



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0048
Information Commissioner's Ref: FS50150598

Heard at Procession House, London, EC4
On 3 March 2009 on the papers

Decision Promulgated
1 June 2009

BEFORE

CHAIRMAN

ROBIN CALLENDER SMITH

and

LAY MEMBERS

JOHN RANDALL

DAVE SIVERS

Between

ROBIN MAKIN

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

MINISTRY OF JUSTICE

Additional Party

Subject matter:

Personal data s.40

Cases:

Bowbrick v Nottingham City Council (EA/2005/0006); Corporate Office of the House of Commons v Information Commissioner & others (EA/2007/0060; MOD v Information Commissioner (EA/2006/0027) and DWP v Information Commissioner (EA/2006/0040).

Representation:

For the Appellant: Robin Makin, Solicitor-Advocate (All Higher Courts) instructed by E. Rex Makin & Co, Solicitors

For the Respondent: Mr. Mark Thorogood, Solicitor, Information Commissioner's Office

For the Additional Party: Mr. Alexander Ruck Keene, Counsel instructed by the Treasury Solicitor

Decision

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 1 May 2008.

Information Tribunal

Appeal Number: EA/2008/0048

SUBSTITUTED DECISION NOTICE

Dated 11 April 2009

Public authority: Ministry of Justice

Address of Public authority: Correct address to be inserted by MoJ

Name of Complainant: Robin Makin

The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is that the 3-page Submission by the Department of Constitutional Affairs to Harriet Harman MP dated 28 November 2005 - about issuing an exhumation licence allowing the remains of Mr George Kelly to be removed from Walton Prison, Liverpool, and re-buried - be disclosed subject to minor redactions detailed in **Annex A**.

Action Required Disclosure in line with this appeal determination.

Dated this 11 day of April 2009

Signed:

Robin Callender Smith

Deputy Chairman
Information Tribunal

Reasons for Decision

Introduction

1. In March 1950 George Kelly was found guilty of a double murder and sentenced to death. He was duly executed and, as required by the legislation of the time, his body interred in the grounds of Walton Prison, Liverpool.
2. Following an application to the Criminal Cases Review Commission, in June 2003 the Court Appeal quashed Mr. Kelly's conviction following an application by Kathleen Hughes, the daughter of George Kelly. The Appellant represents Mrs Hughes.
3. Following the abolition of the death penalty in 1965 the then Home Secretary stated that he would consider applications from relatives or descendants of executed prisoners for exhumation and reburial outside prison grounds. Mrs Hughes first made such an application in 1996. A decision was ultimately taken by the Minister, Harriet Harman, to issue a licence for the exhumation of the remains of Mr. Kelly. The decision to issue a licence was communicated by the Department for Constitutional Affairs (now the Ministry of Justice) to the Appellant by a letter dated 13 December 2005.
4. The present appeal arises out of a request for information under the Freedom of Information Act 2000 (FOIA) that the Appellant made to the Additional Party for information relating to the issuing of the exhumation licence referred to above.
5. In particular the Appellant requested a copy of the advice given to the Minister to issue the exhumation licence in principle for Mr. Kelly; a copy of all communications with the National Offenders Management Service (NOMS) regarding this matter; and the records in relation to communications with a named individual.

The request for information

6. The Appellant made the original request to the Department of Constitutional Affairs (DCA) on 15 December 2005. On 18 January 2006 the DCA responded explaining

that it considered the advice was exempt under the Act but that it required further time to consider the public interest test. In relation to the communications with a named individual the DCA enclosed a copy of the letter sent to the individual on 1 December 2005 and a copy of the communication sent to a NOMS official to advise him of the position on 30 November 2005.

7. Eventually on 6 October 2006 the DCA issued a refusal notice. In relation to the advice given to the Minister the DCA stated that section 36 "Prejudice to the effective conduct of public affairs" was engaged and that the public interest favoured maintaining the exemption. The DCA also stated that, in relation to the communications with the named individual, it was located in another document - a note of a telephone conversation - but that this was considered exempt under sections 40 and 41.
8. On 2 November 2006 the Appellant requested an internal review of the decision to withhold the advice and the telephone note. In his letter the Appellant also queried if the telephone note and the other two letters sent to him were all the information held in relation to the second part of this request.
9. On 1 March 2007 the DCA provided the Appellant with the response to his request for an internal review. The internal review upheld the application of section 36 to the advice given to the Minister and sections 40 and 41 to the telephone note. The internal review did find that the communication with NOMS, in relation to the decision to issue an exhumation licence in principle, had not been addressed and that this would now be looked into.

The complaint to the Information Commissioner

10. On 4 March 2007 the Appellant contacted the Information Commissioner to complain about the way his request for information had been handled, and specifically asked the Commissioner to consider the refusal to disclose the requested information and the time taken to issue a refusal notice.
11. The IC's investigation found that the Additional Party had failed to respond to part of the request (the communications with NOMS) in breach of the requirements of section 1 (1). The IC also found that the refusal notice was in breach of the

requirements of section 17 (1) of FOIA. The IC found that the advice to the Minister was not exempt under section 36 (2) (b) of FOIA as the public interest favoured disclosure of the information. However he did find that the advice to the Minister was the personal data of a third party and therefore exempt under section 40 (2). He also agreed that the note of the telephone conversation was exempt under section 40 (2).

The appeal to the Tribunal

12. The Appellant appealed to the Tribunal on 29 May 2008. From that point on the progress of the appeal became fitful as, at various stages, it appeared that the Appellant and the Additional Party might be able to resolve their differences.
13. Setting out the chronology of that process would not further illuminate this Decision. Suffice it to say that, by the time the Tribunal was dealing with this appeal and the eventual compass of the matters in dispute, the issues had become very narrow.

The relevant statutory provisions

14. Under section 1(1) FOIA a person who has made a request to a public authority for information is, subject to other provisions of the Act: (a) entitled to be informed in writing whether it holds the information requested (section 1(1) (a)) and (b) if it does, and to have that information communicated to him (section 1(1) (b)).
15. The duty to provide the requested information imposed under section 1(1) (b) will not arise where the information is itself exempted under provisions contained in Part II FOIA (sections 21 to 44).
16. Section 40 FOIA provides in relevant part:

“(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 - The duty to confirm or deny—

- (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 the 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

...

(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.

(7) *In this section—*

...

‘data subject’ has the same meaning as in section 1(1) of [the Data Protection Act 1998];

‘personal data’ has the same meaning as in section 1(1) of that Act.”

17. Both section 40(1) and section 40(2) FOIA (where satisfied by subsection (3)(a)(i) or (b) of that section) are absolute exemptions.

18. Section 1(1) of the Data Protection Act 1998 (DPA) provides the definition of the term “data”:

“In this Act, unless the context otherwise requires—

‘data’ means information which—

- (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,*
- (b) is recorded with the intention that it should be processed by means of such equipment,*

- (c) *is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, . . .*
- (d) *does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68; or*
- (e) *is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d);”*

19. By section 1(1) DPA, the term “public authority” means a public authority as defined by FOIA. Thus, the Disputed Information constitutes “data” within the meaning of the DPA, in that - even if it does not fall within paragraphs (a)-(d) - it will fall within paragraph (e).

20. Section 1(1) of the DPA also defines the terms “data subject” and “personal data”:

*“‘data subject’ means an individual who is the subject of personal data;
‘personal data’ means data which relate 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;”

21. In relevant part, the first data protection principle states –

“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 ...”*

22. Condition 6(1) of Schedule 2 DPA states -

“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”.

The questions for the Tribunal

23. The questions to be decided by the Tribunal in this appeal relate to:

- (i) a submission to the Minister Harriet Harman MP dated 23 November 2005 (the “Submission”);
- (ii) a telephone attendance note of a conversation with another relative of Mr Kelly (the “Attendance Note”); and
- (iii) whether those parts of the Disputed Information which continue to be withheld from the Appellant are exempt under section 40 of the Freedom of Information Act 2000.

Evidence

24. The Tribunal has seen all the relevant documentation without redaction (on a "closed" basis) and the variously redacted versions of the Submission of 25 November 2005 that have been disclosed to the Appellant by the Additional Party.

25. One of the reasons for the variations in the redaction of that Submission occurred because Mrs Hughes gave her consent to the disclosure to the Appellant of some data personal to her.

26. The telephone attendance note relates to a conversation with another relative of the late Mr George Kelly. The Additional Party continues to withhold the entirety of that note on the basis that it consists entirely of third party personal data. The Respondent agrees with that characterisation and for reasons explored below the Tribunal agrees with that position and rejects the appeal on this point.

27. The Tribunal regards all evidence submitted to it about family members as Closed Submissions.

Legal submissions and analysis

28. The MOJ maintains that it is clear that all the data contained in the final redacted portion of the Submission constitute personal data being: (1) the name and contact telephone number of the author of the Submission; (2) the names and members of the Civil Service to whom the document was circulated and (3) "third parties related to the deceased as well as their personal opinions, disputes, some personal history and their ongoing actions in relation to the issue" (Decision Notice Paragraph 63).
29. None of the parties submit that the redacted data constitutes sensitive personal data. Questions of the disclosure fall to be considered by reference to the First Data Protection Principle and the 6 conditions provided for in Schedule 2 of the Data Protection Act.
30. The MOJ submits that the only condition provided in Schedule 2 which could be relevant to this case is Condition 6 (that disclosure is necessary for the purposes of legitimate interests pursued -- in this instance -- by the Appellant). The MOJ submits that condition 6 cannot be satisfied because:
- (a) the Appellant has been provided with the vast majority of the submission including, in particular, material points in Paragraphs 8 -- 14 which address the arguments for and against the grant of the application for exhumation;
 - (b) in these circumstances the Tribunal must be satisfied as to what legitimate interest member of the public could have in seeing details of the author of the submission, details of those to whom it was circulated, or matters relating to the relatives of George Kelly;
 - (c) if the Appellant's interest -- as a member of the public -- is found to be legitimate then the Tribunal must then be satisfied that disclosure is necessary for the purposes of the public interest;
 - (d) in this regard, it is submitted, the Tribunal needs to ask itself whether the Appellant's purposes can only be achieved by the disclosure of the redacted data and whether the disclosure is proportionate to the aim pursued.

31. In relation to the entirety of the Telephone Note the MOJ submits it is exempt under section 40 (2) for the reasons given above in Paragraph 16.
32. The Appellant characterises the remaining undisclosed information as “very limited” and – having regard to BBC television coverage of issues surrounding this exhumation – as information in which there is legitimate public interest in what can happen in the determination of such licence applications.
33. He points out that there was a gap of 32 months after Mr Kelly’s conviction was quashed by the Court of Appeal before Mr Kelly received a “lawful and Christian funeral”.
34. In relation to the author of the Submission, the Appellant maintains this is not a very junior official without any "public facing" role. The Appellant maintains that the author was, for a very considerable time prior to 2003, the active and public face of the Department in processing exhumation licenses and related matters. The Appellant maintains the author: " attended events -- such as those relating to retained organs -- and meetings and his contact details were disclosed and were well known." The Appellant had met him in the aftermath of the retained organs "scandal" when he was the responsible and public facing official who dealt with issues like this. He was the "decision maker" concerned in all matters to do with exhumation licences unless and until over-ruled at Ministerial level.
35. In terms of the Telephone Note the Appellant does not accept that its entirety is personal data.

Conclusion and remedy

36. In terms of the Telephone Note the Tribunal has no difficulty in finding to the required standard -- the balance of probabilities – that this contained personal opinions about family members, personal information generally and falls within the ambit of conversations with or about external third parties by a Government Department which are correctly withheld.
37. *Corporate Officer of the House of Commons v Information Commissioner and Mr. Baker (EA/2006/0015 and 0016 at Paragraph 28)* encapsulates what the Tribunal

must consider: *"If A makes a request under FOIA for personal data about B, and the disclosure of personal data would breach any of the data protection principles, then the information is exempt from disclosure under the Act: it follows from section 40 (2) read in conjunction with section 40 (3) (a) (i), or (when applicable) section 40 (3) (b) which does not apply in these appeals. This is an absolute exemption -- section 2 (3) (f) (ii) FOIA. Hence the Tribunal is not required to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure under section 2 (2). However... the application of the data protection principles does involve striking a balance between competing interests, similar to (though not identical with) the balancing exercise that must be carried out in applying the public interest test where a qualified exemption is being considered."*

38. Also: "The concept of lawfulness [in Schedule 1 paragraph 1] cannot sensibly be addressed without considering the conditions set out in Schedule 2 and Schedule 3 also, if it is applicable, because any disclosure which failed to meet at least one of the conditions in the schedules would be contrary to section 4 (4) DPA 1998. This is made clear by the words "in particular" in the first principle." *Common Services Agency v Scottish Information Commissioner [2008] UKHL 47 at paragraph 30 per Lord Hope.*

39. The details in the Telephone note are both personal and confidential. The Tribunal has considered whether redaction might leave anything meaningful in this telephone note without infringing of the requirements of the legislation and has concluded this would not be possible.

40. The situation in terms of the Submission dated 28 November 2005 is different. The starting point is that Mr George Kelly had his conviction for a notorious double murder quashed in June 2003. At that point he was an innocent man. It is reasonable for the public -- and this is not limited to his relatives -- to want to understand how the exhumation decision was arrived at in these circumstances and, insofar as it is possible, to understand the reasons for any delay (particularly the 32 months that occurred in this case) in the proper burial accorded to him.

41. The Tribunal has noted the significant difference between the starting position of the MOJ in relation to the Submission and the final redacted document as it stands at

the time of this appeal hearing. The MOJ would argue that it was not until Mrs Hughes consented to allow her personal data to be revealed that a further and more limited redaction could take place.

42. However the current (final) redaction is, in the Tribunal's view, still much too restrictive. Proper caution and sensitivity about the issues set out on the Submission is one thing but it is clear to the Tribunal that – in the balancing exercise that is at the core of decisions in this area – the balance tips in favour of disclosure with the most minimal redaction possible and proportionate, and that this disclosure generally is necessary in the public interest.
43. In cases such as this HM Prison Service and the Ministry of Justice are dealing with delicate and sensitive historical issues. With the improvements in forensic science techniques it is quite possible in the future that there will be other cases like Mr. Kelly's where a person has been executed by the State and then exonerated through the appeal system and where relatives wish for a proper burial to take place. The matters set out in the Submission are generally informative about the process and the issues which need to be considered and it is in the public interest that these are disclosed.
44. The Appellant raises the issue of the "cc" list of names at the conclusion of the Submission. The Tribunal has seen both the redacted and the un-redacted list and is not persuaded that the public interest requires disclosure of any more of the names than the two that appear on the redacted list.
45. It does however believe that the author of the Submission may be identified. This is an individual who should expect his role to be subject to public scrutiny and who prepared the submission for Ministerial approval. There is inevitably a public profile in a role such as this individual holds and that role requires a significant level of personal judgement and individual responsibility, particularly given the nature of the issues over which advice had to be given. Disclosure of the name is unlikely to cause unwarranted damage or distress to the individual in terms of his safety and security, his career or his reputation. It is significant that the matters contained in the Submission are carefully thought through and examined comprehensively and objectively.

46. Our decision is unanimous.

Signed:

Robin Callender Smith

Deputy Chairman

Date 11 April 2009