IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL (INFORMATION RIGHTS)
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

EA/2014/0225

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50535437
Dated: 20 August 2014

B E T W E E N:-

MAUREEN EDMONDS

Appellant

-And-

THE INFORMATION COMMISSIONER

Respondent

-And-

NORTHAMPTONSHIRE POLICE

Second Respondent

Before

Melanie Carter

Judge

and

Jean Nelson and **John Randall**

Tribunal Members

Date of Decision: **10 April 2015**

Date of Promulgation: **13 April 2015**

DECISION OF THE FIRST-TIER TRIBUNAL

1. This appeal concerns information relating to an investigation by the Northamptonshire Police ('the Police') prompted by an allegation made by the Appellant of theft by deception. The Appellant, Mrs Edmonds, t alleges that her father signed a general power of attorney some 15 months after he was committed into respite care by the NHS, despite doctors having diagnosed him, on admission, with severe dementia and having no mental capacity. The Appellant wrote to the Police on 23 March 2014 requesting information under the Freedom of Information Act 2000 ("the Act") in relation to their investigation of her allegations.

"Re your Email of the 21st March, my request under the FOI Act 2000 … requires you, as the Investigating Officer, to furnish me with a copy of the report filed by the Policewoman who detained my father on [date redacted]. *You do not need to reveal the Officer's name.*

In addition, if you cannot, by law, give to me, the names of the doctors you say you spoke to during your reinvestigation of the case, you are required under the Act to inform me of the location of the NHS premises and the date of your visit. You must also supply me with a copy of the statement by the doctor(s), again you can omit their name(s). he same applies to your visit to [address redacted] *you are required, under my request, to furnish me with the statements by the Care Home Manager and also* [name redacted] *the Carer who supposedly witnessed my father signing* [name redacted] *illegal General Power of Attorney document on the* [date redacted], *some fifteen months after he was committed (not admitted) on the* [date

redacted] *into Emergency Respite Care by the NHS, whose doctors then diagnosed him with severe dementia and having no mental capacity.*

Detective Constable [name redacted], *in an Email to me dated the 15th of June 2013, informed me he had travelled to* [name redacted]*'s home at Dorking to question her under caution and that she had signed a statement denying the theft. Without a copy of her statement and his dated report to me it is merely hearsay, as was his statement to me, in a further Email dated the 3rd of September 2013, that he did not interview* [name redacted] *(*[name redacted]*'s solicitors in Dorking) at the same time, as "he had been forthcoming with information". What information? And if it was given over th4e telephone you must have a recording of the call. I note no effort was made on your part to question* [name redacted] *as to why he is still illegally holding the* [amount of money redacted] *NCC returned to him in 2011, instead of to my father's estate, as was* [name redacted]*'s stated intention."*

2. The Police responded by stating that it neither confirmed nor denied holding any such information, citing section 40(5) of the Act. Following an internal review, the Police provided the Appellant with some information, but upholding its application of section 40(5) with respect to the remainder. The Appellant complained to the Information Commissioner. The Commissioner served a Decision Notice dated 20 August 2014 concluding that the Police were correct to neither confirm nor deny holding information within the scope of the remainder of the request. The Appellant then lodged an appeal with this Tribunal. It is our task to determine whether the Decision Notice is in accordance with law.

3. The relevant exemption applicable to this appeal is section 40. Section 40 of the Act insofar as relevant 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.

(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 **M1**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,,

……

(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)

(b) Does not arise in relation to other 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…"

4. Section 1(1) of the Data Protection Act 1998 ('DPA') defines personal data as:-

"…data which relate to a living individual who can be identified"

5. Pursuant to Section 40(7) of the Act "personal data" has the same meaning as in section 1(1) of the DPA.

Consideration of appeal

6. The Appellant's grounds of appeal go into great detail as to background to the appeal but do not address why the Commissioner's conclusion that the exemption under section 40(5) was correctly relied upon is wrong. The thrust of her submissions are that there was an alleged 'cover-up' by the Police and that there had as a result been a failure to investigate her complaint. These were all matters which were beyond the jurisdiction of both the Commissioner and the Tribunal. The Commissioner maintained that he was correct to conclude that the exemption under section 40(5) is engaged in this case but in his submissions to the Tribunal, refined the position taken in his Decision Notice, as set out below.

7. The Commissioner concluded in his Decision Notice that the requested information, if held, would constitute personal data of which the Appellant is the data subject, pursuant to section 40(1) of the Act. However, the Commissioner now submits that whilst some of the requested information, if held, may constitute the personal data of the Appellant, the vast majority of the requested information, if held, would not constitute the Appellant's personal data but would instead

constitute the personal data of third parties, including those individuals named in the request. The Tribunal agreed with this as the request for information self-evidently related to the personal data of third parties.

8. The Commissioner had concluded in paragraph 19 of his Decision Notice that the Appellant is, or would be, the subject of the requested information on the ground that the information she has requested is about or connected to her. In other words, the Commissioner concluded that the requested information would, if held, constitute the Appellant's personal data on the ground that it concerned the Appellant's complaint to the police. The Commissioner accordingly concluded that the Appellant would, if the information was held, be the data subject within the meaning of section 40(1) (and, by implication section 40(5)(a) would be engaged).

9. However, the Commissioner now submits and the Tribunal agrees that, whilst the police investigation referred to in the request may have been prompted by the Appellant's initial complaint to the police, this does not necessarily mean that information held by the police, if any, relating to that investigation would 'relate to' or identify the Appellant such that it would amount to her personal data for the purposes of the definition in section 1 DPA. That this approach is correct in law is confirmed by the decision of the Court of Appeal in *Durant v FSA* [2003] EWCA Civ 1746 ('Durant'). In circumstances where information is not directly about an individual (and it is therefore questionable whether it relates to him or her), but the data is linked to the individual in some way, the Court of Appeal offered an approach to determining whether the information amounts to personal data about that individual. The overriding concept set out by Auld LJ is that personal data is

"*in short…information that affects…[the data subject's] privacy, whether in his personal or family life, business or professional capacity*".

10. In determining whether information affects the data subject's privacy, Auld LJ said that "*…not all information retrieved…against an individual's name…is personal data…Mere mention of the data subject does not necessarily amount to his personal data. Whether it does…depends on where it falls in a continuum of relevance or proximity to the data subject in a continuum*".

11. The Court of Appeal concluded in Durant that any passing references to Mr Durant and his complaints to the FSA (the subject of his information request), in the FSA's complaint files were not his personal data. The Court found that "It is information about his complaints and the objects of these, Barclays Bank and the FSA respectively" (para 31) and not therefore personal data about Mr Durant to which he was entitled to be given access.

12. On the facts of this case, the requested information also concerns information prompted by a complaint (this time to the police) and the objects of the complaint.

13. Whilst, as in Mr Durant's case, some of the requested information may, if held, amount to the Appellant's personal data (in which case the Commissioner submits that section 40(5)(a) of the Act would be engaged), the Commissioner considers and the Tribunal agrees that the vast majority, if not all of the requested information, if held, would, on the test set out above in Durant, be neither biographical about the Appellant nor have the Appellant as its focus. Accordingly, it would follow that most, if not all of the requested information, if held, would not constitute the Appellant's personal data.

14. The Tribunal agreed further with the Commissioner that if the police were to confirm or deny that it held information within the scope of the request, it would be revealing to the public that, in response to the request, it held information relating to the investigation to which the request referred and more specifically involving the third parties named in the request. Accordingly, the Tribunal decided that section 40(5)(b)(i) of the Act would be engaged on the facts of this case.

15. The question then is whether the confirmation or denial that the information is held to the public at large (which is the effect of a successful request under the Act) would contravene any of the data protection principles.

Whether disclosure would contravene any of the data protection principles

16. The principle which is relevant to the facts of this particular case is the first principle, namely:-

"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.

17. On the facts of this case, the request is for information concerning a criminal investigation. The Tribunal accepted that simply to confirm or deny whether or not the police holds information about the individuals named in the request would itself reveal something about that individual ie: whether he or she had or had not been the subject of any investigation. The Tribunal was of the view that this

would be unfair in the terms of the First Data Protection Principle as it would be the reasonable expectation of any of the persons identified in this appeal that whether or not they were the subject of a criminal investigation would not be revealed to the wider public by way of a Freedom of Information request. Thus, confirmation or denial that would have to be given to comply with section 1(1)(a) would contravene the First Data Protection Principle. Thus, section 40 exemption, applied.

18. The Tribunal was of the view, furthermore that much of the personal data requested could have amounted to sensitive personal data, as defined under the DPA, insofar as it would relate to whether or not a criminal offence had been committed. In these circumstances, the Tribunal could not see that any condition under Schedule 3 DPA would be met, this confirmation or denial by the police of whether the information was held would be a breach of the First Data Protection Principle.

19. Finally we note that the Police could, in our view, have argued that the exemption at section 30 (prejudice to criminal investigation) was engaged, such that the Police could have refused to confirm or deny whether any such information was held under that provision. Whilst the Tribunal had not heard arguments as to the public interest balancing test, the submissions from the Appellant had, if anything, been directed more to that aspect than the legal technicalities that applied to a section 40 case. Given that, the Tribunal is able to at least point out that, had there been an assessment of the public interest in this matter, it was very unlikely to

have satisfied that test, this matter being essentially one of private interest to the Appellant and not that of the wider public.

Conclusion

20. In light of the above, the Tribunal concluded that the Police had been entitled to refuse to confirm or deny whether the information was held under the section 40 exemption. The appeal was therefore dismissed.

21. The Tribunal did wish to point out that the Appellant had not been well served by the Commissioner in this case. The Police having correctly relied upon section 40 of the Act on the basis that it related to third party personal data (see the internal review letter), the Commissioner then confused matters by issuing a Decision Notice that ignored this and stated that the information requested was the personal data of the Appellant (the Decision Notice did not even explain why it differed from the Police's position). Also unhelpfully, the Police had not engaged with these proceedings other than a one line statement that they agreed with the Commissioner's submissions.

22. It was ironic therefore that at paragraph 26 of the Decision Notice, the Commissioner had stated:

"The Commissioner has some sympathy with the complainant whose position is confused by the different access regimes set up by parliament in relation to personal data and public information."

23. These are complex provisions for a litigant in person to navigate through, and whilst this confusion had ultimately not changed the outcome of the appeal, a

correct analysis in the Decision Notice might have avoided the need for these proceedings altogether.

Melanie Carter
Tribunal Judge

10 April 2015