



ON APPEAL FROM:

The Information Commissioner's Decision Notice No:  
FS50554401

Dated: 13th. November, 2014

Appeal No. EA/2014/0297

Appellant: D. Egan ("DE")  
First Respondent: The Information Commissioner ("the ICO")  
Second Respondent: The Chief Constable of West Midlands Police  
("WMP")

Before  
David Farrer Q.C.  
Judge

and

Andrew Whetnall  
and  
Henry Fitzhugh  
Tribunal Members

Date of Decision: 8th. May, 2015

Date of promulgation 16/06/2015

Mr. Egan appeared in person.

WMP was represented by Mr. Carl Bird

The ICO did not appear but made written submissions.

Subject matter:

FOIA s. 40(2)

Whether disclosure of the requested information  
would breach any of the data protection principles.

Abbreviations :

FOIA - The Freedom of Information Act, 2000.

The DPA - The Data Protection Act, 1998

### DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal finds that disclosure of the requested information would breach the first data protection principle.

It therefore dismisses the appeal.

Dated this 8th. day of May, 2015

David Farrer Q.C.

Judge

[Signed on original]

## REASONS FOR DECISION

### The Request

1. On 4th. April, 2012, a police car was involved in an accident which resulted in the death of a member of the public. The police officer who was driving it was charged with causing death either by careless driving. In early 2015 he was found not guilty.
2. DE had a specific concern with accidents involving police vehicles and was contemplating standing for election as a police commissioner.
3. On 23rd. June, 2014 he made the following request for information, citing FOIA -  
*“ (as to the charge against the police driver) could you supply the date that the officer in question is to attend court for the hearing to take place.  
Could you confirm whether the officer is currently in service or suspended, in addition, if the officer is still on active duty, can you confirm if he/she is still driving police vehicles.”*
4. WMP responded out of time on 29th. July, 2014 confirming that it held relevant information but refusing disclosure in reliance on FOIA s.31 and s.40(2). It maintained that refusal following an internal review but invoked only s.40(2) as a material exemption. The DN did not consider s.31; nor do we.
5. DE complained to the ICO who upheld the withholding of the information in the DN. He concluded that the information requested was all sensitive personal data and that disclosure would be unfair, hence a breach of the first data protection principle.

## The appeal

6. DE appealed to the Tribunal. His grounds were very general and amounted to a claim that the refusal was unacceptable and that he wanted the date of the hearing so that he could attend. A response to WMP's response, dated 15th. February, 2015, added nothing material save perhaps the statement that DE had learnt the date of the hearing only on 15th. January, 2015 and his denial that the information was publicly available. Apparently, the name of the driver and the nature of the charge laid were published on the website of the Independent Police Complaints Commission ("the IPCC"). He repeated that WMP could have no reason to refuse his request for the hearing date since it must have been announced in open court. There was therefore nothing confidential about this information. The same did not, of course, apply to the other elements of the request.

7. For reasons that will become apparent, it is unnecessary to review the submissions of the ICO or WMP.

## The Law

8. FOIA s.40(1) provides that personal data of which the applicant for information is the data subject, is exempt information. This is because access is provided for in the DPA.

9. S.40(2) provides that information constituting personal data other than exempted by s.40(1), hence personal data of anybody other than the requester, is exempt if

*"(b) either the first or second condition below is satisfied"*

10. S.40(3)(a) sets out that part of the first condition relevant to this and almost every other case involving this exemption. So far as material it reads -

*". . .that the disclosure of the information to a member of the public other than under this Act would contravene*

*(i) any of the data protection principles,"*

Nothing in s.40(3)(a)(ii)s.40(3)(b) nor s.40(4), which sets out the second condition, is material to this appeal.

11. The data protection principles are set out in Schedule 1 Part 1 to the DPA. The first data principle is the first and generally, as here, the only port of call. It provides

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*“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.”*

12. The only condition in Schedule 1 which could, even arguably, apply to this request is condition 6(1) which requires that

*“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.”*

13. Schedule 3 specifies ten further conditions, some in broadly similar terms to those of Schedule 2. There is no counterpart to Condition 6(1). The application of Schedule 3 to the facts of this appeal will be dealt with summarily later in this decision.

14. The wording of the first data principle makes clear that processing/ disclosing information must satisfy the general requirements of fairness and lawfulness and one or more of the particular conditions laid down in one, or as the case may be,

both of Schedules 2 and 3, which are treated as non - negotiable elements of fairness.

### The potential issues

15.They are -

- (a) Is all or some of the the requested information personal data ?
- (b) If so, is all or some sensitive personal data ?
- (c) If so, would disclosure fulfil at least one Schedule 2 and one Schedule 3 condition ?
- (d) If so, would it be otherwise fair and lawful ?

### Our reasons

16. At the start of the hearing DE confirmed that all three elements of the request remained in issue, although the request as to the date of the court hearing had dominated exchanges.

17.It was accepted on all sides that, by the date of the request, the name of the officer in question had been publicised, evidently via the IPCC website announcement of the fact that he/she had been charged. "Personal data" is defined in s.1 of the DPA, as -

*" . . data which relate to a living individual who can be identified -*

*(i) from those data, or*

*(ii) from those data and other information which is in the possession of, or is likely to come into the possession of the data controller"*

Clearly, the officer could be identified from that information or that information and other data held by the data controller, WMP.

18. Information as to when an identifiable individual will appear in court to face a criminal charge is plainly his personal data, as much as the fact that he faces such a charge. So also are his/her professional status and restrictions on the range of duties he/she could perform pending the outcome of proceedings.

19. By virtue of DPA s.2(h), "Sensitive personal data" include data consisting of information as to -

*"any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings".*

So the requested information was undoubtedly sensitive personal data.

20. Accordingly, to succeed in his appeal, DE needed to show, on a balance of probabilities, that a Schedule 2 and a Schedule 3 condition would be satisfied, if the requested information were disclosed. He had made no attempt in his written submissions to comply with these requirements and came to the oral hearing quite unprepared to argue a case in support of his appeal.

21. The Tribunal therefore explained to DE the different elements of the case that he needed to present and adjourned for a short time to enable him to read the relevant provisions. He was specifically invited to look at Schedule 1 condition 6(1) to see whether he wished to rely on it and reminded that he would then need to consider Schedule 3. Upon the resumption of the hearing, DE stated that he wished to consider seeking legal advice as to the issues raised by the Tribunal. He was told that he could apply for an adjournment of the hearing to a future date, though that was not an indication that it would be granted. He duly applied and the Tribunal retired to consider his application.

22. It decided to refuse the application for these reasons.

(1) Whilst sympathetic to the problems faced by a layman confronted by the intricacies of s.40(2) linked to the provisions of the definitions in and Schedules 1 - 3 to the DPA, it must have been apparent from the DN and, more particularly, the two sets of submissions from WMP, served some time before the hearing, that there were difficult issues to be confronted and that a mere assertion that the DN was wrong would not suffice.

(2) The possible need for legal advice was therefore clear long before the hearing. It was not reasonable to delay the determination of the appeal at such a late stage.

(3) The Tribunal could not discern any arguable case that any of the conditions provided for in DPA Schedules 2 and/or 3 were satisfied.

23.DE then accepted that he could not clear the relevant hurdles and made no further submission. The Tribunal indicated that the appeal would be dismissed and that its reasons would follow in the usual way.

24.Where s.40(2) is invoked by a public authority, the proportionate and efficient approach for the Tribunal, or the ICO, may often be to consider at the outset whether a Schedule 2 and, if applicable, Schedule 3 condition can be fulfilled. If not, there is little value in general assessments of fairness involving the expectations and sensibilities of the data subject. It is, with respect, surprising that no reference to either Schedule appears in the DN which treats the sensitive character of the requested data simply as a factor affecting the expectations of the data subject.

25.Of the Schedule 2 conditions only 6(1) could possibly require consideration in this appeal. Its terms are set out at paragraph 11 above.

26.DE was concerned as to road traffic accidents involving police officers. Whether this amounted to a systematic study of such incidents was unclear but it is a legitimate interest for any member of the public. Whether provision of any part of the requested information was necessary for the purpose of such an interest is much more questionable.

27. Even if, which the Tribunal doubts, it was necessary for such a purpose, disclosure cannot possibly satisfy any Schedule 3 condition. Conditions 2 - 7(1) are much more restrictive than Condition 6(1) of Schedule 2, of which there is no counterpart. Where necessity is a term of the condition, it relates to the protection of vital interests of the data subject, the performance of rights and discharge of obligations and the administration of essential public functions.

28. That being so, this appeal was bound to fail.

29. We therefore dismiss it

30. Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge

8th. May, 2015