First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Appeal Reference: EA/2017/0076

Heard at The Law Courts, Barnsley.

On 28th. September, 2017

Before

David Farrer Q.C.

Judge

and

Jean Nelson and Henry Fitzhugh

Tribunal Members

Between

Neil Wilby

Appellant

and

The Information Commissioner ("The ICO")

First Respondent

and

Police and Crime Commissioner for North Yorkshire

Second Respondent

Representation: Mr. Wilby appeared in person

Elisabeth Kelsey appeared for the Information Commissioner.

Alex Ustych appeared for the Police and Crime Commissioner for North Yorkshire ("PCCNY")

The Tribunal allows this appeal in so far as it relates to the First Request (see § 3) to the extent indicated below. PCCNY is required to provide the requested information as to the total sum invoiced by Weightman's to PCCNY in respect of the county court claim identified in that request within 28 days of the publication of this decision. If that amount can be disclosed by provision of a single document, PCCNY is not required to disclose supporting invoices.

PCCNY is not required to disclose any information in response to requests 2, 3 or 4.

Decision and Reasons

1. Mr. Wilby brought proceedings in the County Court against PCCNY and obtained judgment against her. Neither the nature of those proceedings nor the relief claimed and obtained are relevant to the determination of this appeal.

2. He evidently believed that PCCNY had incurred unreasonably high costs in the conduct of her defence, which was funded by the taxpayer. Whether that is true is not a matter for the Tribunal., though the question, he submits, is a matter of legitimate public interest.

3. On 8th. August, 2016, he submitted to PCCNY the following requests for information –

"(1) *Total billed by Weightmans* (a firm of solicitors) *to* (PCCNY) *for all work done by Weightmans up to and including close of business on 8th. August, 2016 . . . in connection with county court claim number* (quoted). *Listed as Neil Wilby v* (PCCNY*). Invoices should be disclosed where available.*

(2) *Name of all* (PCCNY) *officer(s) or solicitor(s) involved in instructing Weightmans.*

(3) *Rationale for instructing the senior partner of a Leeds – based Top 45 law firm to deal with a low value money claim. Copies of all documents supporting that rationale.*

(4) *Budget allocated to defending the claim. Copies of all documents that refer to, and justify, that sum".*

4. PCCNY responded on 5th. September, 2016, asserting that she could neither confirm nor deny ("NCND") holding any information within the scope of these requests since either confirmation or denial would disclose that an individual had or had not made such a claim, which

would amount to disclosure of his/her personal data, hence to a breach of the first data protection principle. That being so, the duty to confirm or deny did not arise (FOIA s.40(5)(b)(i)). She maintained that response following an internal review.

5. On 23rd. October, 2016, Mr. Wilby complained to the ICO. Most of that complaint consisted of criticism of a solicitor acting for PCCNY, which was irrelevant to the ICO's task of determining whether PCCNY had acted correctly in responding as she did.

6. Soon after the ICO began her investigation PCCNY indicated that she now relied, not on s.40(5)(b)(i), but on s.40(5)(a) as justifying her NCND response. Plainly, her initial reliance on s.40(5)(b)(i) had been misconceived since the personal data, which, she claimed, would be disclosed, were those of the applicant himself, not of a third party such as to involve a breach of any data protection principle. S.40(5)(a) provides that the duty to confirm or deny does not arise where the requested information is the personal data of the applicant, which is exempt information by virtue of s.40(1). That exemption was enacted because applications for the applicant's personal data were already provided for by s.7 of the Data Protection Act, 1998 ("the DPA"). Reliance on s.40(5)(a) therefore required the ICO to decide whether any or all of the information requested was Mr. Wilby's personal data.

7. By her Decision Notice ("the DN") she ruled that all the requested information would, if it existed, be Mr. Wilby's personal data because it would be about or connected to him and a court case listed under his name. She therefore upheld the PCCNY's NCND response, albeit by reference to a different subsection of s.40 from that initially invoked.

8. If all that information was indeed Mr. Wilby's personal data, then PCCNY's response was forensically correct. Where, however, as here, all concerned are perfectly well aware that some or all of the requested information exists because there was a county court case as specified in the first request, an NCND response, which is, of course, permitted but not required by s.40(5), will rarely be helpful. It is highly desirable that the request be treated without more as a subject access request under DPA s.7(1)(c) and that the information said to be the applicant's personal data be provided to him without more ado. A tribunal hearing at which the parties feel obliged to treat fact as hypothesis is faintly absurd and plainly inconsistent with the overriding objective. Of course, it is essential that the public authority first check carefully that the material information is indeed the applicant's personal data.

9. Mr. Wilby appealed against the DN finding. His grounds of appeal are diffuse and cover a number of matters which are not the concern of the ICO or the Tribunal. In his material grounds he argued that none of the information requested was his personal data, that his

action against PCCNY was a matter of public record and that, whilst he held the information as to the quantum of Weightmans' charges, he wanted to obtain it under FOIA so that it was available to the public generally, since the use of taxpayers' money is a question of substantial public interest.

10. The ICO submitted that the requested information at least included Mr. Wilby's personal data in the form of his name and the court claim number. She acknowledged that the amount spent by PCCNY in defending the claim, supporting documents and other information concerning her decision making might not "relate to" Mr. Wilby and invited further submissions from PCCNY.

11. PCCNY, having been made a party to this appeal, argued that all the requested information was Mr. Wilby's personal data, hence s.40(5)(a) justified the NCND response to all the requests. She relied on observations of Lewison L.J. in *Ittadieh v Cheyne Gardens Ltd. and Others [2017] EWCA Civ 121* at §§62 - 66 as to the interpretation of "relates to".

12. Furthermore, she submitted that, if or in so far as the requests were not for Mr. Wilby's personal data, alternative exemptions were engaged, namely, s.32(1)(a) (documents filed with a court), s.40(2) (personal data of third parties) and s.42 (documents enjoying legal professional privilege). Requests 1 and 4 engaged all three exemptions, she claimed. Requests 2 and 3 engaged ss.40(2) and 42.

As to s.42, a qualified exemption, the public interest in disclosure was outweighed by the interest in maintaining confidentiality.

13. In his Reply and a further skeleton argument Mr. Wilby urged the Tribunal to exclude from its consideration of the appeal PCCNY's belated reliance on such further exemptions. He further argued, as to s.32(1), that the Judgment of the Grand Chamber of ECt,HR in *Magyar Helsinki Bizottsag v Hungary (Application 18030/11)* delivered on 8th. November, 2016, conferred on a requester such as himself a right of access to information held by a public body by virtue of Article 10(1) of the European Convention of Human Rights ("the ECHR"), which overrode the exemption enacted in FOIA s.32(1).

14. Oral submissions from all three parties amplified these submissions to some extent, specifically as to the "personal data" issue raised under s.40(5)(a).

The reasons for the tribunal's decision

(i) Were any or all of the requests requests for Mr.Wilby's personal data

15. Conscious of the guidance provided by the three Court of Appeal decisions in *Durant v FSA [2003] EWCA Civ 1746, Edem v The Information Commissioner [2014} EWCA Civ 92 and Ittadieh* (supra), the Tribunal is nevertheless entitled to stand back and ask

itself, as to the first request (which is the nub of the case), whether the amount spent by a public authority in defending a county court case brought by Mr. Wilby looks like Mr. Wilby's personal data. It may tell us something about the authority or those who take financial decisions on its behalf but does it tell us anything about him? Were these the sort of data that Directive EC/95/46 (which was enacted through the DPA) was designed to protect in the interests of personal privacy? We consider that the answer to all three questions is "No".

16. Assuming that any record of PCCNY's total expenditure on Weightmans' invoices will bear the name of the case, hence identify Mr. Wilby, does it furthermore "relate to" him? These are separate and independent elements in the definition of personal data in the Directive and s.1(1) of the DPA –

"Personal data" means data relating 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 and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

As Lewison L.J. observed in *Ittadieh*, when considering *Durant* at §66 -

"(Durant's) *error was the submission that the contents of any document in which he was mentioned were, without more, his personal data".*

17. Of course, the disclosure of such information reveals that Mr. Wilby, who describes himself as an investigative journalist, was involved in a county court action against PCCNY. Here, the "two notions" set out by Auld L.J. at §28 of *Durant* and endorsed by Lewison L.J. at §64 of *Ittadieh* merit citation.[1]

"Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the putative data subject's involvement in a matter or event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one

[1] Moses L.J. did not cast doubt on these "notions" in *Edem;* he simply ruled (§§17 – 20) that the FTT had wrongly sought to apply them to a case in which the question whether data related to an individual did not arise.

of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity."

The information referred to in request 1 accords with neither "notion". Disclosure of the requested information would in no way affect Mr. Wilby's privacy.

18. At §21 of *Edem* Moses L.J. also quoted with approval the ICO's Data Protection Technical Guidance:

It is important to remember that it is not always necessary to consider "biographical significance" to determine whether data is personal data. In many cases data may be personal data simply because its content is such that it is "obviously about" an individual. Alternatively, data may be personal data because it is obviously "linked to" an individual because it is about his activities and is processed for the purpose of determining or influencing the way in which that person is treated. You need to consider "biographical significance" only where information is not "obviously about" an individual or clearly "linked to" him.".

Here, the requested data are neither obviously about Mr. Wilby nor linked to him in the sense illustrated in the Guidance. The identity of the claimant was immaterial; the information related to the quantum of expenditure.

19 The same goes for requests 2, 3 and 4.

20 The Tribunal was able to indicate its decision on this issue in the course of the hearing, to abandon the subjunctive mood for the indicative and to move on to consider the belatedly introduced "alternative" exemptions. It was clearly right to permit reliance on those exemptions, when the Respondents' cases on s.40(5)(a) failed. Mr. Wilby had adequate notice of such reliance. Moreover, the failure of an NCND response to a request requires the public authority to perform its duty of stating whether it holds the information, under s.1(1), not to provide information under s.1(2).

(ii) Can PCCNY rely on .32(1) in respect of any or all requests?

21. S.32(1), so far as material to this appeal, reads -

"Information held by a public authority is exempt information if it is held only by virtue of being contained in-
(a)any document filed with or otherwise placed in the custody of a court for the purposes of proceedings in a particular cause or matter.

22. A schedule of PCCNY's costs of the county court claim must have been filed with the court. It is difficult to see why any record containing the information covered by requests 2, 3 or 4 would have been filed.

23. However, as PCCNY conceded at the hearing, it is inconceivable that a record of the total costs incurred, held by PCCNY, was held only by virtue of the filing of that schedule. PCCNY plainly required such information for its own accounting purposes and to enable it to discharge its liabilities, quite independently of its obligations to the court. That being so, s.32(1) and s.32(3) (the right to NCND the request) are not engaged. Therefore questions as to the relationship between ECHR Article 10 and s.32 do not arise for our determination, although we note that UK courts and tribunals remain bound by the Supreme Court decision in *Kennedy v Charity Commission [2014] UKSC 20* as to the impact of ECHR Art. 10 on s.32.

(iii) Can PCCNY rely on s.40(2) in respect of any or all requests?

24. The first request involves no third party personal data and it is hard to see why s.40(2) was relied on in respect of it.

25. S.40(2) is clearly relevant to the second request, for the names of all officers and solicitors who were involved in instructing Weightmans. The names of such individuals are undoubtedly their personal data (see *Edem* §20). They are therefore exempt information if their disclosure would contravene any of the data protection principles (s.40(3)(a)(i)).

The first data protection principle is that processing of personal data must be fair and lawful (DPA Schedule 1 Part 1 §1) and a requisite element of fairness is the satisfaction of one or more of the conditions in Schedule 2 to the DPA. (Schedule 1 Part 1 §1(a)). The only condition requiring consideration is condition 6(1) which requires that disclosure is necessary for the purposes of a legitimate interest pursued by Mr. Wilby.

26. The request does not discriminate between senior staff taking a significant role in this litigation and the most junior employee who typed a letter to the external solicitors, a person who would have no expectation whatever of being publicly identified as part of a team defending Mr. Wilby's claim. On that ground alone disclosure of names would be unfair. As to condition 6(1), Mr. Wilby's legitimate interest is publication of the sum which PCCNY was prepared to spend in resisting his claim. It is hard to see that any publication of the names of staff is necessary for its fulfilment and he made no sustained attempt to demonstrate such a necessity.

27. The s.40(2) exemption clearly justifies refusal of the second request.

28. If PCCNY holds information responsive to requests 3 and 4 which identifies individual staff members, the same applies to disclosure of their names.

29. The remaining issues will be dealt with quite briefly because request 1 is the heart of this matter, Mr. Wilby's concerns for his other requests

were clearly ancillary and any public interest in disclosure in respect of requests 3 and 4 was much weaker.

(iv)Can PCCNY rely on s.42 in respect of any or all requests?

30 The last exemption requiring consideration is s.42, which provides a qualified exemption for information subject to legal professional privilege ("LPP"). Since it is a qualified exemption, the Tribunal is required to consider the balance of public interests, if it finds that the exemption is engaged. It is invoked in respect of each of the four requests.

31 LPP fulfils the fundamental purpose of protecting, in the interests of the client, the confidentiality of communications between solicitor and client, where legal advice is sought and tendered and, where litigation is underway or contemplated, between solicitor and client or solicitor and third party where the sole or dominant purpose of the communication is its use in the litigation.

32 The disclosure of the quantum of costs (request 1) cannot attract such privilege.

33 The ancillary request for disclosure of supporting invoices may raise different issues. PCCNY relied on two nineteenth century authorities, *Chant v Brown (1852) 9 Hare 790* and *Turton v Barber (1873-74) L.R. 17 Eq. 329*, still cited in the White Book as establishing that a solicitor's bill of

costs is a privileged document. The judgments are terse and scarcely engage with the principles involved. It appears that a bill of costs at the material times was "*in truth,* (the attorney's) *history of the transactions in which he has been concerned".* That might well involve privileged information as to how the case had been prepared and what instructions the client had given. Whether a solicitor's invoices today contain similarly privileged material may be a question of fact requiring scrutiny of the particular documents concerned. The examples of Weightmans invoices produced by Mr. Wilby, following a separate application under The Local Audit and Accountability Act, 2014, relate to services provided between specified dates with a breakdown of charges by reference to the status of the person carrying out the work and the hours spent on such work. We believe that this is a standard pattern of invoicing for a solicitor's services nowadays. Such limited personal data as appear on the invoice were redacted before service on Mr. Wilby.

34 We are doubtful whether invoices in this form are privileged documents because it would be very difficult, if not impossible, to deduce from them how this litigation was being conducted, let alone what legal or presentational advice was being given. Nevertheless, we have probably not seen all the relevant invoices. More importantly, Mr. Wilby acknowledged that, if the total bill was publicly available information, the individual invoices added little or nothing. We agree. For largely pragmatic reasons we do not require their disclosure. We have included the above observations on bills of costs and LPP because it should not be supposed that LPP automatically attaches to them.

35 In form, the third request is not a request for information under s.1 of FOIA. That provides a short justification for a refusal to answer it. However, it may be interpreted as a request for recorded information as to negotiations, if any, with Weightmans which led to PCCNY instructing them to act in the material litigation. The Tribunal has not seen any such information. It may be that they were instructed at the direction of PCCNY's insurers. If, however, such information exists, it is probable that it is privileged, since it will include forecasts of identified work to be performed in the course of litigation. As to the public interest, the quantum of public funds to be spent is significant; the choice of solicitor much less so. The public interest in maintaining privilege prevails.

36 Similar considerations apply to the setting of a budget, which would be substantially dependent on solicitors' advice. It is, therefore, likely that any such material is privileged. Again, there is very little public interest in knowing what budget was set as compared with how much was eventually spent. A refusal of request 4 was justified.

37 For these reasons we order the disclosure of any document recording the total sum invoiced by Weightman's. One document suffices; there is no reason to search for others that simply duplicate the same information.

38 No further disclosure is required.

39 This is a unanimous decision.

David Farrer Q.C.,

Tribunal Judge,

6th. October, 2017