



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/001
Information Commissioner's Ref: FS50083086

Appeal No: EA/2008/0001

Heard on Papers
22 May 2008

Decision Promulgated
26 June 2008

BEFORE

CHAIRMAN

CHRIS RYAN

and

LAY MEMBERS

JACQUELINE BLAKE
ROSALIND TATAM

BETWEEN:

MR NICHOLAS GEORGE FENNEY

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

Decision

The Tribunal upholds the Decision Notice dated 5 December 2007 and dismisses the appeal.

Reasons for Decision

The request for information

1. Over a period of time the Appellant conducted a long running correspondence with the Chief Constable of Avon and Somerset Constabulary (“the Constabulary”) in which he raised various issues and asked various questions. The parties have agreed that for the purposes of this Appeal we should treat one letter within the chain of correspondence as the relevant request for information for the purposes of section 1 of the Freedom of Information Act 2000 (“FOIA”). The letter was dated 11 February 2006 and set out the following requests:

“i. The 'Complaint Investigation File': Complaint against [two named police officers recorded by a third officer] on 6 December...

ii. The identity of the witness alleged to have made a complaint of sexual harassment against me.

iii. The full text of the witness statement purporting to constitute a complaint of 'sexual harassment' arising from the letter or letters which I sent to your potential witness

iv. The letter or letters which I sent to your potential witness.

v. Please let me know on which day the complaint was made.

vi. Please let me know who recorded the complaint.

vii. The identity of the police officer who allegedly saw me at Mole's night-club on the night [name] is believed to have 'disappeared' from Cadillac's nightclub.

viii. The disciplinary and medical records of [named police officer].

ix. A disclosure as to why [named police officer] informed me, [name redacted], and her next of kin in October, 1996, that (i) he was 'frightened' that I was 'going to rape her' and (ii) he didn't want me 'getting her involved in drugs'."

2. Requests iv, v and vii had been satisfied or otherwise resolved before the matter came to us.
3. The Constabulary refused the requests on two grounds. It said that it did not hold some of the requested information and, as to the rest, it claimed that it was exempt from disclosure under FOIA section 30(1) and section 40(2).

The complaint to the Information Commissioner

4. The Appellant complained to the Information Commissioner on 23 November 2006. The Information Commissioner inspected all the information the Constabulary admitted that it held, with the exception of the medical records sought under request viii.
5. After a lengthy investigation, during which the Information Commissioner's staff exerted considerable efforts in clarifying what information was in dispute, a Decision Notice was issued on 5 December 2007. In it the Information Commissioner accepted that some of the information sought had not been held by the Constabulary at the time the request was made and decided that the information which it did hold was exempt from disclosure under section 40 FOIA. Some of the withheld information constituted the personal data of the Appellant himself and therefore fell within the absolute exemption provided by section 40(1). The rest, being the medical records referred to in request viii, was the personal data of the individual whose medical condition they covered and was therefore exempt from disclosure under section 40(2), the disclosure of which would breach the First Data Protection Principle set out in Schedule 1 to the Data Protection Act 1998 ("DPA"). The Information Commissioner therefore concluded that the Constabulary had been justified in refusing all the requests for information.
6. Having decided that none of the information requested should be disclosed on this basis the Information Commissioner did not make any decision under FOIA section 30. The Appellant has sought to raise a number of points in this Appeal on section

30 but as we support the Information Commissioner's decision and the reasoning set out in his Decision Notice we have not given any consideration to the possibility that section 30 might also apply.

The appeal to the Tribunal

7. The Appellant launched an appeal to this Tribunal on 18 December 2007. His Grounds of Appeal at that stage were somewhat cryptic and appeared to relate only to request i. The Tribunal therefore directed that he provide a written statement indicating which of the requests for information his appeal related to and setting out the grounds of appeal in respect of each of them.
8. The Tribunal issued additional directions for the service of an amended Reply, the preparation of an agreed bundle of documents and the disposal of the Appeal without a hearing, as the Appellant had requested. The parties submitted written submissions before the determination took place on 22 May 2008.
9. The written statement and amended Reply helped to clarify the issues at stake and we will summarise them by reference to each of the outstanding requests set out in paragraph 1 above.

Request I – the Complaint File

10. The Information Commissioner concluded that the information in a file dealing with a complaint by the Appellant about the conduct of two police officers constituted personal data of which the Appellant was himself the relevant data subject. It was therefore exempt information under section 40(1) FOIA which provides:

“(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. “

The definition of “personal data” for these purposes is to be found in section 1 of the Data Protection Act 1998 (“DPA”) which provides that it 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 any other person in respect of the individual.”

11. The Information Commissioner acknowledged that the requested information also included information which would constitute personal data relating to the police officers. However, it was his view that this did not prevent the information being properly characterised as information which was exempt under section 40(1).
12. The Appellant has continued to argue that section 40(1) does not apply on the grounds that it was the police officers, and not the Appellant, who constituted in his words the “principal data subjects”. He has also claimed that his reference to the “complaint file” was in fact a reference to the file which the officer investigating the complaint would have submitted to the Police Complaints Authority incorporating his findings.
13. We have concluded that the Appellant’s first argument is wrong. There is no basis for arguing that the DPA intended that the only data subject to be considered when assessing a document incorporating data on more than one individual is the one whose data is more extensive or more significant. If information incorporates the personal data of more than one person the data controller is not required to attempt an assessment as to which of them is the more significant and to then recognise the rights to protection of that individual and ignore any others. Its obligations are set out in sections 7(4) to 7(6) DPA, which require it to consider whether the information requested includes information relating to a third party and, if it does, to disclose only if that third party consents or it is reasonable in all the circumstances (by reference to the particular matters identified in subsection (6)) to comply with the request without his or her consent.
14. The file recording how the complaint lodged by the Appellant was handled includes his personal data for the purposes of DPA section 1 and therefore falls with FOIA section 40(1). The structure of the FOIA in this respect is quite clear and is intended to avoid overlap with the DPA. The information is therefore treated as covered by an absolute exemption and falls out of the machinery for disclosure set

out in the FOIA and must be treated as a data subject request under DPA. (We were informed that the Information Commissioner was considering the Appellant's request under that legislation, as a separate matter).

15. The Information Commissioner also relied on the fact that, as the Appellant has asserted, the complaint file included the personal data of the police officers concerned. This would bring it within section 40(2) DPA, which provides that such information is exempt information if its disclosure would contravene any of the data protection principles (DPA schedule 1) or would cause damage or distress to the data subject or another person (DPA section 10). However, the Information Commissioner did not explore the application of the data protection principles or section 10 in detail. We therefore have no basis for deciding whether the section 40(2) exemption would apply. But we do not need to do so, given our conclusion under section 40(1).
16. The Appellant's attempt in his second argument to narrow his request to just the file submitted to the Police Complaints Authority does not assist him. First, any report would have been based on a complaint made by the Appellant that particular officers behaved towards him in an unlawful manner and would therefore have incorporated personal data of which he was the data subject. Section 40(1) DPA would therefore apply as much to this document as it would to the complaint file as a whole. The Information Commissioner's final written submission to us included a statement to the effect that it seemed that the relevant file did not in fact contain any report to the Police Complaints Authority, although this was not certain. The Appellant in his final submissions suggested that a report must have existed because section 73 of the Police Act 1996 would have required the investigating officer to have prepared one. We believe that this represents a mis-reading of that provision (which has in any event been repealed by the Police Reform Act 2002) because the obligation to prepare a report only arose in certain circumstances where the Police Complaints Authority had become involved. No evidence on this issue was adduced and we are not in a position to make a finding one way or the other. Had the Appeal turned on this point we would have considered a direction that the facts be investigated further, but that is not necessary in view of our

conclusion that the absolute exemption provided for by section 40(1) would have applied in any event.

Request 2 – Witness Identity

17. In clarifying his original grounds of appeal the Appellant simply stated “No appeal” against this item and we have not therefore considered it further, even though the Information Commissioner included argument on the point in his Amended Reply.

Request 3 – Witness statement content

18. In his Decision Notice the Information Commissioner concluded that it was highly likely that this constituted the personal data of the witness herself but that as it dealt with alleged activities of the Appellant he could be identified from it and it therefore also constituted his personal data so that FOIA section 40(1) again applied. The Decision Notice did not address a more important issue in respect of this information, which was that the Constabulary had stated that the witness statement had been destroyed and was therefore no longer held by it at the time when the request had been made. In his Amended Reply the Information Commissioner clarified that he had accepted this statement and stated that the Decision Notice should be treated as setting out his analysis of what the position would have been had the statements not been destroyed. Although the Appellant persisted with a complaint to the effect that it was not true that the witness statement had been destroyed we do not believe that he has placed before us evidence or argument that should cause us to doubt what the Constabulary has said on the subject. We also believe that, even if the witness statement had survived, the Information Commissioner was right to decide that the section 40(1) exemption would clearly have applied to it.

Request 6 – Identity of person recording complaint

19. The Appellant indicated in the document expanding on his original grounds of appeal that there was “no appeal” against the conclusion in the Decision Notice to the effect that the Constabulary had not been obliged to disclose this information for the same reasons as applied to Request 1 above. We have not therefore considered this request further.

Request 8 – Disciplinary and medical records

20. In his Decision Notice the Information Commissioner accepted the Constabulary's statement that no disciplinary record existed. Although the Appellant suggested that this was not consistent with a statement which he said another police officer had made to him about the demotion of the individual who would have been the subject matter of the disciplinary record, we have not been presented with any evidence of sufficient weight or credibility to cause us to doubt what the Constabulary has said.

21. As to medical records the Decision Notice concluded that they would have included a comprehensive medical history of the individual concerned which would constitute "sensitive personal data" under section 2 DPA, the relevant parts of which provide as follows:

"In this Act "sensitive personal data" means personal data consisting of information as to:

(a) ...

(e) ... physical or mental health or condition,"

22. The effect of the interplay between FOIA and DPA on information of this nature is that it is covered by an absolute exemption if disclosure would contravene any of the data protection principles set out in Schedule 1 to DPA. Those principles require personal data to be processed "fairly and lawfully" and have the effect of imposing particularly severe restrictions on the disclosure of sensitive personal data. The Decision Notice concluded that disclosure to the Appellant would have breached the data protection principles because there would be a strong expectation on the part of the police officer that his medical records would be treated as private and not disclosed in the absence of a compelling argument that disclosure would be fair in all the circumstances. It also concluded that none of the conditions for disclosure that apply specifically to sensitive personal data had been satisfied. As disclosure would therefore breach the data protection principles it was subject to the absolute exemption provided for by section 40(2) FOIA. The Appellant has not mounted a serious challenge to that part of the Information

Commissioner's conclusion. We think that the Information Commissioner was correct, in any event, in deciding that the information requested was exempt under FOIA section 40(2) and that the Constabulary was therefore justified in rejecting the original request.

Request 9 – Reason for a particular statement

23. The Information Commissioner's case on this request was, first, that the officer concerned denied that he had ever used the words that the Appellant alleged. As to that we received no evidence to the contrary and the Appellant's bald assertion is not sufficient to justify rejecting the denial. The second argument put forward by the Information Commissioner was that the requested information would in any event have been exempt from disclosure under section 40(1). For the reasons set out in this decision in respect of other requests, in particular request 1, we conclude that this is correct. Accordingly the Constabulary was justified in rejecting this request.

Conclusion and remedy

24. For the reasons we have set out above we have decided that the Constabulary was justified in rejecting each of the Appellant's original requests which remain a live issue and that the Appeal should therefore be dismissed.

Signed

Chris Ryan

Deputy Chairman

Date: 26 June 2008