

Information Tribunal

Appeal Number: EA/2007/0056

Freedom of Information Act 2000

Decision promulgated 21st December, 2007

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

David Farrer Q.C.

LAY MEMBERS

Ivan Wilson

and

David Wilkinson

Between

KENNETH FRASER McCLUSKEY

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

THE PUBLIC PROSECUTION SERVICE FOR NORTHERN IRELAND

Additional Party

By agreement of the parties and with the approval of the Tribunal. This appeal was determined on written submissions without an oral hearing, pursuant to Rule 16 of the Information Tribunal (Enforcement Appeals) Rules, 2005

All references to statutory provisions are to the provisions of the Freedom of Information Act, 2000 (“FOIA”) References to “DPA” are to the Data Protection Act, 1998.

Decision

The Tribunal upholds the decision notice dated 31st. May, 2007 and dismisses the appeal.

Reasons

The Request

- 1 On 23rd. November, 2005, the Appellant requested from the Additional Party (“PPSNI”) a copy of a report with the supporting documentation submitted by Chief Inspector Waterworth on behalf of the Police Service for Northern Ireland to PPSNI, relating to a complaint made by the Appellant against several police officers arising out of an investigation which had ended with the Appellant `s acquittal by direction of the judge of a charge of receiving stolen goods at Craigavon Crown Court on 4th. December, 1998.
- 2 PPSNI refused such information by letter of 5th. January, 2006. Following a request for a review, it maintained that decision, invoking s. 30(1)(a)(b) and (c), 30 (2)(a)(i) and (a)(ii) and s. 40(2) and (3)
- 3 On 22nd. May, 2006, the Appellant complained to the Information Commissioner (“the I.C.”). The I.C. commenced his investigation, pursuing at the same time proposals for an informal resolution of the complaint. The result was that, by the time of the Decision Notice, an agreement had been reached whereby the Appellant was allowed to inspect the file, presumably on certain undertakings.

4 The Decision Notice

The I.C. upheld the PPS(NI) 's refusal and ruled that it had correctly applied both the s.30 and s. 40 exemptions and that, as to the former group of exemptions, the public interest in withholding the requested information outweighed the public interest in its disclosure. He further found that the PPS(NI) was in breach of s.17(1)(c) and 17(3)(b). There is no appeal against that finding. The points made in the Decision Notice are generally similar to those developed in the I.C. 's Reply, Amended Reply and written submission dated 25th. November, 2007.

5 The Notice of Appeal

The Appellant issued a Notice of Appeal, pointing out that he had already been granted access to the whole file at the Belfast offices of PPS (N I). Following directions dated 24th. August, 2007, he submitted additional grounds relating exclusively to the s.30 exemptions. He criticised the I.C 's reliance on ***Guardian Newspapers Ltd. v Information Commissioner and Chief Constable for Avon and Somerset [2006] /EA / 0017*** , arguing that it was distinguishable from this appeal. He further contended that s.30 was not engaged because the Director of Public Prosecutions for Northern Ireland had decided that the evidence obtained following his original complaint did not reveal any offence. Furthermore, there was a clear public interest in disclosing information relating to such a finding in the case of a police officer. In determining this appeal, we have considered as forming the Appellant 's case, his complaint, his correspondence with PPS(NI), the Notice of Appeal and the additional grounds.

7 The PPS(NI) indicated that it did not wish to add to the submissions of the I.C.

8 The Facts

They were simple and undisputed. In 1995 the Appellant ran a plant sale and hire business in Lisburn, Northern Ireland. On 11th March,

1995, police of the R.U.C (as it then was) Stolen Vehicle Squad searched his property and seized a number of items of equipment, which they suspected to be stolen goods. Some were returned after examination but the Appellant was tried on a charge of receiving at Craigavon Crown Court in 1998. The Judge withdrew the case from the jury and the Appellant was acquitted by direction. It is plain that the prosecution case finished up in considerable disarray due to incorrect identification or misdescription of many items. Whatever the reason, the Appellant was plainly entitled to feel seriously aggrieved.

9 The Appellant believed the reason to be a plot to incriminate him falsely, involving several officers. Through solicitors and later in documents which he submitted personally, he made a number of complaints against officers involved in the investigation, which amounted to accusations of attempting to pervert the course of justice.

10 Chief Inspector Waterworth was charged with investigating the complaint. He interviewed the Appellant and all the officers and reviewed the relevant material. He concluded that there was no evidence of criminal conduct. His report was forwarded to the Director of Public Prosecutions for Northern Ireland and was considered by a member of the Independent Commission for Police Complaints. We have seen it or, at least, the material parts of it.

11 The Appellant`s Case

This was an unusual appeal, in that the Appellant had seen everything that he requested before the appeal by virtue of the agreement to which we shall refer again later. He regarded the adverse decision of the I.C. as inconsistent with the agreement by which he was given access to the information. He questioned whether s.30 was engaged at all and argued that, if it was, the public interest here, especially after eight years, favoured disclosure. He made no submissions at any stage as to the s.40 data protection issues. Since the Decision Notice dealt with them, we have nevertheless considered them.

12 The Commissioner`s Case

Put in very summary form it was this:

- As to s.40(2) and (3), disclosure of the identities of the officers and the detailed allegations against them would breach the first data protection principle.
- As to the exemptions claimed under s. 30(1)(a)(b) and (c), 30(2)(a)(i) and (a)(ii), those provisions were engaged and the public interest favoured withholding the information, given particularly the danger of discouraging witnesses from co – operating with criminal investigations by fears that sensitive information or the fact of their assistance might be publicised to the world at large, including undesirables. Citing the *Guardian Case*, he argued that the passage of time was of little consequence in this context and that, by analogy with disclosure of information concerning an investigation which ended in an acquittal (see once again the *Guardian Case*), there was little public interest in access to the facts of a case where the decision was not to prosecute in the first place.

13 The relevant law

So far as relevant FOIA s.40 reads:

40. - (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 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 or

, . . .

DPA variously provides:

1 Basic interpretative provisions.

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

"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,

(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by [section 68](#); or

(e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d);

"personal data" means data which relate to a living individual who can be identified –

(a) from those data . . .

2 In this Act “sensitive personal data” means personal data consisting of information as to –

.....

(g) the commission or alleged commission by him of any offence

.....

THE DATA PROTECTION PRINCIPLES

Part 1

THE PRINCIPLES

SCHEDULE 1

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

Conditions relevant for Purposes of the First Principle

Processing of any Personal Data

.....

6.

(1) 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.

SCHEDULE 3

Conditions relevant for Purposes of the First Principle

Processing of any Sensitive Personal Data

(The ten conditions, of which at least one must be fulfilled. It is unnecessary to list them here, since their details are immaterial.)

FOIA s.30, so far as material, provides:

30. - (1) Information held by a public authority is exempt information if it

has at any time been held by the authority for the purposes of-

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-

(i) whether a person should be charged with an offence, or

(ii) whether a person charged with an offence is guilty of it,

(b) any investigation which is conducted by the authority

and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

(2) Information held by a public authority is exempt information if-

(a) it was obtained or recorded by the authority for the purposes of its functions relating to-

- (i) investigations falling within subsection (1)(a) or (b),***
- (ii) criminal proceedings which the authority has power to conduct,***

14 Our Findings

There is a fundamental difference between a right to information, as provided for by FOIA, and the voluntary disclosure of information by a public authority, pursuant to agreement, such as took place here. Subject to the constraints of DPA or other statutory prohibitions on disclosure, a public authority may, of course, provide information where it could sustain an exemption for which FOIA provides. That is a point which, quite understandably, the Appellant does not seem to have appreciated, when he appealed. It is fair to add that, where such an agreement has been reached, a Decision Notice will not generally be expected to follow.

15 We have no doubt that the absolute exemption provided for by s.40(2) was correctly applied by the I.C. and that, for that reason alone, the Decision Notice should be upheld.

16 The data subjects were the police officers, not the Appellant.. The data sought were plainly personal data, as provided for by the definitions in s.1 of DPA. Indeed they were “sensitive personal data” within the definition in s.2 of DPA.

- 17 We consider that general disclosure of the file, which would result from upholding this complaint, would breach the first data protection principle.
- 18 It would, in a general sense, be unfair to the officers, given the decision that no offence was disclosed, evidently approved by Director of Public Prosecutions for Northern Ireland and accepted by the independent monitor.
- 19 None of the conditions in Schedule 2 was met, as required by Paragraph 1(a) of Schedule 1. There was no evidence that disclosure was necessary for the Appellant `s purposes, as required by condition 6 and none of the other conditions could possibly be fulfilled.
- 20 These being sensitive personal data, none of the Schedule 3 conditions could be met for the purposes of paragraph 1(b).
- 21 We do not consider that this state of affairs could be remedied by redaction of names or other identifying features, which were central to the investigation.
- 22 Accordingly, the s. 40(2) exemption applies.
- 23 We turn briefly to the application of the s.30 exemptions.
- 24 The various provisions referred to by the I.C., s.30(1)(a)(i) and (ii), 30(1)(b) and 30(2)(a)(i) are all engaged because the test is satisfied where the information “has at any time been held “ (s.30(1)) or “was obtained or recorded” (s.30(2)(a)) for the prescribed purposes, even though such purposes have been abandoned.
- 25 However, the weighing of the public interest does not, in our opinion, produce a clear – cut result in this case and we have decided to offer no concluded opinion on it, given that this appeal is decided by the application of s.40 anyway.
- 26 In many cases, the risk of discouraging witnesses from assisting in future cases would be a powerful argument for applying the exemption.

Here however, the persons whose identities and (exculpatory) accounts would be disclosed were police officers. Without further argument, we are not disposed to rule that the same considerations apply as with ordinary members of the public. A potential witness might well not compare his position with that of a serving police officer

27 The I.C. invited us to treat an investigation which led to no prosecution as analogous to an acquittal; as in *the Guardian Case*. Again, we are far from sure that the two cases are to be equated; indeed there could be a case (though certainly not this one) where the decision not to prosecute, of itself, provided a strong interest in public scrutiny of the evidence. There is a difference, in principle, between a decision taken by a jury in a public court after a contested trial and an executive decision taken, perfectly properly, without any public examination of the evidence.

28 For these reasons we make no ruling on the public interest issues which would arise in any decision on s.30.

29 We therefore uphold the I.C. 's decision as being in accordance with law and require no further action from the PPS (NI).

30 A Postscript

It is easy to see why an agreement was reached in this instance, where the identities of the officers were known to the Appellant and no harm could be done by giving him access to the file. Moreover, the case against disclosure to the world at large, based on s.40(2) was unanswerable. Nothing that follows is intended as a criticism of the solution adopted here.

31 However, where, on a provisional view of the law and the evidence, information ought probably to be disclosed, then such an agreement may be contrary to the public interest since the agreement will limit access and any other interested party will have to issue a further request. A sequence of agreements designed to buy off unwelcome

publicity would clearly be contrary to the policy of FOIA. A successful request opens the doors to everyone.

32 We reiterate that that is not the case here and that the members of this Tribunal have not encountered such practices. Nevertheless, it is wise to anticipate and reflect on the consequences of a policy of compromising legitimate requests for information.

D.J. Farrer Q.C.

Deputy Chairman

18th December, 2007