



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

Appeal Reference: EA/2018/0091

Heard at North Staffordshire Magistrates Court

On 25 October 2018

Representation:

Appellant: in person

First Respondent: The Information Commissioner did not appear

Second Respondent: Carl Bird

Before

JUDGE BUCKLEY

MALCOLM CLARKE AND NARENDRA MAKANJI

Between

KAREN BUCKLEY

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

CHIEF CONSTABLE OF WEST MIDLANDS POLICE

Second Respondent

DECISION

1. For the reasons set out below the appeal is dismissed.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice FS50710025 of 26 March 2018 which held that the request was for the complainant's own data and that the Second Respondent in this appeal ('the Police') was correct to rely on s 40(5)(a) of the Freedom of Information Act (FOIA) and neither confirm or deny whether it held the requested information.
2. At the hearing Ms Buckley raised the possibility of applying to adjourn the hearing. Ms Buckley has cognitive difficulties and felt that she was not adequately prepared. After the tribunal indicated that she could be given the opportunity to file additional written submissions after the hearing, she was content to proceed. Both Ms Buckley and the Second Respondent filed additional submissions and the tribunal has taken them into account where relevant.
3. In the light of Ms Buckley's cognitive difficulties, we have included a summary of the main reasons for our decision. Ms Buckley can refer to the rest of the decision for full details of why we have decided as we did.

Summary of main reasons for decision

4. This tribunal can only make decisions about requests made under the Freedom of Information Act. We are not allowed to make decisions about Subject Access Requests.
5. As Ms Buckley knows, there are different ways of asking for information from the Police. You can make a Subject Access Request or a Freedom of Information request.
6. If you want to ask for information **about yourself** you have to make a Subject Access Request. If you ask for information about yourself by making a Subject Access Request the Police will have to provide it unless it falls within one of the exemptions.
7. You cannot get information about yourself by making a Freedom of Information Request. If you ask for information about yourself using a Freedom of Information Request the Police do not have to provide it. The Police do not even have to confirm or deny if they have the information.

8. The only request that the Information Commissioner has made a decision about is the request on 14 July 2017. That is the only request that we can consider.
9. On 14 July 2017 Ms Buckley asked the Police to add recordings of telephone calls and documents to her requests in April and May 2017. The Commissioner has not issued a decision about the requests in April and May 2017, so we cannot consider those requests.
10. The recordings of telephone calls and documents asked for by Ms Buckley are about her arrest and detention by the Police.
11. This tribunal only deals with Freedom of Information Requests. We are not allowed to decide if the Police should have provided the information to Ms Buckley in response to a Subject Access Request. We are only allowed to decide if the Police should have provided the information to Ms Buckley in response to her Freedom of Information request.
12. We have to decide if the information is about Ms Buckley. If the information is about Ms Buckley the Police do not have to provide it in response to her Freedom of Information Request.
13. We have decided that the information is about Ms Buckley. The Police do not have to provide it in response to a Freedom of Information Request. They do not have to tell Ms Buckley if they have any of that information.
14. The Police might have to provide the information in response to a Subject Access Request. They might not have to provide it in response to a Subject Access Request if it is exempt for some reason. We are not allowed to decide that. We can only look at the Freedom of Information request.
15. Ms Buckley has made a lot of other requests for information. She has asked for video evidence, medical evidence and lots more information related to her arrest and the problems she has had with her neighbours. The Information Commissioner has not made a decision about those requests. That means that we cannot make a decision about those requests.
16. We understand that Ms Buckley has a lot of extremely serious complaints about the way she was treated by the Police. Unfortunately, we have no power to do anything about those complaints. The only question for us is whether or not the information is about Ms Buckley.
17. Even if we thought that the Police were guilty of every single thing that Ms Buckley says they have done wrong, she is still asking for information that is about her and that does not have to be provided in response to a Freedom of Information request.

18. This is because the government has decided to provide two separate processes and wants to keep them separate.
19. We understand that it is frustrating and confusing for Ms Buckley that there are two separate processes. We understand that it is frustrating and confusing for Ms Buckley that we cannot deal with all the requests she has made to the Police. It would be easier if we could decide whether the information should be provided in response to her Subject Access Request, and it would be easier if we could make a decision on all the requests she has made but that is not within our powers.
20. That is the end of the summary. The full reasons are set out below.

Factual background

21. From the information given to the tribunal at the hearing, in the bundle and in further submissions it is clear that Ms Buckley wants the Police to disclose any video or audio recordings or other information relating to her arrests in April and May 2017 held by the Police. She alleges a number of wrongs carried out by the police during the process of her arrest and detention. She wants the video/audio recordings/other information to help to prove those wrongs in legal proceedings.
22. We cannot provide Ms Buckley with what she wants. We only have jurisdiction to deal with FOIA requests. We cannot rule on her Subject Access Requests. Further, we only have jurisdiction to deal with the appeal in relation to the request that was ruled on in the Decision Notice. That is the request dated 17 July 2018. We have no jurisdiction to consider the earlier requests.
23. Further, it is not within the power of this tribunal to decide whether or not the police are guilty of any wrongdoing in relation to Ms Buckley's arrest. We do not intend to set out the details of the alleged wrongdoing in this decision.

Request, Decision Notice and appeal

24. Ms Buckley has made a number of FOI and subject access requests to the Police about matters related to her arrest on 11 April 2017.
25. She made the request under the Freedom of Information Act (FOIA) which is the subject of this appeal on 14 July 2017:

I am requesting all recordings of telephone calls and documents be added to my freedom and data access request from in April/may [sic] 2017. This as yet has not been received.

26. This is an extract from a longer letter, but, taken in context, the rest of the letter refers to a separate complaint about the Police's actions in the week immediately

prior to 14 July 2017. There is no request for information relating to those separate issues in that letter and we find that the rest of the letter does not form part of the request.

27. The request refers back to a 'freedom and data access request' in April/May 2017. Ms Buckley made two requests in April 2017. The first request dated 13 April 2017 was made to the Police's Data Protection Unit and requests information relating to her arrest on 11 April 2017.
28. The second request is dated 17 April 2017 and asks for information related to problems that Ms Buckley has had with her neighbours.
29. In an email dated 16 March 2018 to the Commissioner Ms Buckley states that she has made further requests for Police medical records about her and for information relating to her second arrest in May 2017.
30. The public authority replied on 26 July 2017. It refused to confirm or deny if it held the information. It relied on s 40(5)(a) of FOIA because the request was for Ms Buckley's own data. The letter stated that a request for a person's own data should be requested via a Subject Access Request.
31. An internal review was carried out and the Police upheld their decision, again informing Ms Buckley that she could make a Subject Access Request.
32. In a Decision Notice dated 26 March 2018 the Commissioner decided that the requested information related to allegations that Ms Buckley had made about the Police and her neighbours. The Commissioner decided that the information, if held, would be Ms Buckley's own personal data. Confirming or denying whether the Police held the data would put into the public domain information about the existence or otherwise of allegations that Ms Buckley made against the Police and her neighbours. This would be a disclosure of personal data relating to Ms Buckley.
33. In her Notice of Appeal Ms Buckley raises a number of points, all of which the tribunal have read and considered and taken account of where relevant. The tribunal considers the following to be potentially relevant to its decision.
 - a. She has been wrongfully imprisoned and the Police acted unlawfully in a number of ways. Video and audio evidence of her arrest and detention will prove or disprove the unlawful actions of the Police.
 - b. The ICO have confirmed that you can obtain your own data even if the video/audio contains other individuals.
 - c. The decision is biased.
 - d. She made requests via email in April/May 2017.
 - e. She disagrees that there is no requirement to consider the public interest under s. 40(1). She submits that there is a requirement to consider the public interest if there is a breach of duty, or failure to act or delays in

acting, lack of evidence or where bodily harm, illness or injury is suspected.

34. In her response the Information Commissioner submits that the duty to confirm or deny does not apply because doing so would amount to disclosing information about the requestor.

Legal framework

S 40 – Personal Information

35. The relevant parts of s 40 of FOIA provide:
- (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.
 - ...
 - (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)
 - ...
36. 'Personal data' has the same meaning as in s1(1) of the Data Protection Act 1998 (s40(7) FOIA):
- "personal data" means data which relate to a living individual who can be identified-
- (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
- and includes any expression of opinion about the individual and any indication of the intentions of the data controller or another person in respect of the individual.
37. The definition of "personal data" consists of two limbs:
- i) Whether the data in question "relate to" a living individual and
 - ii) Whether the individual is identifiable from those data.
38. The tribunal is assisted in identifying 'personal data' by the cases of *Ittadieh v Cheyne Gardens Ltd* [2017] EWCA Civ 121; *Durant v FSA* [2003] EWCA Civ 1746 and *Edem v Information Commissioner* [2014] EWCA Civ 92, from which the following principles are drawn.
39. In terms of 'identifiability', personal data covers, for example, the name of a person in conjunction with his telephone details or information about his working conditions or hobbies, as well as information that a person has been injured and is on half time, or his name and address.
40. In *Durant*, Auld LJ, giving the leading judgment said at [28]:
- Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may

have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity.

41. In *Edem Moses LJ* held that it was not necessary to apply the notions of biographical significance where the information was plainly concerned with or obviously about the individual, approving the following statement in the Information Commissioner's Guidance:

It is important to remember that it is not always necessary to consider 'biographical significance' to determine whether data is personal data. In many cases data may be personal data simply because its content is such that it is 'obviously about' an individual. Alternatively, data may be personal data because it is clearly 'linked to' an individual because it is about his activities and is processed for the purpose of determining or influencing the way in which that person is treated. You need to consider 'biographical significance' only where information is not 'obviously about' an individual or clearly 'linked to' him.

42. S 40(5)(a) excludes the duty to confirm or deny in relation to information which constitutes personal data of which the applicant is the data subject. Unlike some other exclusions, s40(5)(a) does not require that confirmation or denial might or would itself disclose the existence of the information or cause any prejudice (see Coppel, *Information Rights: Law and Practice*, para 24-006).

The Task of the Tribunal

43. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

Issues

44. The issues we have to determine are:
- a. Whether the information requested was personal data of which Ms Buckley is the data subject.
 - b. Whether s 40(5) is an absolute exemption

- c. If so, where the public interest balance lies.

Evidence and submissions

45. We have read and were referred to a bundle of documents and took account of Ms Buckley's and the Police's oral and written submissions, including those submitted after the hearing and the Police's skeleton argument.

Discussion and conclusions

Was the information requested personal information?

46. The information requested relates either to Ms Buckley's arrests and detention or to her dispute with her neighbours. Taken together, we find that Ms Buckley would be identifiable from the data.
47. We find that all the information is obviously about Ms Buckley. It is clearly linked to Ms Buckley. It is about her arrest or her dispute with her neighbours. It is about her activities or the way that others have treated her or her private property and has been processed for the purpose of determining, influencing or recording the way that she will be or has been treated. Both the arrest and the dispute with her neighbours are of biographical significance to Ms Buckley and the focus of both events is on Ms Buckley. Any information that is not about Ms Buckley would not fall within the scope of her request. She has only asked for information that relates to her arrest or to her dispute with her neighbours.
48. We find that all the information falls within the definition of personal data.
49. Although we are only considering the 14 July 2017 request, it may assist Ms Buckley to know that we would have reached the same decision about much of the requests for information about her arrests in April or May 2017 and for information about any engagement between the Police and her neighbours relating to Ms Buckley's disputes with her neighbours. Those would also be requests for personal data for the reasons set out above. The tribunal notes that there are certain elements of information requested on 13 April 2017 which may not be her personal data, for example 'confirmation and procedures of how the police support people with learning difficulties', but we have not reached a conclusion on these issues, because those are not the requests to which this appeal relates.

Public interest balance

50. Our interpretation of s 40(5) is that it is an absolute exemption, because it arises out of s 40(1). The Tribunal noted that there is a prima facie contradiction in the Act between s 2(3) and s 40(5). S 40(5) specifically states that the duty to confirm or deny does not arise in respect of Section 40(1) information. However, s 40(5)

is not listed as an absolute exemption in s2(3) which explicitly provides that there are no other absolute exemptions.

51. This is a matter of statutory interpretation. Different tribunals have taken different conclusions on this. In reaching our conclusion we accepted the logic of the submissions by the police on this point, which pointed out the inconsistencies and incompatibility with the principles of the Data Protection Act of the alternative interpretation.
52. If we are wrong in that conclusion, the public interest balance that has to be undertaken is not in relation to whether or not the information should be disclosed. There is no question over whether s 40(1) is an absolute exemption. We cannot therefore consider Ms Buckley's arguments about the public interest in disclosing the requested information.
53. If there is a balance to be considered under s 40(5) it is the public interest in the Police confirming or denying whether it holds the requested information under FOIA. There is nothing before us to suggest any significant public interest in the Police making that confirmation or denial. On the other hand, there is a significant and strong public interest in the entirely separate regimes being maintained by s 40(5) which we would have found outweighed any opposing public interest.
54. In conclusion we find that the information requested was Ms Buckley's personal data and therefore the duty to confirm or deny did not apply. The appeal is therefore dismissed.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 29 January 2019

Promulgated: 31 January 2019