ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50518483

Dated: **17th. March, 2014**

Appeal No. EA/2014/0074

Appellant: **Michael Goodall ("MG")**

Respondent: **The Information Commissioner ("the ICO")**

Before

David Farrer Q.C.

Judge

and

Paul Taylor

and

Jean Nelson

Tribunal Members

Date of Decision: 29th. September, 2014

Date of promulgation: 30th September 2014

The Appellant appeared in person.

The ICO did not appear but made written submissions

Subject Matter FOIA s.40(5)(b)(i)

Whether confirmation or denial that the authority held the requested information would (apart from FOIA) breach any of the data protection principles.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

Dated this 29th. day of September, 2014

David Farrer Q.C.

Judge

[Signed on original]

REASONS FOR DECISION

The Background

1. There has been considerable friction between MG and his next door neighbours for some time. He has complained of the behaviour of one or more of the neighbouring family both to the police and to Tameside Metropolitan Borough Council ("the Council"), but the problem remains. He now contemplates taking legal action of an unidentified kind against them.

The Request

2. On 1st. June, 2013 he made a request for information to the Council in the following terms -*"I noticed that my inquiry about (the neighbours' address) was passed to Reablement (MH). Reablement Services are for existing users. This indicates that someone at (the neighbours' address) is already known to the Mental Health Service. Is this correct ?"*

3. On 3rd. June, 2013 the Council replied that it was "not appropriate" to disclose to MG any information about his neighbour. Plainly, that did not satisfy its obligations under s.17(1) of FOIA; not until 8th. July, 2013, outside the time for compliance specified in s.10(1), did the Council state that the information was sensitive personal data and therefore exempt under s.40. Even that indication did not comply with s.17(1). Indeed, the Council never identified the relevant FOIA provision which, it said, entitled it to refuse to confirm or deny that it held the requested information.

4. In further correspondence MG suggested that, if it held no information indicating that a member of the neighbours' household was known to Mental Health Services, then there were no data requiring protection, hence no problem in replying to his request. Further, he indicated that, as a responsible potential litigant, he required this information in order to decide whether to take legal action against the neighbours. The Council explained that its policy when dealing with such requests

was to neither confirm nor deny since, if it confirmed that it held no requested personal data in one case, a failure to confirm in another would amount to a statement that it held such data.

5. He sought an internal review of the refusal to confirm or deny the possession of such data. It resulted in a confirmation of the Council's stance.

The Complaint

6. MG referred the Council's response to the ICO on 16th. September, 2013.

7. The ICO upheld in due course the Council's refusal in his Decision Notice ("DN"), setting out the provisions of s. 40(5)(b)(i). He concluded that the information sought (if it were held) was "sensitive personal data" as defined in DPA s. 2(e), that an individual member of the neighbouring family could be identified if the requested information was disclosed and that a statement as to whether or not a member of the family was known to Reablement would breach the first data protection principle. MG appealed.

8. His grounds of appeal included the following points -

(i) The Council and the ICO had referred at different stages to different subsections of FOIA s.40 and suggested certain consequences. Suffice it to say that there could be no doubt as to the substance of the Council's refusal and the DN clearly identified s.40(5)(b)(i);

(ii) S. 40(5)(b)(i) is not included in s. 2(3)(f) as conferring an absolute exemption from the duty imposed by s.1. Accordingly, the Council was obliged to consider the public interest when deciding whether to confirm or deny. He cited FTT decisions on the point. The omission is strange,

given that the effect of confirming or denying may be identical to giving the answer "yes" or "no". However, S. 2(3)(f) is quite clear and the Tribunal must have regard to the public interest in its decision. The requirement for "fair" processing of data may, in many cases, import some consideration of the public interest anyway.

(iii) The public interest must be assessed by reference to MG's Convention rights, including those conferred by ECHR Articles 6 and 8. That may require a departure from the requirements of the DPA 1998.

(iv) There is a public interest in the local community being aware of mental health problems, which could result in anti - social behaviour.

(v) In considering litigation against the neighbours it is relevant , indeed important, that MG should know whether a potential defendant has mental health problems, which might influence his decision to litigate.

Our Decision

9. FOIA s.1(1)(a) provides that any person making a request for information is entitled to be informed in writing whether it holds that information and (s.1(1)(b)), if it does, to have it communicated to him. There are a number of exceptions to this fundamental principle.

10. S. 40(5)(b)(i), so far as material provides -

"(5) The duty to confirm or deny -

. . . .

(b) does not arise in relation to (the personal data of a third party) 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 s.1(1)(a) would (apart from this Act) contravene any of the data protection principles . . . . .

11. The first issue is whether a disclosure of personal data would result from a confirmation or denial. There were evidently several members of the neighbouring family. Personal data are defined in DPA s 1(1) as -

"*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, . ."

12. The Council is a data controller. If it holds relevant data as to the neighbouring family, then it holds data which would identify the particular member or members within the terms of the request so that the extended definition in s.1(1)(b) would be satisfied in any event.

13. However, it seems likely that the definition in s.1(1)(a) is satisfied without more. Given that MG and probably other local residents had observed this family and interacted with it, then, if the answer "Yes" were given, it is probable that the member(s) concerned would be identified. That probability is strengthened by MG's identification of one particular family member as a likely candidate in an email of 9th. and faxes of 10th. and 21st. August, 2013 sent to the Community Mental Health Team.

14. If a denial were given, it would constitute a statement, as to each such member, that he or she was not known to Reablement, the Mental Health Service. That would be a processing by the Council of the sensitive personal data of each of

them. If a confirmation were given, that would amount to a statement that at least one member was known to the service.

15. We turn therefore to a consideration of the data protection principles, specifically, as is usual, to the first principle, set out in DPA Schedule 1 Part 1 which requires that personal data be processed fairly and lawfully and, in particular so as to meet at least one of the conditions in Schedule 2. In a case such as this, involving sensitive personal data, further compliance with at least one condition in Schedule 3 is required.

16. We start with a consideration of fairness.

17. The information in question is essentially medical and relates to the health of an individual. The law does not confer on the doctor /patient relationship a legally enforceable privilege, as it does with lawyer/ client. Nevertheless, as a society, we recognise the fundamental importance of confidentiality within such a relationship, not just as to what the patient tells the doctor or nurse or vice - versa but as to any diagnosis and consequent treatment.

18. In our judgement, the relationship of a mental health service run by a local authority to a person to whom it provides treatment is no different. The patient has an unqualified expectation of confidentiality, perhaps even stronger than with most physical ailments. The discovery that he had been identified publicly as receiving such treatment would be a shattering experience calculated to destroy any trust in the health services.

19. We set out above at paragraph 8(iii) - (v) various matters which, says MG, nevertheless render disclosure through confirmation or denial fair or, alternatively, demonstrate at least an equal public interest in an answer, yes or no. We emphatically disagree

20. Nothing in the Human Rights Act, 1998 entitles the Tribunal to disregard the provisions of the DPA 1998. It is unclear how Article 8 of the ECHR, the right to respect for private and family life, could be relevant to questions of fairness or the public interest anyway. Article 8 involves an individual not a general right. In staying silent the Council is doing nothing to interfere with MG's right to a private life. Any such threat comes from the neighbouring family. There is, anyway, no reason to suppose that, if that family is disturbing MG's family life, a confirmation or denial would stop it or enable MG to stop it.

21. Article 6(1) provides for an individual's right to a fair and public hearing in the determination of his civil rights and obligations. It has no bearing on the public interest. More importantly, MG does not need these sensitive data (if indeed they exist) in order to seek against his neighbours any private law redress to which he is entitled. The mental health of a defendant has generally no bearing on his liability. If it did, the obvious and proper source for an order for disclosure of such information would be the court, not the ICO. If MG treats information of that kind as influencing a decision to litigate, that is a tactical matter for him and his advisers. It certainly does not make fair or in the public interest the communication to him of sensitive personal data.

22. We do not understand how rights to the peaceful enjoyment of possessions, protected by Article 1 of the First Protocol to the ECHR, have any relevance to this case.

23. Equally, the claim that the local community has an interest in disclosure of these data in order, presumably, to take measures to protect itself against anti - social behaviour is bizarre. If that were true, then every member of the community receiving treatment for mental illness or disorder could expect to be pointed out to his neighbours by the authority responsible for his treatment. What the local community could do with such information beyond gossip is hard to fathom. The damage to patient trust would be incalculable.

24. MG's submission that, beyond satisfying the requirement of fairness, con- formation or denial would meet one of the conditions in DPA Schedule 2 was doomed to failure. None of the 6 conditions could possibly be met.

25. In summary, we attach very great importance to the preservation of confidentiality as to medical data. The most compelling public interest would be required for any communication of these data to the public, even in the most general terms, to be fair or in the public interest. MG' s submissions as to his competing human rights and community interests fail, not just because they are much weaker or harder to discern than the imperative need for medical confidentiality but because a "Yes" or "No" answer to the request would achieve nothing for him or the community.

26. It might be argued that all these considerations apply only to a response confirming his supposition. That is not so. Fairness in processing the data of a particular individual means fairness to all those whose personal data are held by the council. If it adopted a policy of denying but never confirming, it would obviously defeat the whole purpose of the "neither confirm nor deny" exception by effectively confirming through silence. Moreover, a denial is a communication of sensitive data in a case such as this, as noted above. A citizen is perfectly entitled to expect silence on the subject of his health, good or bad, and it cannot be fair or in the public interest to confound that expectation without warning, let alone consent.

27. For these reasons we uphold the Decision Notice

28. Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge.

29th. September, 2014