First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2018/0095

Decided without a hearing
On 7 November 2018

Before

JUDGE ANTHONY SNELSON
ROGER CREEDON
SUZANNE COSGRAVE

Between

OP

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

AMENDED DECISION

The unanimous decision of the Tribunal is that:

(1) Pursuant to Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, r14(1), the proceedings are anonymised to the extent shown in the title above.

(2) The appeal is dismissed.

REASONS

Introduction

1. On a date which it is not necessary to specify, criminal proceedings were brought by OP, the Appellant, against two individuals, QR and ST. Those proceedings were taken over by the Crown Prosecution Service ('CPS') and discontinued. That action was challenged by the Appellant through the medium of judicial review, which was successful. The prosecution was then resumed but subsequently, for a second time, taken over by the CPS and discontinued.

2. Having pursued complaints under the CPS complaints procedure, one of which was upheld and the other not, the Appellant remained aggrieved. He considered and still considers that the organisation provided a tardy and incompetent service which resulted in a needless waste of time and money. On 14 September 2017 he wrote to the CPS requesting, pursuant to the Freedom of Information Act 2000 ('FOIA'), information in these terms:

   > **I would like to request a breakdown of the cost to the CPS of dealing with the case of [OP v QR and ST], both in criminal proceeding in [redacted] [redacted] Court and the subsequent judicial review proceedings brought in the High Court. This should include the notional cost for staff time spent dealing with the matter, as well as fees paid to external counsel.**
   >
   > **Please could you [break] this down by expenditure by CPS [redacted] and expenditure by the CPS appeals unit.**

3. The CPS responded on 21 September 2017 as follows:

   > **The [CPS] neither confirms nor denies holding the information you have requested. Under section 40(5) of [FOIA] we are not obliged to confirm or deny whether we hold information which is, or if it were held would be, exempt on the basis that it relates to you.**

4. The Appellant challenged that response, disputing that the information sought was personal data but, following an internal review, the CPS maintained its stance.

5. In the meantime, the Appellant directed a subject access request under the Data Protection Act 1998 to the CPS in respect of the same information. This was met by a refusal notice dated 21 November 2017 which stated that the request was not for personal data, an outcome with which, as he states in his notice of appeal, he wholeheartedly agrees.

6. On 13 December 2017, the Appellant complained to the Respondent ('the Commissioner') about the way in which his request for information had been handled.

7. By a decision notice dated 11 April 2018 the Commissioner determined that the CPS had been correct in refusing to confirm or deny holding the information sought, for the reason it had given.

8. By a notice of appeal dated 8 May 2018, the Appellant challenged the Commissioner's adjudication. He set out four grounds:

   (1) The CPS stance was contradictory and "*Wednesbury* unreasonable."
   (2) The data were not "personal data" of which he was the subject.
   (3) Further, the data were not "sensitive personal data".
   (4) In any event, the information could and should be produced in anonymised form.

9. The Commissioner resisted the appeal in a document dated 14 June 2018. Dealing with the Appellant's grounds, she submitted, respectively, as follows.

   (1) The concept of *Wednesbury* unreasonableness has no place in information rights law.
   (2) The information sought is "personal data" of the Appellant *and* of QR and ST.
   (3) Further, the information sought, although not "sensitive personal data" of the Appellant, is "sensitive personal data" of QR and ST.
   (4) Anonymisation of a response by the CPS would not protect the identities of the data subjects because it would need to be read in the context of the request, which names them.

10. In a reply of 27 June 2018 to the Commissioner's response the Appellant joined issue with her on the four grounds and added a fifth:

   (5) The information which the CPS seeks to protect (the identities of the data subjects) is already in the public domain and therefore there can be no public interest in giving a 'neither confirm nor deny' ('NCND') response.

11. The appeal is before us for consideration on paper, the parties being content for it to be determined without a hearing.

The applicable law

The freedom of information legislation

12. FOIA, s1 includes:

   (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.**

13. By FOIA, s40[1], it is provided, so far as material, as follows:

> **(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), and**
> **(b) does not arise in relation to other information if or to the extent that either –**
> **(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 or section 10 of the Data Protection Act 1998 …**
>
> **…**
>
> **(7) In this section –**
>
> **"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998 … ;**
> **"data subject" has the same meaning as in section 1(1) of that Act;**
> **"personal data" has the same meaning as in section 1(1) of that Act.**

The exemptions under s40 are unqualified under FOIA and the familiar public interest test has no application. Rather, the reach of the exemptions is, in some circumstances, limited by the data protection regime (see below).

14. The purpose of s40(5) is clear: it is to relieve a data controller of the normal duty (under FOIA, s1(1)(a)) to confirm or deny possession of requested information by permitting a NCND response where disclosure would offend against the data protection code, by operation of s40(5)(a) or s40(5)(b)(i). If either applies, Parliament has enacted that the protection of privacy trumps the public interest in freedom of information.

The data protection legislation

15. The data protection regime in force before the commencement of the Data Protection Act 2018 ('DPA 2018') and the implementation of the General Data Protection Regulation (25 May 2018) applies to this case (see DPA 2018, Sch 20, para 52). That regime is founded on the Data Protection Act 1998 ('DPA 1998').

16. DPA 1998, s1 includes:

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[1] As it stood before the 2018 amendments (see below)

(1) In this Act, unless the context requires otherwise -

"data" means information which—

(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,

(b) is recorded with the intention that it should be processed by means of such equipment,

(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or

(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record …

"data controller" means a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;

"data processor", in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;

"data subject" means an individual who is the subject of personal data;

"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 …

"processing", in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

(a) organisation, adaptation or alteration of the information or data,

(b) retrieval, consultation or use of the information or data,

(c) disclosure of the information or data by transmission, dissemination or otherwise making available …

17. DPA 1998, s2 includes:

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

…

(g) the commission or alleged commission by [the data subject] of an offence …

18. The data protection principles are set out in Part 1 of Schedule 1 to DPA 1998. The first is relied upon by the Commissioner. It is in these terms:

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.

19. The sixth data protection principle is mentioned in the Commissioner's response to the appeal, although she does not place reliance upon it. It reads:

Personal data shall be processed in accordance with the rights of data subjects under this Act.

The broad statutory language is deceptive: the interpretation provisions of Schedule 1, Part II, para 8 severely limit the sixth principle's scope and it is clear that it does not apply in the present context. Nor does any other data protection principle.

20. Schedule 1, Part II, paras 1-4 contain provisions designed to aid interpretation of the first data protection principle. We have considered them but none appears to be in point here and there is no need to recite them.

21. Schedule 2 includes condition 6(1), which states:

> **The processing is necessary for the purposes of legitimate interests pursued by the employer or 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.**

In addition, condition 1 might be relied upon by the Appellant. It is met where the data subject "has given his consent to the processing". It might be contended that, by his FOIA request, the Appellant has impliedly consented to the disclosure of his personal data. There is no other condition in Schedule 2 that is even arguably applicable to the Appellant or to QR or ST.

22. The conditions under Schedule 3 are narrow and specific. It is worthy of note that condition 1 is more tightly drawn than the corresponding provision of Schedule 2, applying only where the data subject has given "his *explicit* [our emphasis] consent" to the processing. Plainly, there is no question of consent, explicit or otherwise, on the part of the material data subjects, QR and ST. Condition 5 reads:

> **The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.**

This condition too has no application here and is cited merely to draw attention to the narrow scope of the conditions. Most of the others apply where the processing is "necessary" for stipulated reasons. None is arguably applicable to the material data subjects, QR and ST.

23. DPA 1998, s10 gives a data subject the right to require a data controller to cease, or not to begin, processing his or her personal data on the ground that such processing is causing him or her substantial and unwarranted damage or distress.

Authorities

24. In *Durant v Financial Services Authority* [2004] FSR 28, the Claimant, Mr Durant, sought from the Respondent ('the FSA') copious information which, he said, amounted to his personal data under DPA 1998. Much, if not all of it, was

information generated by or arising out of a complaint which he had made to the FSA concerning a bank, with which he had been in dispute over a number of years. The case turned on the proper interpretation of DPA 1998, s7(1), which, *inter alia*, gives a data subject the right to be told by any data processor whether his personal data are being processed and the information which those data contain. The claim at first instance failed and the appeal to the Court of Appeal was dismissed. The first and principal point in the appeal was whether the information sought amounted to Mr Durant's personal data. The Court of Appeal unanimously held that it did not. Giving the leading judgment, Auld LJ stated (para 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 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.**

At para 31, the learned judge continued:

> **In short, Mr Durant does not get to first base in his claim against the FSA because most of the further information he sought, whether in computerised form or manual files, is not his "personal data" within the definition in section 1(1). It is information about his complaints and the objects of them, Barclays Bank and the FSA respectively. His claim is a misguided attempt to use the machinery of the Act as a proxy for third party discovery with a view to litigation or further investigation…**

25. The *Durant* case was considered by the House of Lords in *Common Services Agency v Scottish Information Commissioner* [2008] 1 WLR 1550. That was a Scottish case concerned with the interaction between the Freedom of Information (Scotland) Act 2002 ('FOISA') and DPA 1998. The material provisions of FOIA and FOISA are, for present purposes, indistinguishable. The litigation arose out of a request directed to the Common Services Agency for information about the incidence of childhood leukaemia by year between specified dates in each census ward within Dumfries and Galloway. One issue in the case was whether those data, after being subjected to a process known as "barnardisation", would be anonymous to the extent that they ceased to be "personal data". In the Court of Session, the Lord President, having cited the *Durant* case, concluded that the material was not personal data because barnardisation had removed the "focus" of the information from the individual children to the incidence of the disease in particular years within

specified locations. Allowing the appeal, the House of Lords held that that approach was wrong. Giving the principal speech, Lord Hope (at para 20) having accepted that barnardisation "may indeed" have changed the focus of the information, continued:

> **But this does not resolve the question whether or not it is "personal data" within the meaning of DPA 1998, which is the question that must be addressed in this case. I do not think that the observations in *Durant v Financial Services Authority* ... have any relevance to this issue. The answer to the problem must be found in the wording of the definition in section 1(1) …**

Earlier in his speech, Lord Hope had reviewed the legislation, including the Council Directive on which DPA 1998 is founded. At para 7 he commented:

> **In my opinion there is no presumption in favour of release of personal data under the general obligation that FOISA lays out. The references which that Act makes to provisions of DPA 1998 must be understood in the light of the legislative purpose of that Act, which was to implement Council Directive 95/46/EC. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data …**

The tribunal's powers

26. The appeal is brought pursuant to the FOIA, s57. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

> **(1) If on an appeal under section 57 the Tribunal consider –**
>
> **(a) that the notice against which the appeal is brought is not in accordance with the law; or**
> **(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,**
>
> **the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the tribunal shall dismiss the appeal.**
>
> **(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.**

27. Under its rules of procedure of 2009 (cited fully in our Decision above) the Tribunal has power, by rule 14(1), to prohibit the disclosure or publication of specified documents or information or any matter likely to lead members of the public to identify any person who, in its view, should not be identified. It is well-established that such a power is to be exercised sparingly because its use derogates from the principle of open justice, which is essential in any free and democratic society (see *eg Adams v SSWP and Green* [2017] UKUT 0009 (AAC)).

Analysis and conclusions

Personal data

28. The first question, under s40(5)(a), is whether the information to which the request relates is exempt information under s40(1) as constituting personal data of which the Appellant is the subject.

29. The Applicant submits that the information sought (the costs incurred by the CPS in the two sets of legal proceedings) cannot be "personal data" of his. He relies on the *Durant* case, contending that whether information amounts to "personal data" depends on whether it has an individual as its focus, and whether it is biographically significant in relation to that individual. On that test, he says that the information does not "relate to" him within the meaning of those words in the definition of "personal data" in DPA 1998, s1(1) (cited above). The Commissioner replies that the information does "relate to" the Appellant, the statutory language being satisfied if (*inter alia*) "it is about", or "linked to", or "has some biographical significance for", the relevant individual (decision notice, para 17). Moreover, the balance of the DPA 1998, s1 definition is satisfied since the Appellant can be identified from the data and/or from other information in the possession of the CPS.

30. We have reminded ourselves of the precise wording of s40(1) and (5)(a). We note in particular the broad terms of s40(1), which exempts "*any*" information to which a request "*relates*" if it constitutes personal data of which the applicant is the subject. It seems to us self-evident that (a) the fact of participation by the Appellant in the legal proceedings referred to in the request is information to which the request "relates" (hereafter, "the related information"), and (b) that the related information, if it constitutes personal data at all, is personal data of which the Appellant is the data subject, and (c) that if the CPS were compelled to confirm or deny possession of the requested information, its answer would necessarily disclose the related information. It follows that the key question is whether the related information constitutes "personal data" under s1(1).

31. The s1(1) question turns on two sub-issues. First, does the related information itself "relate" to a living individual (the Appellant)? Second, if so, can the Appellant be identified from it alone or in combination with other information in the possession of, or likely to come into the possession of, the CPS? It is plain and obvious that the second question can only receive an affirmative reply. As to the first, the Appellant raises a respectable argument, but it is not one which we can accept. Its flaw, as we see it, is that it is founded on the *purpose* of the request (to establish the cost of the legal proceedings) and seeks to confine the information which it is calculated to extract to those dry data. As we have shown, s40(1) plainly envisages a much wider class of personal data being caught by the request and that class includes the related

information as to the Appellant's identity and his participation in the legal proceedings.

32. We are satisfied that the related information itself "relates to" the Appellant within the meaning of s1(1). The *Durant* case does not assist us. It was decided on different provisions from those under consideration here and in a wholly different context. We take our guidance from the House of Lords in the *Common Services Agency* case, paras 19-20 (from which we have cited above), focussing on the wording of the legislation. Giving the statutory language its ordinary meaning, we consider it plain and obvious that the fact that the Appellant was a party to the litigation to which the request refers is information which "relates to" him. Moreover, even if we applied the *Durant* gloss, we would arrive at the same outcome. The related information is "linked to" the Appellant, is "about" him and has more than a little "biographical significance" for him. This is nothing like the *Durant* case, in which the Court of Appeal was understandably reluctant to countenance what was seen as an abuse by Mr Durant of the data protection regime. In that case, there was no privacy interest for the DPA to protect.

33. If this reasoning is correct, the appeal fails without more, but in case we are mistaken, we will complete the analysis. If, contrary to our view, the Appellant is not defeated by s40(5)(a) read with s40(1), the next question is whether the duty to confirm or deny is excluded by s40(5)(b)(i). Here we start from the premise that the identities of QR and ST constitute "other information", to be differentiated from the s40(5)(a) information (namely the information that the *Appellant* was a party to the legal proceedings to which the request refers). Would the giving to a member of the public of a confirmation or denial conforming to FOIA, s1(1)(a) in respect of the "other information" contravene any of the data protection principles or DPA 1998, s10?

34. We can immediately put aside s10: there is no suggestion of any notice under that provision having been served.

35. What would be the effect of a confirmation or denial to the hypothetical member of the public? The answer must be: disclosure to him or her and, by extension, the public at large (since disclosure under FOIA is disclosure to the whole world) of the identities of the parties to the legal proceedings, and the fact that QR and ST were accused of criminal offences. Would such processing (disclosure is processing) breach a data protection principle?

36. The only relevant data protection principle is the first (see above). This focuses attention on "fair" and "lawful" processing and on whether a Schedule 2 condition and, where applicable, a Schedule 3 condition are met.

37. Here it is convenient to start with the schedules. It seems to us that Schedule 2, para 6(1) (cited above) raises an arguable point, namely whether the imaginary disclosure to the member of the public under s40(5)(b)(i) would be judged "necessary" for the purposes of the legitimate interests of the Appellant (in exposing what he sees as avoidable and unjustifiable waste of public resources) or "unwarranted" as prejudicing the rights and freedoms of QR and ST. In addition, as we have noted, there is room for an argument by reference to condition 1 of Schedule 2 that the Appellant has impliedly consented to his personal data (if such it is) being processed.

38. In our view it is not necessary to decide whether a Schedule 2 condition (or more than one) is met. Let it be assumed that the Schedule 2 inquiry is resolved in favour of the Appellant. Rightly, he does not argue that Schedule 2 gets him home. That would be an untenable position: given the meaning of "sensitive personal data" under DPA 1998, s2 (see above), it is plain that Schedule 3 is in play, since the data under consideration include "information as to the commission or alleged commission of an offence" by the data subjects (QR and ST). It is for him to make out a Schedule 3 condition, but he cites none. Having gone through the Schedule 3 conditions with care, we are satisfied that none is applicable. We are further satisfied that the absence of an applicable Schedule 3 condition is fatal to the appeal. The requirement for such a condition to be met is absolute.

39. In addition, the general requirement for the relevant processing to be "lawfully" carried out would necessarily be breached given the failure to meet any of the special conditions applicable to "sensitive personal data" cases.

Further points raised by the Appellant

40. We have reviewed the Appellant's grounds of appeal against the foregoing analysis. We can well understand why he runs the *Wednesbury* unreasonableness argument. He is fully entitled to feel frustration at finding himself met by a public authority which resists his two requests with apparently contradictory defences, at least in relation to *his* data. But our role is to deal with the issue before us on FOIA, s40. In the end the first ground of appeal raises a jury point and nothing more.

41. The second and third grounds have been covered above.

42. As to the fourth ground, we reject the anonymisation solution proposed by the Appellant. Its flaw lies in the fact that it ignores the well-established principle that any answer to a FOIA request must be read in conjunction with the request itself. Where the request names any person, the answer, anonymised or not, inherently discloses the information contained in the request. A recent reiteration of the point is to be found in the FTT decision in *Naulls v The Information Commissioner and another* EA/2018/0022, para 12 (the passage states

the principle as part of a summary of the Commissioner's argument but the decision as a whole must be read as accepting it).

43. We turn to the fifth ground. Here again, the Appellant's argument cannot be accepted. We have two reasons. In the first place, it is not clear to us that the fact that certain information can lawfully be gleaned through access to public records (from which, he says, the identities of the parties to the legal proceedings and the character of those proceedings could be ascertained) necessarily means that it is already "in the public domain" to the extent that any *information rights* balancing exercise (if applicable) would need to be determined in favour of release. We have not had the relevant law argued in any depth, but we can say confidently that this is certainly not a clear case of information having become public (*cf eg M C v Information Commissioner and another* [2014] UKUT 0481 (AAC)).[2] Our second and much more fundamental reason is that in any event this is *not* an *information rights* balancing exercise. The fifth ground rests on a basic misapprehension that a public interest test applies. As we have explained, the s40 exemptions are unqualified and the permissibility of the CPS's NCND response turns on the proper application of the data protection legislation. The question whether information is already accessible to the public is not explicitly identified as a material consideration for the purposes of any Schedule 2 condition, although it would, we accept, feature in an analysis of "prejudice to the rights and freedoms or legitimate interests of the data subject" under condition 6(1). But, for reasons already given, we have declined to determine whether that condition is met and have proceeded on an assumption, favourable to the Appellant, that he succeeds under Schedule 2. As for Schedule 3, however, as we have noted, condition 5 applies only where the personal data have been made public as a result of steps deliberately taken by the data subjects, QR and ST. Self-evidently, there is no question of this condition being met here and, as we have stated, no other Schedule 3 condition is met. In these circumstances, the fifth ground cannot avail the Appellant.

Overall conclusion

44. For all of these reasons, we conclude that the CPS was entitled to give a NCND response to the request and the Commissioner's decision was correct.

Disposal

45. It follows that the appeal must be dismissed.

46. Having arrived at this outcome, we are satisfied that it is wholly necessary to make the order set out in para 1 of our Decision and further, in these Reasons,

[2] That was a case under FOIA, s30. In circumstances where the information sought had been made public in a judgment of a High Court judge delivered in open court and in a widely-publicised decision of the Court of Appeal on a judicial review application, the UT held that the public interest test came down firmly in favour of confirming or denying possession of the information.

to anonymise (throughout) the other parties to the original litigation and redact certain other details quoted in para 2 above. If we did otherwise, we would ourselves be publishing the personal data of the Appellant, QR and ST and our adjudication would be entirely futile, driving a coach and horses through the very privacy rights (in particular those of QR and ST) which, as we have found, warrant the NCND response.

(Signed) Anthony Snelson

Judge of the First-tier Tribunal

Dated: 7 December 2018

Promulgation date: 10 December 2018