



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2014/0203

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50524696
Dated: 17 JUNE 2014**

Appellant: TREVOR FORDY

1ST Respondent: INFORMATION COMMISSIONER

**2ND Respondent: CHIEF CONSTABLE OF
WEST YORKSHIRE POLICE**

On the papers at: FOX COURT, LONDON

Date: 12 MARCH 2015

Date of decision: 24 APRIL 2015

Before

ROBIN CALLENDER SMITH
Judge

and

PIETER DE WAAL AND GARETH JONES
Tribunal Members

Written submissions:

For the Appellant: Mr Trevor Fordy

For the 1st Respondent: Mr Adam Sowerbutts, Solicitor for the Information
Commissioner

For the 2nd Respondent: M S Percival, Solicitor for the West Yorkshire Police

IN THE FIRST-TIER TRIBUNAL

Case No. EA/2014/0203

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

Subject matter: FOIA 2000

Absolute exemptions

- Personal data s.40

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 17 June 2014.

SUBSTITUTED DECISION NOTICE

Dated 24 April 2015

Public authority: Chief Constable of West Yorkshire Police

Address of Public authority: West Yorkshire Police HQ
Laburnum Road
Wakefield
WF1 3QP

Name of Complainant: Mr Trevor Fordy

The Substituted Decision:

For the reasons set out in the Tribunal's determination below, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 17 June 2014.

Action Required The 2nd Respondent is to confirm or deny whether the requested information is held and to provide the requested information to the Appellant within 31 days of notice of this decision or explain – by way of reliance of any other exemptions within FOIA – why it is not required to do so.

24 April 2015

Robin Callender Smith
Judge

REASONS FOR DECISION

Introduction

1. Mr Trevor Fordy (the Appellant) is a former Detective Superintendent and senior investigating officer who, before retirement, served with Northumbria Police Force.
2. Since his retirement he has been employed as a Police Liaison Manager with a forensic company providing services in digital data recovery to UK law enforcement agencies including police forces and the security services.
3. In November 2006, during the course of his employment, the Appellant was contacted by a senior West Yorkshire Professional Standards Department (PSD) member in relation to information from a “whistle-blower” suggesting misappropriation and copying of the Appellant’s employer’s intellectual property by named police officers.
4. From 12 December 2006 until 9 November 2011 there were various investigations, reports and litigation in respect of this.

5. Late in 2012 – after the litigation had been finalised – the West Yorkshire Police (WYP) authority agreed to implement an independent review of the case and the conduct of its PSD.

6. That review began early in 2013, was undertaken by the Chief Constable of Devon and Cornwall and was concluded in March/April 2013.

7. The Appellant requested a copy of the finalised report and was told, in an email on 24 April 2013 from the Deputy Chief Constable of Devon and Cornwall:

I have discussed the report with WYP and they are willing to disclose the report but as it will be technically released into the public domain by giving it to you it will have to be in line with FOI. There will be some redactions where sensitive issues such as the Security Services are mentioned but he [WYP Deputy Chief Constable] has assured me that where there is criticism of WYP this will not be redacted.

8. In May 2013 the Appellant was provided with a redacted copy of the 29-page review.

9. This was after WYP had been consulted by Devon and Cornwall Police and been allowed to redact (via its Disclosure Unit) the document and then authorised its release.

10. The Devon and Cornwall review was critical of the WYP's PSD investigation and its overall competence. It recommended a letter of apology to the Appellant and the payment of compensation.

11. An unconditional written apology from WYP conceding the flaws in its PSD investigation was received by the Appellant in October 2013. The Appellant has not accepted compensation.

12. His FOIA request, dated 27 August 2013, was to the West Yorkshire Police in the following terms:

Again, in the interests of openness and transparency, I would invite WYP to provide me with an unredacted copy of the report and appendices.

13. WYP responded on 24 September 2013 stating it was withholding the information under section 40(5). It upheld this decision after an internal review dated 10 December 2013.

14. The Appellant contacted the Commissioner on 16 September 2013. He complained about the application of section 40(5) on the basis that he had already been provided with a redacted copy of the report but not the appendices.

15. He accepted that he had not been provided with the redacted copy of the report in response to a written request to WYP.

The complaint to the Information Commissioner

16. The Commissioner considered the Appellant's request in the light of WYP's reliance on section 40(5) FOIA which permits public authorities not to confirm or deny whether requested information is held if to do so would constitute a disclosure of personal data.

17. He upheld WYP's reliance on section 40(5).

The Law

18. Section 40 FOIA states:

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.

(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

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).

(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 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 being processed).

The appeal to the Tribunal

19. The main points made by the Appellant in his grounds of appeal and further correspondence can be summarised as follows:

- A redacted version of the report has already been released to him on 14 May 2013 – he asserts under FOIA – and the Commissioner had failed to take into account all the background evidence he supplied in relation to this.
- The Commissioner had been incorrect to conclude that his only FOIA application was on 27 August 2013 because he had made several previous requests to WYP seeking the same information. The first written request for an unredacted copy of the report and Appendix A had been handed personally to WYP's Temporary Deputy Chief Constable on 8 July 2013 and there had been other (acknowledged) written requests on 13 July, 17 July, 28 July and 11 August 2013 before his request dated 27 August 2013
- The suggestion by the Chief Constable of WYP that the redacted copy was only provided to him following a risk assessment was, in his submission, incorrectly based on a false premise because most of the redacted material was already within the public domain.
- He believed that all the available evidence supported the fact that the Devon and Cornwall Police report was released to him under the terms of FOIA.

The questions for the Tribunal

20. Was the WYP entitled to rely on section 40(5) FOIA to refuse to confirm or deny that it held the information requested by the Appellant?

Evidence and Closed material

21. The Tribunal was provided in advance of the hearing with an agreed bundle of material which included an unredacted version of the Devon and Cornwall Constabulary report dated 27 March 2013.

22. The Tribunal reminded itself of the recent guidance for the approach to be taken by courts and tribunals in respect of any closed material procedure.

23. In *Bank Mellat v HMT (no. 1)* [2013] UKSC 38, which was not a case about FOIA, Lord Neuberger said at paragraphs 68-74 that:

- i) If closed material is necessary, the parties should try to minimise the extent of any closed hearing.
- ii) If there is a closed hearing, the lawyers representing the party relying on the closed material should give the excluded party as much information as possible about the closed documents relied on.
- iii) Where open and closed judgments are given, it is highly desirable that in the open judgment the judge/Tribunal (i) identifies every conclusion in the open judgment reached in whole or in part in the light of points made or evidence referred to in the closed judgment and (ii) says that this is what they have done.
- iv) A judge/Tribunal who has relied on closed material in a closed judgment should say in the open judgment as much as can properly be said about the closed material relied on. Any party excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and the arguments it has received.

24. In *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC) the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA cases, noting that such practices are likely to be unavoidable in resolving disputes in this context:

- i) FOIA appeals are unlike criminal or other civil proceedings. The Tribunal's function is investigative, i.e. it is not concerned with the resolution of an adversarial civil case based on competing interests.
- ii) Closed procedures may therefore be necessary, for consideration not only of the disputed material itself, but also of supporting evidence which itself attracts similar sensitivities.
- iii) Parliament did not intend disproportionate satellite litigation to arise from the use of closed procedures in FOIA cases.
- iv) Tribunals should take into account the Practice Note on Closed Material in Information Rights Cases (issued in May 2012). They should follow it or explain why they have decided not to do so.
- v) Throughout the proceedings, the Tribunal must keep under review whether information about closed material should be provided to an excluded party.

25. The closed bundle in this appeal contained the disputed information. There was nothing additional in the closed bundle and it was necessary for the Tribunal to see the disputed information in order to reach its decision.

26. The Tribunal has considered carefully and rigorously the Appellant's points and concerns already expressed in the notice of appeal and in other representations and submissions.

27. In the interests of transparency the Tribunal has not felt it necessary to set out its reasons for its decision in a closed or confidential annexe.

28. It intends the reasons which follow to be self-explanatory without referring to the detail of the information requested.

Conclusion and remedy

29. A striking feature of the Commissioner's Decision Notice occurs from Paragraphs 15/18 which states:

[15] The Commissioner considers that the way in which the request is worded clearly indicates that the complainant is seeking information which can be linked with a named individual. He considers that to comply with section 1 (1) (a) of FOIA (i.e. to either confirm or deny holding the information) would inevitably put into the public domain information about the existence or otherwise of the report (and appendices) *linked to the complainant, which would constitute the disclosure of information that would relate to the complainant* [emphasis added].

[16] The Commissioner considers that, where this sort of information is linked to an individual it will be that individual's "personal data". Therefore, the Commissioner considers that to confirm or deny whether the requested information is held would in itself constitute the disclosure of personal data.

[17] In considering whether section 40 (5) (a) should have been applied, the Commissioner has taken into account that FOIA is applicant blind and that any disclosure would be to the public at large. If the information were to be disclosed it would in principle be available to any member of the public. Confirmation or denial in the circumstances of this case would reveal to the public information which is not already in the public domain and which is not reasonably accessible to the general public *about the complainant* [emphasis added]. The Commissioner therefore considers that the exemption was correctly relied upon by WYP in this case.

[18] The Commissioner would remind applicants that any individual wishing to access their own personal data will still be able to pursue this right under the DPA. It is noted that WYP advised the complainant that he should consider making such a request.

30. In short, the Commissioner appears to have categorised the Appellant's information request as a subject access request that should more correctly be made under the provisions of the DPA.

31. The Tribunal does not agree with this characterisation of the Appellant's information request.

32. The Appellant's request was not for access to his personal data, but for an unredacted copy of "the report and appendices". There is nothing in the wording of the request which links the report to the requester or to any

other individual, thus presenting a difficulty for WYP to confirm or deny whether it is held without identifying an individual. In view of the formulation of the request, The Tribunal does not see how confirming or denying whether the unredacted report is held will, in itself, reveal personal information about the requester or any other person. Also, without going into the detail of the relevant report, anyone reading it would conclude that the focus and purpose of the report was to review the investigation undertaken by WYP's PSD. The report is not primarily about the Appellant.

33. In the context of the duty to confirm or deny, the Tribunal is not satisfied that the report constitutes personal data about the Appellant. In many senses he and his personal data are only incidental to the report.

34. For that reason, using section 40(5) to neither confirm nor deny whether the requested information is held is, to that limited extent, not warranted.

35. That does not necessarily mean that the Appellant will receive the information he is requesting because there may well be other exemptions which are fully justified in relation to disclosure of the redacted information.

36. However the Appellant is entitled to know the FOIA-basis on which the material that has been redacted is being withheld from him.

37. In addition, he maintains that the report has already been released to him under the provisions of FOIA, albeit redacted.

38. The Tribunal, on the balance of probabilities, is not satisfied that this is a correct characterisation of the situation.

39. There appears to have been a high degree of misunderstanding and miscommunication between Devon and Cornwall Police and WYP in

respect of the basis of and circumstances in which the redacted report was provided to the Appellant, to the extent that the Appellant's possession of the information that he has is more likely to have been obtained on a personal and confidential basis than as a result of the general release of the information to the public at large.

40. In any event, for the reasons explained above the Tribunal finds that it was impermissible for WYP to neither confirm nor deny (on the basis of section 40(5) FOIA) whether the requested information is held.

41. Our decision is unanimous.

42. There is no order as to costs.

Robin Callender Smith

Judge

24 April 2015