



Neutral Citation number: [2023] UKFTT 916 (GRC)

Appeal Number: EA/2023/0132

Decision given on: 1 November 2023

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

Between:

NIGEL RAWLINS

Appellant:

and

THE INFORMATION COMMISSIONER

Respondent:

Before: Brian Kennedy KC, Paul Taylor, and Susan Wolff.

Hearing: On 30 October 2023 on the papers.

For the Appellant: as a Litigant in person in writing of the Grounds of Appeal dated 23 March 2023.

For the First Respondent: Richard Bailey of the ICO by way of written Response to the Grounds of Appeal, dated 23 May 2023.

Decision: The Tribunal dismiss the appeal.

REASONS

Introduction:

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("FOIA"). The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice ("DN") dated 1 February 2023 (reference IC-177485-H8Z7), which is a matter of public record. (*References to the Open Bundle herein = "OB"*).

Factual Background to this Appeal:

2. The appeal concerns the Appellant's request for information on 25 March 2022, wherein the Appellant made the following request to Sussex Police ("SP"): *"Can you also confirm under the Freedom of Information Act all or any disciplinary actions taken against [Redacted] when he was an acting Police Officer. His behaviour is hostile and violent."*
3. SP refused to confirm or deny holding the requested information. the Commissioner issued DN in which he concluded SP were correct to apply s40(5B) of FOIA to the request because;
 - i) *the requested information, if held, would constitute third party personal data" DN paragraph [7]"*;
 - ii) *The Police would have no lawful basis for confirming or denying that the requested information was held and for this reason the exemption under s.40(5B) was correctly engaged "DN paragraph [11]"*.

The Grounds of Appeal:

4. On 6 March 2023 the Appellant appealed to the Tribunal against the DN. In his grounds of appeal, the Appellant argues;

“Sussex Police are continuing to ignore and blatantly in disregard to their duty of care and protection to the public. Article 2 of the Human Rights Act ‘Safeguarding Life’ states: They must do everything reasonable within their powers to protect life. They are withholding vitally important information from us, which could cause death/injury or severe health problems. They have a legal obligation to adhere to the Law and the Police are already aware of our risks. For over three years, [redacted] has continued to intimidate and threaten my family and using foul language and aggression. He was finally interviewed by a member of the public, working as [redacted] and admitted to this [redacted] that he used aggravated and violent conduct; swearing at me in the road to fight him. He was wearing just a dressing gown and was completely out of control.

This has not only led to massive ongoing stress and worry but in May last year, he and [redacted] blocked my car in and punched and smashed my windscreen in trying to get me out of my car. This included spitting in my face and damaging my car further.

Apparently, this matter has still not been dealt with but far more importantly, Sussex Police continue to ignore their legal responsibility to make the public aware of possible risks, life changing and otherwise.

I request this matter be reviewed. I will be passing on this information to [redacted] who amongst other [redacted] are shocked by the ability of Sussex Police to ignore their duty of care and protection.”

The Commissioner’s Response:

5. Generally, the Commissioner relies on the DN as setting out his findings and the reasons for those findings. The Commissioner nevertheless makes the following observations in respect of the Appellant’s grounds of appeal. The Appellant argues that *“Sussex Police are continuing to ignore and are blatantly in disregard of their duty of care and protection to the public”* and that *“they are withholding vitally important information from us, which could cause death / injury or severe health problems”*. The Appellant then sets out the alleged aggressive behaviour of the individual who is the subject of the request towards the Appellant and his family for which he has made a complaint to Sussex Police.
6. The Commissioner has accepted in the DN Paragraph [7] that there is some legitimate interest in the Police confirming or denying to the public under FOIA

that the requested information is held relating to SP's accountability in its disciplinary procedures and that it would allow the public to have confidence in or raise concerns about the standards the police expects of its officers.

7. However, upon further reflection, the Commissioner questions whether confirmation or denial to the public under FOIA that the requested information was held was necessary to meet such a legitimate interest as it would simply confirm or deny whether any disciplinary action had been taken against the individual in the past. Nevertheless, even if it could be established that it was necessary to confirm or deny that the information was held to meet the legitimate interest, for the police to have a lawful basis for confirming or denying that the requested information is held, the above legitimate interest would have to outweigh the prejudice to the rights and freedoms or legitimate interests of the individual.
8. On the facts of this case, any potential individual concerned would have a reasonable expectation that SP would not confirm or deny to the public under FOIA that the requested information was held as such a confirmation or denial would reveal whether disciplinary action had been taken against the individual who is (and was at the time of the response to the request) no longer a serving police officer. Further, confirmation or denial to the public would cause unwarranted distress to the individual.
9. The grounds of appeal the Commissioner argues, focus on the Appellant's private interest in seeking confirmation or denial that the requested information is held concerning the behaviour of the individual towards the Appellant and his family. There is no suggestion in the grounds that the individual has demonstrated such behaviour to other members of the public. As such, the Commissioner argues any legitimate interest in confirmation or denial suggested by the Appellant in the grounds of appeal is accordingly limited. The Tribunal endorse and accept this limitation on the Appellant's legitimate interest.

10. The Appellant has failed to demonstrate in his grounds of appeal that the legitimate interest in confirming or denying that the requested information is held is sufficient on the facts of this case to outweigh the strong prejudice to the individual's rights and freedoms that would result from such a confirmation or denial on the facts of this case. Again, on the facts pertaining to this appeal, the Tribunal endorse and accept this assertion by the Commissioner.
11. For these reasons and those set out in the DN, the Commissioner maintains that he was correct to conclude that confirmation or denial that the requested information is held would contravene the data protection principle under Article 5(1)(a) UK GDPR and that therefore the exemption under s.40(5B) was correctly relied upon.

Legal Framework:

Section 40(5) – Personal Information:

12. Section 40(5B) of FOIA allows a public authority to refuse to confirm or deny that it holds information if the mere act of confirming (or denying) that information is held would, in itself, reveal personal data about an identifiable individual and would contravene one of the data protection principles.
13. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed – if the public authority can only confirm whether or not it holds the requested information, if to do so would be:
 - a) lawful (i.e. would meet one of the conditions of lawful processing listed in Article 6(1) UK GDPR.
 - b) Fair; and
 - c) Transparent.

The Commissioners' reasoning:

14. In this case the Commissioner was satisfied that there was a legitimate interest in the confirmation or denial confirming or denying whether information is held but recognised that individuals have a clear and strong expectation that their personal data will be held in accordance with data protection laws. On the facts of this case the Commissioner was satisfied that any such person concerned would not reasonably expect the SP to confirm to the world at large whether it held the requested information in response to a FOIA request.
15. As the Commissioner found that there is insufficient legitimate interest to outweigh any data subject's fundamental rights and freedoms, he found there is no lawful basis for doing so and therefore the SP were entitled to rely on s40(5B) of FOIA to neither confirm nor deny that the requested information is held.

Conclusions:

16. The appeal raises several issues. The request to the ICO was made on 25 March 2022 and refers in some detail to an alleged specific incident. However, in his grounds of appeal he has referred to the alleged assailant as being guilty of intimidating behaviour for over a period of three years. It is difficult to identify when the alleged incident he has described occurred or when any of the alleged intimidating behaviour commenced but it would appear to be over three years prior to 5 March 2023. The relevance of this is in the Legitimate Interest that arises from the background generally and when it is said to have arisen.
17. Prior to 2015, all police misconduct matters were private. There was no public access to misconduct hearings, and they were chaired by a Senior Officer. The position on publication of information changed on 1 May 2015. The Police Conduct regulations 2012/2632 were amended in various ways, introducing a

legally qualified Chair, publicly accessible hearings, pre-hearing notices, and post hearing notices (publishing the result of the public hearing for at least 28 days). These changes were not retrospective for any matters prior to 2012. In 2017, regulations were introduced which require that details of any police officer dismissed for misconduct are placed on a publicly searchable list. In 2020, the new Police (Conduct) Regulations 2020/4 were introduced, and the post-hearing notice was replaced by publication of the misconduct hearing panels full rationale. It is up to the Chair of the Panel as to the content of the documents, and the Chair can decide not to publish at all if appropriate. The Chair can also grant anonymity to any subject of such a hearing.

- 18.** Neither the appellant nor the Commissioner made any reference to the statutory framework for disclosure of police misconduct hearings. However, the Tribunal notes the relevance of these for similar investigations by the ICO into such alleged complaints against police officers, and in this appeal. The significance of the Police (Conduct) Regulations 2020 is twofold: (a) the regulations acknowledge a wider public interest in disclosure of misconduct outcomes and (b) for police officers, subject to misconduct hearings, the expectation of confidentiality is significantly lessened except where the Legally Qualified Chair (LQC) decides not to publish.
- 19.** In the circumstances of this case the Tribunal concludes that if the police hold (or do not hold) information relating to any police misconduct prior to the 2020 regulations, a police officer would have a significant expectation of confidentiality. If the police hold (or do not hold) information relating to a police misconduct after 2020 the police officer concerned would have a reasonable expectation of confidence where the LQC decided against publication. Otherwise, the information would be in the public domain.
- 20.** On the facts of the case and the evidence provided in the bundles, the Tribunal agrees with the Information Commissioner that S. 40 (5B) applies. Disclosing

whether the police hold or do not hold information about the data subject would contravene the first data protection principle.

21. Even if we are wrong about our reasoning on the above, the Tribunal do not accept that the Grounds of Appeal have established an error of Law in the DN or in the exercise of the Commissioners discretion in his application to the facts of the material issues to be addressed herein. In particular, we unanimously accept and adopt the reasoning in paragraphs 5 – 11 of the DN.

22. Having considered all the evidence and the submissions before us we unanimously find in s.40(5B) has been properly applied by the SP in this case.

Brian Kennedy KC

30 October 2023.