



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Case Nos. EA/2009/57 and 2009/89

ON APPEAL FROM:

Information Commissioner

Decision Notice ref FS50210434 and FS50233972

Dated 24 June and 17 September 2009

Appellant: David Young

Respondent: Information Commissioner

On the papers

Date of tribunal meeting: 28 January 2010

Date of decision: 10 February 2010

Before

HH Judge Shanks

Rosalind Tatam

Michael Hake

Subject area covered:

Personal data s.40

Cases referred to:

Durant v FSA [2003] EWCA Civ 1746

Decision

The appeals are dismissed.

Reasons for Decision

The appeals

1. These appeals, which we have heard together, both relate to requests for information under the Freedom of Information Act 2000 made by Mr Young against the police. Both requests arose out of incidents involving him or a member of his family in which he alleges they were mistreated by officers and where his complaints have not, in his view, been satisfactorily dealt with.
2. The first request (which is the subject of appeal EA/2009/0057) was made to the Kent Police by letter dated 11 April 2008 in these terms:

I would like to know of any and all complaints made against the following officers [names given] during their time with Kent County Constabulary or any other force they may have previously served with.

Please inform me of all complaints made and not just those that were recorded.

The second (subject of appeal EA/2009/0089) was made to the Hampshire Constabulary by letter dated 11 December 2008:

[named officer]

Please inform me of any and all complaints made about the above officer during his time with the police service not just Hampshire Police.

Please include all Recorded Complaints whether they were recorded as substantiated or not and any complaints that were not recorded but remain on file.

Please inform me of the nature of each complaint. Please also inform me of any criminal convictions the officer has and what they were for.

I refer to his time as a Police Constable as well as any higher rank he may have held...

3. In both cases the police refused to confirm or deny whether they held such information, relying in effect on the exemption at section 40(5) of the 2000 Act and in both cases the Information Commissioner upheld their decision and Mr Young has appealed.
4. The relevant statutory provisions are these:

Data Protection Act 1998

1 (1) In this Act...

“personal data” means data which relate to a living individual who can be identified ... from those data ... and includes any expression of opinion about the individual and any indication of the intentions of ... any person ... in respect of the individual...

2 In this Act “sensitive personal data” means personal data consisting of information as to ... the commission or alleged commission by him of any offence...

Schedule 1

The Data Protection Principles

1 Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless

- (a) at least one of the conditions in Schedule 2 is met; and**
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.**

...

Schedule 2

...

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

Freedom of Information Act 2000

Part I

...

1(1) Any person making a request for information to a public authority is entitled-

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and**
- (b) if that is the case, to have that information communicated to him.**

(2) Subsection (1) has effect subject to ... section 2 ...

2(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either-

- (a) the provision confers absolute exemption, or**
- (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public**

interest in disclosing whether the public authority holds the information,

section 1(1)(a) does not apply.

[Note: section 2(3) deals with absolute exemptions; it states that the following provisions of Part II (and no others) are to be regarded as conferring absolute exemptions; section 40(5) is not listed]

...

Part II

...

40...

(5) The duty to confirm or deny-

...

(b) does not arise in relation to ... information if or to the extent that ...

(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...

5. In order for the police to rely on section 40(5) in these cases they had to be satisfied that:

- (1) information as to whether they held any details of complaints about the named officers was the personal data of those officers;
- (2) disclosure of that information would contravene a data protection principle; and
- (3) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighed the public interest in disclosing whether the police held details of such complaints.

We shall consider these points in turn.

Personal data

6. In his Notices of Appeal Mr Young appeared to accept that information relating to complaints against named officers was personal data but in his submissions dated 4 December 2009 at para 24 he states that his position is that "...the information requested is not personal data as it relates to complaints made by the public about a public servant". Although this point was raised very late in the day the Tribunal considered it.
7. Although we have not been provided with any of the information requested by Mr Young (and therefore have no idea whether in fact any complaints have been made against the named officers) we are quite satisfied that the Commissioner was right to conclude that information as to whether such complaints had been made (or not made) amounted to the personal data of those officers. Clearly such information is about identifiable individuals who (we are prepared to assume in the absence of evidence to the contrary) are still living and it is "biographical in a significant sense" and focussed on those individuals (to adopt the tests in *Durant v FSA* [2003] EWCA Civ 1746). The fact that the information relates to the public duties of police officers does not in our view prevent it being "personal data" (though this may be a relevant factor in relation to the other issues that arise in this case).

Contravention of a data protection principle

8. The first data protection principle is contravened if personal data is processed (which includes disclosed) in circumstances where one of the conditions in Schedule 2 of the 1998 Act is not met. The only condition in Schedule 2 which is a possible candidate in this case is condition 6(1); in order to satisfy that condition, the disclosure of information as to whether details of complaints about the named officers was held had to be:
 - (1) "necessary for the purposes of legitimate interests pursued by" Mr Young and/or the public at large; and
 - (2) not "unwarranted by reason of prejudice to the rights and freedoms or legitimate interests" of the officers.

9. Mr Young's case is that disclosure is necessary and warranted in this case; his reasons in summary are as follows:

- (1) the police are public servants who have a great deal of power over citizens;
- (2) that power can be abused;
- (3) it is being increasingly abused;
- (4) officers must be accountable for such abuse;
- (5) the existing complaints and disciplinary procedures are ineffective and biased in favour of the officer being complained about;
- (6) the public therefore need to know the record of complaints about individual officers;
- (7) in particular, details of complaints made against a particular officer will allow a member of the public who wishes to bring legal proceedings against him to obtain evidence from other complainants to support his case;
- (8) because of the public nature of their jobs officers should reasonably expect that complaints made against them should be subject to public disclosure;
- (9) officers who do not abuse their power have nothing to fear from disclosure since only decent law-abiding citizens who really have been treated badly make complaints against the police.

10. Points (1), (2) and (4) are obviously right. The Tribunal clearly cannot make any definitive finding about point (3) on the basis of a few newspaper articles and we decline to do so. Nor on the evidence we have seen can we be satisfied that point (5) is correct; all we can say is that there is a comprehensive complaints system in place instituted by Parliament (most recently by the Police Reform Act 2002) supervised by the Independent Police Complaints Commission and that a complaint should lead in appropriate cases to disciplinary action or criminal proceedings against an officer with appropriate sanctions and publicity; we also note that it is open to individual citizens who are not content with the outcome of a complaint to bring legal proceedings against the officer concerned or the police force or even the

IPCC in relation thereto. As to points (6) and (7), we consider that the fact that an officer has or has not had complaints made against him is of little relevance to the question whether or not he has in fact abused his power, particularly given that any complaint of substance should lead to disciplinary or criminal proceedings, and it is unlikely that previous complaints which have not led to successful proceedings against the officer would form the subject of admissible evidence in relation to a subsequent complaint. We are not therefore satisfied that there is a necessity for Mr Young or the public to know whether the police hold details of complaints against particular officers for any legitimate purpose.

11. That finding alone means that condition 6(1) would not be met and the first data protection principle would be contravened. But in any event we consider that, even if disclosure of the information was “necessary”, it would have been “unwarranted”. In this connection we note the provisions of the Police Reform Act 2002 and the Police (Complaints and Misconduct) Regulations 2004 (SI 2004/643) in relation to publicity: there are express provisions that a complainant and other directly interested persons are to be kept informed about specific complaints¹ (these provisions are themselves subject to exceptions, including if non-disclosure is necessary in the public interest)² but, apart from a very general power in the IPCC to publish information for general purposes (which do not include those relied on by Mr Young)³, there is no provision allowing publication of information about complaints. This, combined with our clear view that Mr Young’s point (9) is just not consistent with our own experience of the world, leads us to the firm view that, contrary to his point (8), officers can in general reasonably expect that the mere existence of complaints about them will not be the subject of public disclosure. Such disclosure would therefore prejudice their rights and/or legitimate interests and we consider that such prejudice would be sufficient to make disclosure “unwarranted” in these cases.

12. We therefore agree with the Commissioner that compliance by the police with section 1(1)(a) of the 2000 Act would (apart from the Act itself) contravene the first

¹ See sections 20 and 21 of the 2002 Act

² See regulation 12 of the 2004 Regulations

³ See regulation 25 of the 2004 Regulations

data protection principle and that section 40(5)(b)(i) therefore applies to Mr Young's requests.

Public interest

13. The public interest balance was not considered by the Commissioner but strictly it ought to be considered in cases where section 40(5) is relied on.⁴ Mr Young's case is that there is a strong public interest in the disclosure of the information we are concerned with for the reasons we outline in paragraph 9 above. In the light of all the considerations we have set out in paragraphs 10 and 11 above we are of the view that the public interest in maintaining the exclusion of the duty to confirm or deny in this case very substantially outweighed the public interest in the police disclosing whether they held information of the description sought by Mr Young.

The request for criminal convictions

14. We note that in his second request for information Mr Young also asked for details of criminal convictions of a named officer. Although this request does not appear to have been considered separately, we are satisfied that information as to whether or not the officer had criminal convictions was itself "sensitive personal data" in accordance with the definitions in sections 1 and 2 of the 1998 Act which we have set out above. Disclosure of that information would therefore have been a contravention of the first data protection principle unless one of the conditions in Schedule 3 of the 1998 Act would have been met (which was clearly not the case). In those circumstances section 40(5)(b)(i) would have applied to exclude the duty to confirm or deny provided that the public interest balance favoured maintaining that exclusion. Given the clear legislative policy in the Data Protection Act 1998 that sensitive personal data should only be disclosed if one of the conditions in Schedule 3 is met we are satisfied that the public interest balance favoured maintaining the exclusion.

Conclusion

⁴ The omission of section 40(5) from the list in section 2(3) may well have been a legislative oversight but the Tribunal can see no way round it.

15. It follows that the police were indeed entitled to rely on section 40(5) in this case and were not obliged to comply with section 1(1)(a) or supply Mr Young with the information he sought and that his appeal must therefore be dismissed

16. Our decision is unanimous.

17. Finally we note that although this case started as appeal to the Information Tribunal, by virtue of The Transfer of Tribunal Functions Order 2010 (and in particular articles 2 and 3 and paragraph 2 of Schedule 5) the Tribunal which has decided Mr Young's appeal is now constituted as a First-tier Tribunal.

HH Judge Shanks

Dated 10 February 2010