Tribunals Service
Information Tribunal

Information Tribunal Appeal Number EA/2009/0017
Information Commissioner's Ref: FS50170141

Heard on Papers at Finance & Tax Tribunal, 45 Bedford Square, London, WC1B 3DN
On 4 June 2009

Decision Promulgated
On 10 June 2009

BEFORE

CHAIRWOMAN
Melanie Carter

and

LAY MEMBERS
Rosalind Tatam
Tony Stoller

Between

B E T W E E N:-

MARK HOOPER

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

-and-

THE COMMISSIONER OF POLICE OF THE METROPOLIS

Additional Party

Subject matter:

Application for striking out, Rule 9

Duty to confirm or deny s.1(1)(a)

Personal data s.40

Cases:

Bennett v Information Commissioner EA/2008/0033

Decision on the papers

The Tribunal grants the application of the Information Commissioner and this Appeal is struck out under Rule 9 of the Information Tribunal (Enforcement Appeals) Rules 2005.

Reasons for Decision

Introduction

1. By a letter dated 12 April 2007 the Appellant made a request for information to the Metropolitan Police Service ("MPS") in the following terms –

   "In relation to [named officer's] disciplinary hearing:

   1. Has this information been released to any bodies?

   2. If any who."

2. The MPS issued a refusal notice on 21 May 2007 neither confirming nor denying that it held information requested in accordance with section 40(5) Freedom of Information Act 2000 ("FOIA"). That decision was upheld on internal review, the outcome of which was communicated to the Appellant on 15 June 2007. The complainant complained to the Information Commissioner ("IC") on 7 July 2007 challenging the decision to withhold the information requested. The IC issued a Decision Notice on 16 February

2009 which stated that the MPS was excluded from its duty to confirm or deny whether it held the requested information by virtue of section 40(5)(b)(i) FOIA because doing so would contravene the First Data Protection Principle set out in the Data Protection Act 1998.

The appeal to the Tribunal

3. The Appellant appealed the Decision Notice. In the IC's reply the Tribunal was asked to consider striking out the appeal under rule 9 of the Information Tribunal (Enforcement Appeals) Rules 2005 ("the 2005 Rules") on the basis that the Notice of Appeal did not disclose a reasonable ground of appeal. The Tribunal's task therefore has been, not to consider the merits of the appeal, but rather whether the Notice of Appeal disclosed a reasonable ground of appeal.

4. Directions issued by the Chair dated 9 April 2009 gave the Appellant to 8 May 2009 to comment in writing on whether the appeal should be struck out under rule 9. He did not send in any submissions.

The Tribunal's powers

5. The Tribunal's jurisdiction on appeal is governed by section 58 of FOIA. As it applies to this matter it entitles the Tribunal to allow the Appeal if it considers that the Decision Notice is not in accordance with the law or, to the extent that it involved an exercise of discretion, the IC ought to have exercised his discretion differently.

6. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts.

7. Under Rule 4 of the 2005 Rules, an appeal against a Decision Notice must be made in writing and must state the grounds of appeal. As follows from section 58, these must be grounds upon which an error of law maybe found.

8. Rule 9 of the 2005 Rules provides:

> *"9. (1) ……. where the Commissioner is of the opinion that an appeal does not lie to, or cannot be entertained by, the Tribunal, or that the notice of appeal discloses no reasonable grounds of appeal, he may include in his reply under Rule 8(2) above a notice to that effect stating the grounds for such contention and applying for the appeal to be struck out. "*

9. There is little guidance provided for the Tribunal on the circumstances in which it will be appropriate to strike out an appeal under Rule 9. We have adopted the approach taken by a differently constituted panel of this Tribunal in the case of *Bennett v Information Commissioner* EA/2008/0033 which stated that:

> *" We consider that the language used in Rule 9 is unambiguous. A reasonable ground of appeal is one that is readily identifiable from the Notice of Appeal, relates to an issue the Tribunal has jurisdiction to decide and is realistic not fanciful."*

10. Before considering the grounds of appeal, this decision sets out in more detail the basis upon which the IC based his conclusions in the Decision Notice. This gives the framework within which the Tribunal had to carry out its function under rule 9.

The Duty to Confirm or Deny

11. A person who has made a request for information under section 1(1) FOIA is, subject to other provisions of the Act: (a) entitled to be informed in writing whether the public authority holds the information requested (section 1(1)(a)) and (b) if it does, to have that information communicated to him or her (section 1(1)(b)). Compliance with section 1(1)(a) FOIA is referred to as "the duty to confirm or deny" (section 1(6) FOIA). A

public authority may be excluded from the duty to confirm or deny under provisions contained in Part II FOIA.

12. The IC concluded that the MPS was excluded from the duty to confirm or deny whether it held the requested information under section 40(5)(b)(i). This provides:

> *"(5) The duty to confirm or deny –*
>
> *(b) does not arise in relation to other information if or to the extent that … –*
>
> *(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles ."*

13. Thus, where to confirm or deny whether an authority holds particular information would in itself be a breach of a Data Protection Principle, that authority is released from its obligations under section 1(1) of FOIA. It is moreover prohibited from making this disclosure if it is to uphold the data protection rights of the named officer. The First Data Protection Principle provides that processing of personal data, which would include disclosure to the public under a FOIA request, must be fair and lawful.

14. In this case, the IC's concern has been with regard to confirming or denying whether the requested information is even held as this would indicate one way or the other whether the named officer had had a disciplinary hearing against him or her. Whilst the Appellant has been apparently been privy to information in this regard, it has to be remembered that disclosure under FOIA is disclosure to the world. Hence, the IC had to write his Decision Notice omitting certain facts already known to the Appellant, which cannot be released on account of the Data Protection Principles and the Data Protection Act 1998. The Tribunal noted that given this and the complexity of the law involved, the Decision Notice is somewhat hard to follow in some paragraphs.

15. The IC, in concluding that there would be a breach of the First Data Protection Principle if the MPS confirmed or denied whether it held the requested information, took into account the following:

a) The IC was of the view that it was the reasonable expectation of the named officer that the MPS would not disclose whether or not he or she had been subject to a disciplinary hearing;
b) the named officer was not senior in rank;
c) an employee normally expects his disciplinary matters, if any, to be kept private;
d) the position of police officers is to an extent different to other kinds of employees, both in practice and due to public interest considerations;
e) there is legislation governing disclosure as a result of disciplinary hearings;
f) thus there is limited disclosure to complainants and the parties to any disciplinary hearing under the Police (Complaint and Misconduct) Regulations 2004;
g) this however is disclosure to those involved in the process and not publication to the world;
h) there is the possibility that a particular complaint would be processed by the Independent Police Complaints Commission resulting in, if appropriate, the publication of an investigation report including the naming of particular officers;
i) this disclosure however is governed by the Police Reform Act 2004 such that there will be no disclosure where there is a reason not to do so;
j) it was the reasonable expectation of the named officer that the issue of disclosure would be governed by existing practices and legislation and that even where there was limited disclosure this would not necessarily mean that there should also be disclosure to the public.

16. The Tribunal noted that the IC had taken into account the particular circumstances of the case and public interest arguments put forward by the Appellant. Paragraph 42 and 43 of the Decision Notice stated:

"42. While the Commissioner accepts that there may be legitimate interest in the general public knowing whether officers who are unfit to police are disciplined appropriately. He considers that the provisions of the Police Reform Act satisfy this interest and that disclosure under the Act in not appropriate in this case.

43. The complainant has argued to the Commissioner that as the named officer is performing a public role this information should be disclosed. However, after

considering the circumstances of this case, and particularly in view of the ranking of the named officer, the Commissioner does not consider that this would make confirming or denying the existence of this information fair".

17. In these circumstances, the IC concluded that to confirm or deny whether the requested information was held would be processing of personal data that would be unfair and therefore in breach of the First Data Protection Principle. It followed that the exemption in section 40(5)(1)(b) applied and the MPS was not under any duty under section 1(1)(b) either to confirm or deny.

Grounds of appeal

18. The Appellant's grounds of appeal are contained in a letter dated 16 March 2009, such that:

> *"I lodged my complaint about the Metropolitan Police back in 2002. And it has taken till now to receive an answer?.....I am making two complaints, the first the time taken, and secondly the decision made by the ICO.*
>
> *The ICO has used DOUBLE standards in their decision with dealing with my complaint. The law is the law, and cannot be used to fit their decision to protect the Police Force and then twist the said rulings to win the next argument.*
>
> *The general Public have to adhere to the law and so should the Metropolitan Police force and those who protect it!."*

19. The Tribunal understood the Appellant's first ground of appeal to be that the Decision Notice is flawed by reason of the time taken by the IC to reach his decision. The Tribunal's task in determining an appeal is to consider whether the Decision Notice is in accordance with law. As such, it is the substance of the Decision with which the Tribunal is concerned. It may not take into account the time taken or indeed the conduct of the IC in coming to a decision. As as differently constituted Tribunal has stated in a previous case (*Caughey v Information Commissioner EA/2008/0012)* "*in exercising its appellate functions [the Tribunal] should deal with the substance of any*

decision notice before it" and also *"the fact and length of the delay in the [Commissioner's investigation] are again in no way material to the issue to be considered on this appeal, ie: whether the Commissioner had in some way committed an error in law"* (paragraphs 37 & 39).

20. The Tribunal was of the view therefore that the Appellant's first ground of appeal was not reasonable in the sense that it was, given the limitations on the Tribunal's jurisdiction, not realistic and would be bound to fail at a substantive hearing.

21. With regard to the second possible ground of appeal, expressed in terms of "DOUBLE standards", the Tribunal found it impossible to discern what error of law was being put forward. It noted that the Appellant had been afforded a further opportunity to provide submissions in advance of the strike out hearing but had chosen not to do so. The Tribunal spent sometime in seeking to identify whether, on the face of the Decision Notice, there was any discernable error of law. It could find none. In the absence of any argument or indeed evidence to support the assertion that the Decision Notice should be overturned, the Tribunal was bound to find that this second ground of appeal would fail.

Conclusion

22. The Tribunal struck out the appeal on the basis that the Notice of Appeal did not disclose a reasonable ground of appeal.

23. Finally, albeit beyond its jurisdiction, the Tribunal wished to echo the concerns of the IC set out in paragraph 50 of the Decision Notice that the MPS had not acted with due expedition. Taking into account also the length of time taken by the IC to complete his investigation, it did appear that the Appellant had had to wait a very long time for a final determination in this matter.

24. Our decision is unanimous.

Signed

Melanie Carter

Deputy Chair Date: 10 June 2009