



**IN THE FIRST-TIER TRIBUNAL** **Case No. EA/2013/0214**  
**GENERAL REGULATORY CHAMBER**  
**INFORMATION RIGHTS**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50485894**

**Dated: 17 September 2013**

**Appellant:** Nick Dunnett  
**Respondent:** Information Commissioner  
**Public Authority:** Ministry of Defence

**Heard at:** Field House, London

**Date of hearing:** 10 March 2014

**Date of decision:** 26 March 2014

**Before**

Angus Hamilton

Judge

and

Dave Sivers

and

Rosalind Tatam

**Subject matter:** ss 31 (law enforcement), 40 (personal information), 42 (Legal professional privilege) and 36 (prejudice to effective conduct of public affairs) Freedom of Information Act 2000

**Cases considered:**

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal dismisses the appeal for the reasons set out below.

## **REASONS FOR DECISION**

### Introduction

- 1 On 25th of July 2012 the appellant asked the public authority to disclose the following information:

' Please may I have all the recorded information held within the MoD on the boating incident in Cherbourg Marina in September 2011'.

- 2 The MoD replied on December 3, 2012. It provided only some information within the scope of the appellant's request and refused to provide the remainder relying upon the exemptions in section 40, section 31 and section 42 of FOIA.

- 3 Following an internal review the appellant complained to the Commissioner. The Commissioner determined that the initial scope of his investigation was to check whether the public authority had properly claimed the exemptions in sections 31, 40 and 42 of FOIA. During the course of the commission's investigation the MoD stated that it also relied upon the exemption in section 36 of FOIA.

- 4 SS 31, 36 and 42 of FOIA are all qualified exemptions. For all qualified exemptions in accordance with s2(2) of FOIA it is also necessary to consider whether:

*'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.'*

The Tribunal has described this as the 'public interest balancing exercise'.

- 5 In a Decision Notice dated 17 September 2013 the Commissioner determined that the exemptions had been appropriately claimed and furthermore determined that the public interest balancing exercise in section 2(2) of FOIA favoured upholding the exemptions in ss 31, 36 and 42 rather than requiring disclosure. The public interest balancing exercise does not apply to the exemption based on personal information (s.40) although there are other factors to be considered in relation to this exemption which flow from the Data Protection Principles contained in the Data Protection Act 1998 (see paragraphs 9 and 10 below).

The appeal to the Tribunal

- 6 The appellant submitted an appeal on 3 October 2013. The grounds of appeal within FOIA are not immediately clear. This is of course at least partly understandable in relation to a litigant in person who may not have had the benefit of legal advice. The Tribunal did their best to interpret the appellant's submissions in a manner that was consistent with the legislation. The appellant's principal contention was that the provisions of FOIA were being unreasonably claimed by the MoD with the purpose of covering up misbehavior by a serving officer within the Armed Forces. This could be interpreted either as an assertion that the exemptions had not been properly claimed or, where the public interest balancing exercise was relevant, that the public interest on balance favoured disclosure over maintaining the exemption.
- 7 The Tribunal formed the view that the appellant was principally arguing that the public interest balancing exercise favoured disclosure and, in relation to the s.40 exemption, that the Data Protection Principles permitted disclosure. The appellant did not appear to be contending that the exemptions had been wrongly claimed – although he did raise an objection to the late reliance on the s.36 exemption. The Tribunal noted that in his skeleton argument of 27 January 2014 the appellant commented that the MoD has 'no respect for FOIA or for Public Interest' – an assertion which would seem to support the Tribunal's interpretation of

the appellant's grounds of appeal. This would also appear to be the approach adopted by the Commissioner in his response to the appeal.

The questions for the Tribunal

- 8 The Tribunal concluded that the questions to be answered were, first, whether each of the claimed exemptions had been claimed appropriately. Secondly, in the case of the three qualified exemptions, the Tribunal had to consider whether the public interest balancing exercise favoured upholding the exemption or favoured disclosure. Finally in relation to the personal information exemption (s.40) the Tribunal had to consider whether disclosure (a form of 'processing' as defined by the Data Protection Act 1998) could be seen as fair and lawful and in accordance with the Data Protection Principles set out in the Data Protection Act 1998 (DPA).
- 9 In relation to the personal information exemption – the Tribunal concluded that the personal information relating to the Army officer who was principally involved in the matter and the two Gunners who were said to have accompanied him constituted sensitive personal data as it related to the 'commission or alleged commission by him of any offence' (s. 2(g) DPA 1998). The Tribunal also concluded that the personal data relating to the names of various correspondents discussing the event after it occurred were not sensitive personal data although they were personal data. The Tribunal noted that neither of the parties appeared to dispute this analysis.
- 10 In relation to the personal information exemption the issue consequently became whether disclosure would be fair and lawful and whether, in relation to non-sensitive personal data, it was in accordance with at least one of the conditions in Schedule 2 of the DPA 1998 and, in relation to sensitive personal data, in accordance with at least one of the conditions in Schedule 3 DPA 1998.

### Evidence

- 13 All parties have agreed that this matter should be considered 'on the papers' only and we heard no live evidence or oral submissions. No parties or representatives attended the hearing.
- 14 We considered, from the Appellant, the Notice and Grounds of Appeal and supporting documents and the appellant's final submissions (skeleton argument). We have considered, from the Commissioner, the Decision Notice, the response to appeal and the final submissions. There were no submissions from the public authority and the Tribunal understood that they had not been joined as a party to the proceedings

### Conclusion

- 15 The Tribunal first considered whether each of the four claimed exemptions was engaged. The Tribunal had the benefit of considering both the redacted information disclosed to the appellant and the unredacted information. The redacted information had been helpfully marked to indicate which exemption had been relied on in relation to each redaction.
- 16 As already mentioned the Tribunal noted that the appellant did not appear to be asserting that the claimed exemptions were not engaged. The Tribunal also noted the Commissioner's careful analysis of each of the claimed exemptions. The Tribunal reviewed that analysis but concluded that it was correct and that each of the claimed exemptions was engaged. The Tribunal noted that the appellant objected to the MoD only raising the s.36 exemption during the course of the Commissioner's investigation. However, it is now well established, in authorities binding the Tribunal, that a public authority may rely on 'late claimed exemptions' during an investigation and, indeed, during proceedings before a Tribunal.

- 17 The Tribunal then proceeded to consider the public interest balancing exercise in relation to the three qualified exemptions. At this stage the opinions of the panel began to diverge and there was a minority dissenting view on certain points.
- 18 In relation to s 31 (law enforcement) – a majority of the Tribunal considered that the public interest favoured maintaining the exemption because there was a risk of the police investigation in France or the Army disciplinary proceedings being prejudiced by the disclosure of information covered by this exemption. The Tribunal took into account that disclosure under FOIA is always treated as being to the ‘world at large’ rather than to a specific individual and thus it was not pertinent to consider what any single individual might or might not do with the information and whether that action might cause prejudice to any criminal or disciplinary proceedings. A minority of the Tribunal felt that there was a significant public interest in the alleged misbehaviour of an Army officer being subject to proper public scrutiny on the basis that such an individual should be expected to behave appropriately in all aspects of his or her life (i.e. whether on duty or not). That panel member also felt that the risk of prejudice to criminal or disciplinary proceedings was low – particularly bearing in mind that the criminal investigation was occurring in France and the particular nature of military disciplinary proceedings. A minority therefore concluded that the public interest balancing exercise favoured disclosure of this category of information.
- 19 In relation to s.36 (prejudice to effective conduct of public affairs) – the Tribunal unanimously agreed that the public interest balancing exercise favoured upholding the exemption. The Tribunal felt that there was a compelling argument that a Minister should be able to receive candid confidential advice from his or her civil servants and that this would be undermined if the advice provided here was liable to disclosure and public scrutiny. The Tribunal did however note that the advice provided in this case did not in any event appear to relate to or contain any information that the appellant was actually seeking.

20 In relation to s. 42 (legal professional privilege) – the Tribunal unanimously agreed that the public interest balancing exercise favoured upholding the exemption. The Tribunal felt that there was a compelling argument that individuals should be able to receive clear candid and confidential legal advice which should only in the most exceptional circumstances be subject to disclosure and public scrutiny. The Tribunal could find no exceptional circumstances in this particular case. The Tribunal did however note again that the advice provided did not appear to be a category of information which the appellant was asking to be disclosed.

21 In relation to s.40 – personal information – the Tribunal first considered the non-sensitive personal data – i.e. the names of the correspondents discussing the matter after the event. In relation to the Schedule 2 DPA 1998 conditions which might justify a disclosure of such personal data the Tribunal felt that the only pertinent condition was –

*The processing is necessary for the purposes of legitimate interests pursued by the data controller 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.*

22 The Tribunal considered that this condition created something similar to the public interest balancing exercise in that the rights of the data subject had to be balanced against the ‘legitimate interests’ of a third party. However the panel could not identify an appropriate legitimate interest in the disclosure of the names of the various correspondents who discussed the matter after the event. If such a person had willfully sought to mislead or illegitimately conceal matters then the Tribunal could see a legitimate interest in identifying and holding such a person to account and that those legitimate interests could outweigh the individual’s rights - but the Tribunal



could not identify any such inappropriate activity. Yet again the Tribunal noted that this appeared to be a class of information which the appellant had not specifically asked to be disclosed.

23 In relation to the sensitive personal data – that is the identity of the officer and Gunners said to be involved in the incident at Cherbourg – a majority of the panel considered that such a disclosure would either not be fair in accordance with the Data Protection Principles or could not find any condition in Schedule 3 of DPA 1998 that would permit such a disclosure. One member of the panel felt that the disclosure of the identity of the officer involved in the incident would be fair – applying the principle that there was a significant public interest in the alleged misbehaviour of a Army officer being subject to proper public scrutiny – but had reservations in relation to the identity of the two Gunners – on the basis that any expectation of high standards of behaviour might be lower in their case.

24 That panel member on considering the Schedule 3 conditions thought that the condition -

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

- could justify disclosure of the officer's identity given that he had allegedly engaged in willful misbehavior which had attracted press interest including reports that identified him by name. However that panel member, conscious of being in a minority, did not reach a conclusion on this point.

24 Our decision to dismiss this appeal was a unanimous decision in relation to certain aspects (ss 36 and 42 exemptions) and majority decision in relation to others (ss 31 and 40 exemptions).

25 The Tribunal wished to emphasise that their decision was based on matters as they were at time when the appellant made his request – that is when there was an ongoing criminal investigation in France and the

possibility of Army disciplinary proceedings. There will come a time when the French investigation and proceedings (if any) will have concluded and Army disciplinary proceedings will either have been concluded or a decision will have been made not to bring any and it may be that in those circumstances any request for information will be treated differently as certain exemptions may no longer apply. Mr Dunnett may therefore want to monitor the progress of these matters and repeat his request at an appropriate stage

Signed:

Angus Hamilton DJ(MC)

Tribunal Judge

Date: 26 March 2014

Promulgated: 27 March 2014