (e) Given the importance that is placed on protecting an individual's personal data, the arguments for non-disclosure outweigh any legitimate interest in favour of disclosure.
14. Therefore, the Commissioner concluded that confirmation or denial in this case would breach the first data protection principle and found that the exemption in section 40(5) FOIA is engaged and the duty to confirm or deny did not arise.
15. The appellant appealed against this decision, and submitted written submissions in support.
16. The appeal concentrates on the 'public interest' in confirming whether or not Paul Clune(s) is employed by the police, because the appellant says that he was harassed, intimidated and provoked by the man he suspects is a police officer on 8 September 2016. If he turns out to be a police officer then his misconduct can be investigated and other members of the public possibly protected.
17. At the heart of his submissions is the appellant's belief that he has been targeted by way of 'intimidation and harassment by police helicopter operatives'. He lives in Thame but says that when he visited a previous address in Crystal Palace on each occasion a police helicopter was operating nearby.
18. In relation to the incident which led to the present request his submissions seek to explain why he believes the passengers in the helicopter to be police officers, but his reasons are limited to comments about (a) the way the men were dressed (informally), (b) what they were carrying (a notebook from Staffordshire University); (c) the unlikelihood that they would have hired a helicopter from the south coast; and (d) the fact that the helicopter flew in low and fast over the appellant's property when it

landed. He also suspects that comments in relation to his online request about the flight might be police related (but only because a pseudonym PCD175 was used (and PC would be the initials of Paul Clune(s))). His essential case is that as he has put forward a plausible case of wrongdoing, then this creates a public interest in disclosure, and in any event a public interest in releasing the information 'to provide a full picture'.

DISCUSSION AND DECISION

19. We have read all the documentation and submissions put forward by the appellant in relation to his conviction that he has been targeted by helicopter operatives. We have not referred to every point in this decision but have considered all the points that have been made.
20. In our view the approach of the Commissioner as set out above in this case is correct. We also note a point which the Commissioner has at least alluded to in the decision notice, and that is once the police have disclosed, for example, that a person is not an employee, and then decide to neither confirm nor deny (NCND) in a subsequent case (when in fact a person is an employee), then the fact that the person is employed is exactly what will be inferred from that approach. Thus, a consistent approach to NCND is essential whether a person is employed or not.
21. We note that the appellant does not appear to dispute the analysis of the Commissioner in the decision notice in relation to the applicable law as outlined above. His essential case is that the legitimate interest in confirmation or denial (which would itself lead to the disclosure of personal information) outweighs the interests of the data subject.
22. There is, indeed, a legitimate interest in ensuring accountability of public bodies and officers. However, in this case the evidence that the two men dropped off by the helicopter on 8 September 2016 were police officers,

and that the intention of the men was to harass the appellant is especially thin, and therefore the legitimate interest claimed must be seen in that light.

23. The appellant says that he spoke to the owner of the neighbouring field who told him that he had been asked for permission for a helicopter to drop off two businessmen for Thame Business Park, to be collected two hours later, which appears to be exactly what happened. The appellant's supposition (as he puts it) that the intention was to provoke him into making a complaint which he could not prove is, in fact, pure speculation. It is true that the incident happened sometime after the appellant had raised issues with West Yorkshire about helicopter operations, but there is nothing to suggest that the presence of a helicopter in the adjacent field to the appellant's property on 8 September 2016 was anything other than a coincidence.

24. In these circumstances, the situation is that any legitimate interest in disclosure cannot make the disclosure of personal information fair in this case.

25. Further, we note that the appellant states that his aim is to make a complaint if his supposition is correct. It may be that the appellant would prefer to have the answer to his request before he makes a complaint, but in fact he does not need to name a particular police officer to make a police complaint, and the information he already has would have been sufficient to allow a formal investigation into his allegations to have taken place.

26. Therefore we find: -

(a) The name and identity (which constitute the information sought) are personal data.

- (b) Confirmation or denial that the information is held will have the effect of disclosing the information sought.
- (c) There is a legitimate interest in ensuring transparency by public bodies.
- (d) But confirmation or denial is not necessary for the purposes of those legitimate interests, because that would lead to the disclosure which is unwarranted by reason of prejudice to the rights of the data subjects.
- (e) Processing the information by way of disclosure as aforementioned would not meet the requirement of fairness.

CONCLUSION

27. For the reasons set out above we are satisfied that that chief constable was entitled to rely on s40(5) FOIA to decline to confirm or deny that the information is held, and the appeal is dismissed.

Signed *Stephen Cragg QC*

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 5 March 2018.

(Case considered by Panel on 17 February 2018).

Date Promulgated: 6 March 2018