



Case Reference: EA/2021/0376

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: on the papers
Heard on: 6 June 2022
Decision given on: 22 June 2022

Before

TRIBUNAL JUDGE BUCKLEY

TRIBUNAL MEMBER MARION SAUNDERS

TRIBUNAL MEMBER NAOMI MATTHEWS

Between

GABRIEL KANTER-WEBBER

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is Dismissed.

REASONS

Introduction

1. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
2. This is an appeal against the Commissioner's decision notice IC-86525-W2N9 of 16 December 2021 which held that the Chief Constable of Cambridgeshire Constabulary ('the Police') was entitled to rely on s 40(2) of the Freedom of Information Act 2000 (FOIA). The Commissioner concluded that the Police were in breach of s 17 FOIA.
3. The Commissioner did not require the Police to take any steps.

Factual background to the appeal

4. The appeal relates to a request for an audio recording of police disciplinary proceedings held in public in November 2020.

Requests, decision notice and appeal

The request

5. This appeal concerns the following request made on 2 December 2020:

Hi, please can you provide a PDF of the outcome of this hearing

<https://cambs.police.uk/assets/PDFs/About/Misconduct/AboutUs-Misconduct-PC2683.pdf> and also of the transcript (if no transcript is available then the audio recording).

The response

6. The Police provided a substantive response on 6 January 2021 stating that they did not hold the requested information except the audio recording which they withheld under s 40 (personal data).
7. The Police carried out an internal review and overturned the original decision. They provided a link to the PDF of the outcome of the hearing. They stated that there was no transcript. The Police stated that the audio recording was exempt under s 40.

The Decision Notice

8. In a decision notice dated 16 December 2021 the Commissioner decided that the Police were entitled to withhold the information under s 40(2).
9. The Commissioner was satisfied that the information relates to and identifies the individuals concerned and fell within the definition of personal data in s 3(2) of the Data Protection Act 2018 ('DPA').

10. The Commissioner concluded that the appellant's legitimate interest was the transparency of police misconduct proceedings. She was satisfied that there were no less intrusive means of achieving the legitimate aims than to disclose the requested information.
11. The Commissioner concluded that there was insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. Accordingly she concluded that there was no basis for processing under Article 6 of the UK GDPR and disclosure would not be lawful. The Police were entitled to withhold the information under s 40(2) FOIA.

Notice of Appeal

12. The two grounds of appeal are:
 - 12.1. Not all of the recording is personal data.
 - 12.2. The Commissioner was wrong to conclude that there is a reasonable expectation of privacy in relation to proceedings in open court.

The ICO's response

Personal data

13. Having listened to the audio recording the Commissioner is satisfied that all of the recording would constitute the data subject's personal data. The recording relates to a disciplinary hearing which names the data subjects. As such the entirety of the information on the audio recording identifies and relates to the data subjects who are the subject of the hearing. Accordingly, the audio recording could not be redacted.

Expectation of privacy in open court

14. **Khuja v Times Newspapers** [2017] UKSC 49 concerned the press reporting of information in real time relating to ongoing court proceedings. If the press had wished to report on the disciplinary hearing, the data subjects would not have had, at that time, a reasonable expectation of privacy in relation to what had been said in open court. This is to be contrasted with a FOIA request some time after for information which had been heard in open court. The question is then to what extent is the information realistically accessible to the public at the time of the response to the request.
15. The Commissioner maintains that if the information is not in the public domain at the time of the response to the request the data subjects referred to in the audio recording would have a reasonable expectation that the recording would not be disclosed to the public as a whole at that time in response to a FOIA request. The Commissioner concluded on the facts of this particular case the audio recording was not realistically accessible to a member of the public at the time of the response to the request and therefore not in the public domain at that time.

The appellant's reply

16. The Commissioner was wrong to distinguish Khuja. It was not confined to contemporaneous reporting. The Commissioner was wrong to apply a test of whether the information was realistically accessible to the public at the time of the response to the request. The misconduct proceedings in this case were widely reported.
17. It is untenable to argue that all of the audio recording constitutes personal data.

The appellant's final submissions

18. The integrity of the Commissioner's investigation is called into question because he had not listened to the audio recording.
19. The background of the Police (Conduct) Regulations 2020 militate against their being any expectations of privacy on the part of participants. The disputed information does not engage the factors in favour of a private hearing. Every member of public who gave evidence at this hearing had an opportunity to request a private hearing and an opportunity to back out.

Evidence

20. We read and took account of an open bundle. We also listened to the closed recording of the disciplinary hearing. This was the disputed information and it has to be closed, otherwise the purpose of the proceedings would be defeated.

Legal framework

Personal data

21. The relevant parts of s 40 of FOIA provide:
 - (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 does not fall within subsection (1), and
 - (b) either the first, second or the third condition below is satisfied.
 - (3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act -
 - (a) would contravene any of the data protection principles, or..
22. Personal data is defined in s 3 of the Data Protection Act 2018 (DPA):

(2) 'Personal data' means any information relating to an identified or identifiable living individual (subject to subsection (14)(c)).

(3) 'Identifiable living individual' means a living individual who can be identified, directly or indirectly, in particular by reference to –

(a) an identifier such as a name, an identification number, location data or an online identifier, or

(b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

23. This is in line with the definitions in the General Data Protection Regulation (EU) 2016/679. Recital 26 to the Regulation is relevant, because it refers to identifiability and to the means that should be taken into account:

(26) The principles of data protection should apply to any information concerning an identified or identifiable natural person. Personal data which have undergone pseudonymisation, which could be attributed to a natural person by the use of additional information should be considered to be information on an identifiable natural person. To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly. To ascertain whether means are reasonably likely to be used to identify the natural person, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments. The principles of data protection should therefore not apply to anonymous information, namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable. This Regulation does not therefore concern the processing of such anonymous information, including for statistical or research purposes.

24. The definition of "personal data" consists of two limbs:

- i) Whether the data in question "relate to" a living individual and
- ii) Whether the individual is identified or identifiable, directly or indirectly, from those data.

25. The tribunal is assisted in identifying 'personal data' by the cases of **Ittadieh v Cheyne Gardens Ltd** [2017] EWCA Civ 121; **Durant v FSA** [2003] EWCA Civ 1746 and **Edem v Information Commissioner** [2014] EWCA Civ 92. Although these relate to the previous iteration of the DPA, we conclude the following principles are still of assistance.

26. In **Durant**, Auld LJ, giving the leading judgment said at [28]:

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 recording of the putative data subject's involvement in a matter or an 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 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.

27. In **Edem** Moses LJ held that it was not necessary to apply the notions of biographical significance where the information was plainly concerned with or obviously about the individual, approving the following statement in the Information Commissioner's 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 clearly '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.

28. The High Court in **R (Kelway) v The Upper Tribunal (Administrative Appeals Chamber) & Northumbria Police** [2013] EWHC 2575 held, whilst acknowledging the Durant test, that a Court should also consider:

(2) Does the data "relate" to an individual in the sense that it is "about" that individual because of its:

- (i) "Content" in referring to the identity, characteristics or behaviour of the individual?
 - (ii) "Purpose" in being used to determine or influence the way in which the individual is treated or evaluated?
 - (iii) "Result" in being likely to have an impact on the individual's rights and interests, taking into account all the circumstances surrounding the precise case (the WPO test)?
- (3) Are any of the 8 questions provided by the TGN are applicable?

These questions are as follows:

- (i) Can a living individual be identified from the data or from the data and other information in the possession of, or likely to come into the possession of, the data controller?
- (ii) Does the data 'relate to' the identifiable living individual, whether in personal or family life, or business or profession?
- (iii) Is the data 'obviously about' a particular individual?
- (iv) Is the data 'linked to' an individual so that it provides particular information about that individual?
- (v) Is the data used, or is it to be used, to inform or influence actions or decisions affecting an identifiable individual?
- (vi) Does the data have any biographical significance in relation to the individual?
- (vii) Does the data focus or concentrate on the individual as its central theme rather than on some other person, or some object, transaction or event?
- (viii) Does the data impact or have potential impact on an individual, whether in a personal or family or business or professional capacity (the TGN test)?

(4) Does the data "relate" to the individual including whether it includes an expression of opinion about the individual and/or an indication of the intention of the data controller or any other person in respect of that individual. (the DPA section 1(1) test)?

29. The data protection principles are set out Article 5(1) of the GDPR and s 34(1) DPA. Article 5(1)(a) GDPR provides: that personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject. Article 6(1) GDPR provides that processing shall be lawful only if and to the extent that at least one of the lawful bases for processing listed in the Article applies.

30. The only potentially relevant basis here is article 6(1)(f):

Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which requires protection of personal data, in particular where the data subject is a child.

31. The case law on article 6(1)(f)'s predecessor established that it required three questions to be answered, which we consider are still appropriate if reworded as follows

1. Is the data controller or a third party pursuing a legitimate interest or interests?
2. Is the processing involved necessary for the purposes of those interests?
3. Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?

32. Lady Hale said the following in *South Lanarkshire Council v Scottish Information Commissioner* [2013] 1 WLR 2421 about article 6(f)'s slightly differently worded predecessor:

27. ... It is well established in community law that, at least in the context of justification rather than derogation, 'necessary' means 'reasonably' rather than absolutely or strictly necessary The proposition advanced by Advocate General Póitares Maduro in *Huber* is uncontroversial: necessity is well established in community law as part of the proportionality test. A measure which interferes with a right protected by community law must be the least restrictive for the achievement of a legitimate aim. Indeed, in ordinary language we would understand that a measure would not be necessary if the legitimate aim could be achieved by something less. ...

33. S 40(3A) is an absolute exemption and therefore the separate public interest balancing test under FOIA does not apply.

The role of the tribunal

34. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she

should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

Issues

35. The issues for the tribunal to determine are:

- 35.1. Does the information relate to an identified or identifiable living individual?
- 35.2. Is the data controller or a third party pursuing a legitimate interest or interests?
- 35.3. Is the processing involved necessary for the purposes of those interests?
- 35.4. Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?

Discussion and conclusions

Integrity of the Commissioner's investigation

36. As this is a full merits review, the tribunal looks at the matter afresh. Accordingly we do not need to consider the issue raised by the appellant about whether the Commissioner reached a decision without listening to the audio recording. We have listened to it.

Personal data

37. The question for us to determine is whether the audio recording of the disciplinary hearing is the personal data of an identifiable living individual.

38. We have determined that the individual is identifiable, even if it were possible to 'redact' his name. The proceedings were widely reported in the press at the time and, in particular because of the facts of the case, it would be possible for a motivated individual to identify the individual even if his name were redacted.

39. The disciplinary proceedings are 'obviously about' the individual. That individual is the focus of the disciplinary proceedings. The information is biographical in a significant sense. It is about his activities. The entire proceedings took place in order to determine the way which that individual should be treated. The result of those proceedings would affect the individual's rights and interests. The proceedings have an impact on him in both a personal and professional capacity.

40. In our view the audio recording of these disciplinary proceedings as a whole clearly falls within the definition of personal data of the individual who is the subject of those disciplinary proceedings.

41. The appellant, in effect, urges us to consider the content of the recordings 'line by line' and consider whether all of it constitutes personal data, on the basis that it is

clear from the press reporting of the proceedings that some of the matters discussed, taken in isolation, are not the personal data of the individual concerned.

42. We do not accept that this is the appropriate approach. Our conclusions, set out above, relate to the entire disciplinary proceedings. It may be the case that we could identify a paragraph or a sentence that did not, considered in isolation, look like that individual's personal data. It is not right to consider the information in isolation. Looked at in context and in the light of the rest of the disciplinary hearing, we find that information in the course of the proceedings which does not, at first glance, look like personal information, is the individual's personal data for the reasons set out in para 38 above.

Legitimate interest

43. We accept that the appellant is pursuing a legitimate interest, namely transparency in police disciplinary proceedings and the principle of open justice.

Reasonable necessity

44. We have considered whether the disclosure of the requested information is reasonably necessary for the purposes of the identified legitimate interests. Disclosure must be more than desirable, but less than indispensable or an absolute necessity. Disclosure must be the least restrictive means of achieving the legitimate aim in question, because it would not be necessary if it could be achieved by anything less. We must consider whether the legitimate aim could be achieved by means that interfere less with the privacy of the data subjects.

45. We recognise that the Commissioner accepted that disclosure was necessary for the purposes of the legitimate interests. The tribunal carries out a full merits review, and we find that disclosure of the audio recording under FOIA was not reasonably necessary for the purposes of open justice and transparency in police disciplinary proceedings.

46. The proceedings were held in public. Any member of the public or journalist could have attended the hearing at the time and heard every word which is on the audio recording. If it was not convenient to attend the hearing, a member of the public could have read one of the numerous press reports of the hearing. The outcome of the hearing was published on the Police website. We find that the legitimate aim of transparency and open justice is achieved by these means. It is not necessary, for those purposes, to also disclose the entire audio recording to the world via FOIA.

47. On this basis, we agree with the Commissioners conclusion that the Police were entitled to rely on s 40(2) to withhold the audio recording.

48. Much of the appellant's arguments related to the question of whether or not the individual concerned had a legitimate expectation of privacy. The question of whether or not the individual had a legitimate expectation of privacy is not relevant

at the stage of considering whether or not disclosure is reasonably necessary for the purposes of the legitimate interests. We do not therefore need to decide that question.

49. Upper Tribunal Judge Jacobs explained this point in **Kol v Innformation Commissioner and Reigate and Banstead Borough Council** [2022]UKUT 74 (AAC), where the first tier tribunal and the Commissioner had, like this tribunal has, decided that disclosure was not necessary for the purpose of the legitimate interests:

The starting point for data protection law is this: a person's data is protected from disclosure except in accordance with the legislation. There is no precondition that it is protected if, and only if, disclosure would have some particular effect on the data subject.... To reduce it to its simplest: personal data is protected just because it is personal data. That is what the first preamble to GDPR says. Just to be clear, I am not saying that the effect of disclosure on the data subject is irrelevant. It is relevant, but only if it is necessary to resolve a conflict between the interests of the person who requested the information and the person to whom it relates. In this case, the Commissioner and the tribunal did not reach that stage.

50. We also have not reached the stage where it is necessary to resolve a conflict between the interests of the person who requested the information and the person to whom it relates. Accordingly, we do not need to consider whether or not the data subjects had a reasonable expectation of privacy.
51. Having concluded that it is not reasonably necessary to disclose the requested information it is not necessary for us to consider whether the legitimate interests are overridden by the interests of the data subjects. We find that the Police were entitled to rely on the exemption in s 40(2) FOIA.

Signed Sophie Buckley

Date: 21 June 2022

Judge of the First-tier Tribunal