IN THE FIRST-TIER TRIBUNAL **EA/2013/0140**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM
The Information Commissioner's Decision
No FS50497812 dated 27 June 2013

Appellant: **Terry Smith**

Respondent: **The Information Commissioner**

Date and place of hearing: **on the papers**

Date of decision: **7 February 2014**

Before

Anisa Dhanji
Judge

and

Alison Lowton and Dave Sivers
Panel Members

Subject matter

FOIA section 40(5)(b)(i) - whether confirming or denying would breach the first data protection principle

Case Law

Armstrong v Information Commissioner & HMRC (EA/2008/0026)
A v Information Commissioner (EA/2006/0012)
Johnson v Medical Defence Union [ ]
London Borough of Camden v Information Commissioner (EA/2007/0021)

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DECISION

This appeal is dismissed.

Signed

Anisa Dhanji
Judge

Date: 7 February 2014

REASONS FOR DECISION

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the "Commissioner"), on 27 June 2013.

2. It arises from a request for information made under the Freedom of Information Act 2000 ("FOIA") by the Appellant, Mr Terry Smith, to the Second Respondent, the Chief Constable of Essex Police (the "Public Authority"). The request was for information as to certain automatic number plate recognition ("APNR") activations in respect of a specific vehicle on a specific date.

3. The Appellant is a crime writer. He claims that on 28 February 2008, he was conducting research for a book and that as part of that research, he was the passenger in a vehicle (a Vauxhall Vectra Index R529VLH), following an old type Loomis van in Basildon, Essex. He and the driver (who was also the registered owner of the vehicle), were both arrested and charged with conspiracy to rob. They were later convicted (following trials in 2009 and 2010), and imprisoned. The Appellant claims that he was wrongly convicted. Amongst other things, he says that the police tampered with the evidence, substituting details of the old type Mercedes Loomis van that he had been following, with a newer model which had no relevance to his research. His request for information under FOIA is in respect of the Vauxhall Vectra on the day in question, and he says that this information will help him to uncover the truth and prove his innocence.

The Request

4. The Appellant's request, made on 11 April 2012, was on the following terms:

'*1. According to the National ANPR Data Centre, all ANPR data which is generated by automatic number-plate readers in Essex, belongs to and is owned by the Chief Constable to Essex Police. The NADC are merely the "controllers" of the data.*

2. On that basis, please can you provide me with the archive national ANPR details for all activations in relation to Vauxhall Vectra (index R529VLH), in Essex on 28th February 2008, in which it was confirmed by Essex Police that I was a passenger on that particular day.

3. Should it be the case that this ANPR data has become deleted from the NADC database, please can you inform me, on whose authority was the data deleted and the precise date of the deletion.

4. Just so there is no ambiguity or confusion as to the correct registration of the vehicle and the precise date of the information required. It is Vauxhall Vectra "Romeo-five-two-nine-Victor-Lima-Hotel" on the Twenty-eighth of February Two-thousand-and-eight.'(see page 01 in the bundle attached)."

5. The Public Authority refused to confirm or deny whether it held the information. In refusing the request, it relied on section 40(5)(b)(i) of FOIA (confirming or denying would contravene the data protection principles).

6. In reality, it would seem that the Appellant already has the information he requested. The agreed bundle includes a number of papers generated during the course of the criminal trials which resulted in the convictions of the Appellant and the third party. In a letter dated 24 April 2009 (at page 23 of the bundle), the CPS informed the Appellant's solicitors that Essex Police have no ANPR records for R529VLH for 28 February 2008. This is also what is stated in the witness statement of Essex Police's Communications Officer (at page 26 of the bundle). However, disclosure in response to a request under FOIA is disclosure to the world at large, and even if the Appellant was given the information he has requested for the purposes of his trials, it does not disentitle him from making the FOIA request that he has.

The Appeal to the Tribunal

7. The Appellant complained to the Commissioner under section 50 of FOIA. For the reasons set out in its Decision Notice, the Commissioner found that the Public Authority was entitled to rely on the exemption in section 40(5)(b)(i) of FOIA.

8. The Appellant has now appealed to the Tribunal against the Decision Notice. All parties have requested that this appeal be determined on the papers without an oral hearing. Having regard to the nature of the issues raised, and the nature of the evidence, we are satisfied that the appeal can properly be determined without an oral hearing.

9. We have considered all the documents received even if not specifically referred to in this determination, including, in particular, the documents in the agreed bundle, and such written submissions as have been received from the parties. Neither party relies on any witness evidence.

The Tribunal's Jurisdiction

10. The scope of the Tribunal's jurisdiction in dealing with an appeal against the Commissioner's Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the Commissioner's Decision Notice is not in accordance with the law or to the extent that it involved an exercise of discretion by the Commissioner, he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice

as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.

11. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, the Tribunal will often receive evidence that was not before the Commissioner.

Issues and Findings

Legislative Framework

12. Under section 1(1)(a) of FOIA, a person who has made a request for information to a public authority is entitled to be informed, in writing, whether the public authority holds that information. Under section 1(1)(b), this is referred to as the public authority's duty "to confirm or deny". This duty is distinct from and in addition to the public authority's duty under section 1(1)(b) to provide the information requested if it holds it. The duties provided for in sections 1(1)(a) and (b) do not apply if any of the exemptions set out in FOIA apply.

13. The issue for determination in this appeal is whether the Public Authority is required to confirm or deny that it holds the information requested or whether it is exempt from its duty to do so by virtue of section 40(5)(b)(i).

14. In so far as it is relevant, section 40 provides as follows:

Personal Information

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 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 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that

Act (data subject's right to be informed whether personal data are being processed).

15. The effect of section 40(5)(b)(i) is that if by simply confirming or denying that it holds the information, it would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 ("DPA") (processing likely to cause damage or distress), the Public Authority is exempt from the duty to do so.

Would disclosure breach the data protection principles?

16. There can, of course, be no breach of any data protection principle, nor of section 10 of the DPA, unless what is in issue is personal data. The Commissioner found that by confirming or denying that it holds the requested information, the Public Authority would be revealing information coming within the scope of the definition of "*personal data*" found in section 1(1) of the DPA, in relation to the registered keeper of the vehicle. In particular, it would disclose whether the vehicle had or had not been driven in Essex on that day.

17. The Appellant appears to accept that the information that would be revealed would constitute the personal data of that third party. He has not appealed against the Commissioner's findings in this regard.

18. What he disagrees about is whether disclosure of that personal data would contravene the first data protection principle. The Commissioner has not claimed that any of the other data protection principles would be breached. For completeness, we would also note that section 10 of the DPA (right to prevent processing likely to cause damage or distress) is not in issue here. The data subject in question has not given any notice under section 10 of his objection to disclosure and there is no suggestion that the personal data contains any "sensitive personal data" as defined under section 2 of the DPA. The only issue, therefore, is whether, by virtue of the personal data that would be disclosed by simply confirming or denying that it holds the information, the Public Authority would be contravening the first data protection principle.

19. The first data protection principle provides that personal data shall be processed fairly and lawfully, and in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met. The word "process" is defined in section 1 of DPA and includes disclosure to a third party or the public at large.

20. There is no suggestion that processing the personal data in the present case would be unlawful. The question is whether it would be fair. A wide approach to fairness is endorsed by the observations of Arden LJ in **Johnson v Medical Defence Union** at paragraph 141:

> *"Recital (28) [of Directive 95/46] statesthat "any processing of personal data must be lawful and fair to the individuals concerned". I do not consider that this excludes from consideration the interests of the data user. Indeed the very word "fairness" suggests a balancing of interests. In this case the interests to be taken into account would be those of the*

data subject and the data user, and perhaps, in an appropriate case, any other data subject affected by the operation in question."

Although that case concerned the provisions of the Freedom of Information (Scotland) Act 2002, the principles apply equally in relation to FOIA.

The Commissioner's findings

21. The Commissioner decided that disclosure of the third party personal data that would arise by the Public Authority confirming or denying whether it held the information would not be fair. He did not go on, therefore, to consider whether any conditions in Schedule 2 were met.

22. In deciding that disclosure would not be fair, the Commissioner took into account a number of factors, including, in particular, the reasonable expectations of the third party, and the consequences for him of such disclosure.

23. The Commissioner accepted that the personal data in issue entered the public domain by virtue of the criminal trials in 2009 and 2010 which resulted in the convictions of the Appellant and the third party. The Commissioner considered, however, that in line with the Tribunal's findings in **Armstrong v IC & HMRC EA/2008/0026**, information which is disclosed in court may enter the public domain briefly, but its availability in practice is likely to be short lived and restricted to a limited number of people unless it passes into more permanently available sources like on-line newspaper reports. The Commissioner noted that there are a number of on-line newspaper articles which report details of the court cases, including the names of the defendants, details of the offences they were charged with, and their convictions. However, he noted that these newspaper articles do not include any detailed information similar to the requested information in this case and that while the broad details of the cases are discussed in the newspaper articles, the specifics of particular pieces of evidence are not. On this basis, the Commissioner was satisfied that despite the court cases and media coverage, for the purposes of this request, neither the specific information requested, nor information very similar to it, can be said to have been in the public domain at the time of the request.

24. Nevertheless, given the information that had been put into the public domain as a result of the trials, the Commissioner considered that disclosure would be unlikely to cause any significant harm to the third party. However, he found that the third party would have a reasonable expectation that the Public Authority, in line with the approach it adopts in other cases, would not disclose this information. For this reason, he found that disclosure would not be fair.

25. The Commissioner accepted that disclosure could still be fair if there was a more compelling public interest in disclosure, but he found that there was no such public interest in this case. He found the Appellant's assertion that the information would assist him to challenge his conviction and sentence, and disclose public wrongdoing and corruption, did not amount to a compelling

public interest. As to the former, this was a private rather than a public interest, and the latter was largely speculative.

Our findings

26. In our view, the proper starting point is to identify what personal data would be disclosed if the Public Authority were to confirm or deny whether it holds the requested information.

27. The Appellant has asked for ANPR details held on the national archive in respect of a particular Vauxhall Vectra in Essex, on 28 February 2008. By confirming or denying if it holds this information, the Public Authority is potentially disclosing whether the vehicle was being driven in Essex on that day. We say *potentially* because it is not clear from the evidence before us that if the vehicle was being driven in Essex on that day, the Public Authority would necessarily hold ANPR details. If it does hold such information, however, then clearly that would disclose that the vehicle was being driven in Essex on that day. It would not disclose that the registered keeper of the vehicle was driving it but it would disclose that a vehicle registered in his name was being driven in Essex on that day. Alternatively if no information is held, then it may disclose that his vehicle was not being driven in Essex on that day. As already noted, it is not disputed that that information is the personal data of the registered owner.

28. Would disclosure of that personal data be fair? As the Tribunal has observed in other cases (see for example **London Borough of Camden v Information Commissioner** and **A v Information Commissioner**), section 40 seeks to ensure that the interests of those requesting information from a public authority do not undermine, unnecessarily, the interests of those individuals whose personal data might find its way into the public domain as a result of the public authority complying with such a request. When section 40 is engaged, the Tribunal is required to undertake quite a different task from when it deals with other FOIA exemptions. FOIA promotes the right to information, but when section 40 is under consideration, the DPA determines the proper approach, and the interests of data subjects receive a high degree of protection. These cases concerned section 40(2), but the reasoning applies equally in the case of section 40(5).

29. The newspaper articles referred to by the Commissioner are not before us. The appellant has not disputed, however, that the personal data in issue in this appeal was not specifically referred to in any of the newspaper reports about the trials. We do not suggest that information disclosed during the course of a criminal trial only enters the public domain if it is included in newspaper reports. As always, each case must be considered on its own facts. There may well be cases where the personal data in issue is so integral to the prosecution's case that the trial and resulting conviction will effectively put that information in the public domain even if it is not covered in newspaper reports. However, we do not find that is the position in the present case. We note that the Indictment makes no mention of the vehicle or even the date in question. The particulars of the offence refer to the period 1st September 2006 to 30th April 2008. There is also nothing to suggest that the allegation

that the vehicle in question was being driven in Essex on that day was so fundamental to the charge against the Appellant and the third party that the fact of the trial and the convictions can be said to have put that information into the public domain.

30. We agree, therefore, with the Commissioner's finding that the information was not in the public domain as at the date of the request. We also agree with the Commissioner that it must follow that there would be some harm to the third party if the information were to be disclosed in response to a FOIA request but that given the information that was likely disclosed during the course of the trial, any invasion of privacy would be relatively minor.

31. As to whether unfairness arises because of any reasonable expectations of the third party, the Commissioner says that the Public Authority would be extremely unlikely, under FOIA, to confirm or deny whether it holds specific information about particular individuals in response to requests such as that in issue in this case. On this basis, he says that the third party would have had a reasonable expectation that the information would not be disclosed to the Appellant. The Commissioner also says that it is important that the Public Authority should be able to maintain a consistent approach in all such cases.

32. Although there is no evidence to suggest that the third party would have had any specific knowledge of the Public Authority's practice, we accept that there would be a general expectation that a public authority would not disclose information amounting to personal data without a strong competing public interest in favour of disclosure. Although we agree with the Commissioner's findings to this extent, we part company from him in his endorsement of a consistent approach adopted by the Public Authority. To apply the exemption in section 40(5)(b)(i), or indeed any other exemption properly, it is necessary for a public authority to have regard to the particular facts of the case. An assessment of whether disclosure would be fair must require a consideration of whether it would be fair in relation to any particular data subject on the facts of any particular case.

33. As to the competing interest in favour of disclosure, the Appellant has set out his arguments at some length. In essence, he says that the information will help him to challenge his conviction and expose the wrongdoings of the police. As already noted, the Commissioner says that the former is a personal interest and the latter is speculative. If indeed the Appellant had been wrongly convicted, that would be matter of considerable public interest. However, it is far beyond this Tribunal's remit to make findings on such an issue, nor indeed is there proper evidence before us to support any such findings. We also keep in mind that there are other and more appropriate channels for the Appellant to seek redress for any miscarriage of justice in relation to his conviction. The mere allegation that he has been wrongly convicted is not enough to outweigh the interest of the data subject.

34. For the reasons we have given, we find that although on the facts of the present case, the invasion of privacy or harm that would arise from disclosure would not be considerable, disclosure would still not be fair. This finding

determines the appeal and it is not necessary to go on to consider whether any conditions in Schedule 2 are met.

Decision

35. The Appellant's appeal is dismissed.

36. Our decision is unanimous.

Anisa Dhanji

Judge

Date: 7 February 2014

Promulgated 10 February 2014

Paragraphs 3, 21, 23 and 29 have been corrected under Rule 40 of The Tribunal Procedure (First-tier Tribunal) General Regulatory Chamber) Rules 2009 (relating to clerical mistakes, accidental slips and omissions)