



Appeal number: EA/2016/ 0264

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

GREGORY GORDON

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

**TRIBUNAL: JUDGE ALISON MCKENNA
Ms ROSALIND TATAM
Mr HENRY FITZHUGH**

Determined on the papers, the Tribunal sitting in Chambers on 9 February 2017

DECISION

1. The appeal is allowed.
2. The Crown Prosecution Service is to take the following steps: disclose to the Appellant the requested information in the revised redacted form we have identified in the confidential annexe to this Decision. The redactions we have directed are those in respect of which we find section 40 (2) FOIA to be engaged.

REASONS

Background to Appeal

3. The Appellant made a request to the Crown Prosecution Service on 24 August 2015, asking for a copy of a letter sent by David Cameron MP to the Attorney General about one of Mr Cameron's constituents. The letter related to the investigation of an alleged criminal offence.
4. The Appellant also asked for a copy of the Attorney General's reply, or a draft thereof if none was sent.
5. The CPS originally refused to confirm or deny whether it held the information requested in reliance upon s. 40 (5) FOIA. Subsequently, it agreed to release the requested information after it had been redacted in reliance upon s. 40 (2) FOIA, as the correspondence contained personal data. The letter from Mr Cameron was disclosed with nearly all of it redacted. The letter from the Attorney General was also disclosed, redacted in part.
6. The Respondent issued Decision Notice FS50605198 on 1 November 2016, upholding the CPS's decision. The Decision Notice concluded that (i) the withheld information constituted personal data; (ii) the withheld information constituted sensitive personal data because it relates to the alleged commission of a criminal offence; (iii) disclosure of the requested information would be unfair and breach the first data protection principle.

Appeal to the Tribunal

7. The Appellant's Notice of Appeal dated 4 November 2016 seeks the release of information which has been redacted in the version of Mr Cameron's letter released by the CPS. He maintains that he is not seeking the disclosure of sensitive personal information but that there is a public interest in knowing whether Mr Cameron sought to question a pending prosecution. The grounds of appeal do not challenge the redactions contained in the disclosed version of the Attorney General's reply.
8. The Respondent's Response dated 5 December 2016 maintained the analysis as set out in the Decision Notice. In responding to the Appellant's grounds of appeal, it is submitted that it is not possible to redact the letter so as to remove all third party

personal data because to do so would render it meaningless. It is further submitted that the conditions in schedule 3 DPA for the processing of sensitive personal data are not met.

9. The Appellant's Reply dated 6 December 2016 takes issue with the Respondent's Response in not accepting that the entirety of Mr Cameron's letter constitutes sensitive personal data.

10. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered an agreed open bundle of evidence comprising 63 pages, including submissions made by both parties, for which we were grateful. The Tribunal also had before it a closed bundle comprising the withheld information.

The Law

11. The duty of a public authority to disclose requested information is set out in s.1 (1) of FOIA. The exemptions to this duty are referred to in section 2 (2) as follows:

"In respect of any information which is exempt information by virtue of any provision of Part II, section 1 (1) (b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

12. The category of exemption relied upon under FOIA in this case is s. 40 (2) FOIA. Where engaged, this provides an absolute exemption falling under s. 2 (2) (a) FOIA so that no public interest balancing exercise is required.

13. S. 40 (2) FOIA provides that information is exempt from disclosure if it is the personal data of a third party and that its disclosure would breach one of the data protection principles set out in schedule 1 to the Data Protection Act 1998 ("DPA"). The first data protection principle is that it must be fair and lawful to process (that is, disclose) the personal data.

14. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

"If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

15. We note that the burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

Conclusion

16. It is not disputed by the Appellant that the sensitive personal data of the constituent concerned should be redacted prior to disclosure of the letter from Mr Cameron. He seeks the disclosure of information which does not constitute sensitive personal data.

17. We are satisfied that there are parts of Mr Cameron’s letter which constitute sensitive personal data and which it would be unfair and in breach of the first data protection principle to disclose. However, having considered the un-redacted version of the letter contained in our closed bundle, we conclude that the redactions made by the CPS also encompass matters which do not constitute sensitive personal data. We find that it would be possible to disclose them without identifying the data subject. We disagree with the Respondent’s assessment that it would not be possible to redact sensitive personal data but disclose the remainder.

18. We have set out in a confidential annexe to this Decision a revised set of redactions for Mr Cameron’s letter, in relation to which we are satisfied that the redacted information constitutes sensitive personal data within the meaning given to that term by s. 40 (2) FOIA. The information we have redacted would identify the constituent concerned in relation to the alleged offence and we find it would be unfair and in breach of the DPA to do so. However, the parts of the letter which we have not directed to be redacted would not in our opinion identify the constituent concerned and, accordingly, we find that they do not constitute personal data or sensitive personal data. We conclude that the Decision Notice is erroneous in having permitted wide-ranging redactions in relation to which the exemption claimed is not engaged.

19. This appeal is accordingly allowed and we now direct the CPS to take steps to disclose the remaining parts of the letter in accordance with the confidential annexe to this Decision.

ALISON MCKENNA

DATE: 16 February 2017

PRINCIPAL JUDGE

Promulgated: 16 February 2017