IN THE FIRST-TIER TRIBUNAL

GENERAL REGULATORY CHAMBER

(INFORMATION RIGHTS)

Case No. EA/2010/0193

ON APPEAL FROM:
Information Commissioner
Decision Notice ref FS50273690
Dated 15 November 2010

Appellant: Omar Stephens

Respondents: (1) Information Commissioner

(2) Crown Prosecution Service

Date of Tribunal telephone meeting: 23 May 2011

Date of decision: 1 June 2011

Before

HH Judge Shanks

Roger Creedon

Jacqueline Blake

Subject areas covered:

Freedom of Information Act 2000:

Refusal of request s.17

Investigations and proceedings conducted by public authorities s.30

Personal data s.40

Legal professional privilege s.42

Tribunal's powers s.58

Data Protection Act 1998

Personal data s.1(1)

Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009:

Rule 8(3).

Cases referred to:

Colliass v IC EA/2010/0084

Durant v Financial Services Authority [2003] EWCA Civ 1746

Decision

For the reasons set out below the Tribunal decides that:

(1) the Commissioner's and CPS's applications to strike out the appeal are dismissed;

(2) the Information Commissioner's decision notice dated 15 November 2010 is "not in accordance with the law;"

(3) the decision notice should be set aside and a "substituted decision notice" issued by the Tribunal;

(4) the parties may make any representations they wish in relation to the terms of the substituted decision notice provided they are received by the Tribunal by 1600 on 17 June 2011.

Reasons for Decision

Background and request for information

1. On 6 December 2005 the Appellant, Omar Stephens, was convicted of murder at the Old Bailey following a trial. He is currently a serving prisoner at HMP Swaleside.

2. On 20 April 2009 he made a request expressly under the Freedom of Information Act 2000 for the following information relating to the conviction:

    1. **Previous convictions of the deceased and all of the prosecution witnesses in the case.**

    2. **All material which discloses information that may have been communicated by lay witnesses e.g. previous witness statements, unused witness statements, CAD Messages, Officers IRB's and CRIS.**

    3. **All material which directly, or indirectly reveals that the case against the defendant has been, obtained, prepared and processed by the Police Officers, e.g. crime reports, CAD messages, memos, action and message forms and other operational documents.**

    4. **All documentation the defendant is entitled to.**

    5. **Any information indicating the background to this offence which is consistent with the defendant innocence; for e.g. names and details of other suspects and their previous convictions.**

    6. **All information indicating that the integrity of the evidence or of the integrity of the prosecution witnesses, or the inferences to be drawn from that or their evidence is in doubt.**

7. **Information as to the reliability of the observations made by the Prosecution witnesses; for e.g. any disciplinary or police complaint commission action on the investigation taken against any of the police officers involved in dealing with this offence.**

8. **Any and all, other information which could reasonably be expected to assist the defence. (sic)**

3. On 20 May 2009 the CPS officer dealing with the matter replied to the request in these terms:

> **In order to process your request for information, I have reviewed and considered all the material the CPS holds in relation to R v Omar Stephens … I can confirm that the CPS does hold information in relation to your request, however the information is exempt from disclosure under section 30, 40(1), 40(2) and 42 of the Freedom of Information Act. Please see the attached section 17 notice which explains the reasons for not disclosing the requested information.**

Attached was a document headed "S17 Notice under the Freedom of Information Act 2000 WITHHOLDING INFORMATION." The document gives a certain amount of information about the various exemptions relied on (including the unsurprising fact that the CPS instructed prosecuting counsel) but does not relate them to any particular information or category of information coming within the terms of the request. The decision in that letter was upheld in a review letter dated 27 July 2009 which stated that a proper assessment had been made and a reasonable decision reached; there was still no attempt to relate the claimed exemptions to any particular information requested.

The Information Commissioner's decision

4. On 27 July 2009 Mr Stephens wrote to the Commissioner complaining about the refusal of his request. In his letter he apparently referred specifically to the Data Protection Act 1998. According to the decision notice the Commissioner carried out an assessment as to whether, "to the extent these were requests for Mr Stephens' own personal data," they were dealt with in accordance with section 7 of the Data Protection Act. Having decided that it was likely that they were so dealt with the

Commissioner informed Mr Stephens that consideration would be given to whether they had been dealt with in accordance with the Freedom of Information Act.[1]

5. At paragraph 8 of his decision notice the Commissioner stated:

> **When citing section 40(1), the [CPS] did not specify to which of the complainant's requests it believed this exemption to be engaged. The Commissioner has assumed, therefore, that [it] cited this exemption in relation to all of [Mr Stephens'] requests. In forming a conclusion as to whether this information would constitute the personal data of [Mr Stephens], the Commissioner has taken into account the wording of the requests and what this suggests about the nature of the information requested.**

It seems clear from this passage that the Commissioner did not take steps to find out anything about the content of the information which the CPS actually held which came within the terms of Mr Stephens' request nor which exemptions were claimed in relation to what information. Nevertheless he went on to decide in paragraph 18 of the decision notice that all the information requested by Mr Stephens was his own personal data and thus absolutely exempt under section 40(1) of the Freedom of Information Act 2000 and (at paragraph 21) that the CPS had therefore correctly "cited" that section. It followed from these conclusions that no consideration was given to the other exemptions relied on by the CPS. The Commissioner also stated at paragraph 20 of the decision notice that the [CPS] had failed to comply with section 17(1)(b) in failing to specify the sub-sections of sections 30 and 42 relied on; we do not entirely understand this finding, particularly so far as it relates to section 42.

<u>The appeal</u>

6. Having failed to obtain what he wanted through the Commissioner, Mr Stephens appealed to the Tribunal against the Commissioner's decision notice. With respect to Mr Stephens we have to say that his grounds of appeal, even after the Tribunal invited him to resubmit them, cannot be described as clear or cogent, but he did state: "I believe the Commissioner was wrong in is decision, because if there is information to my innocents that was not disclose, it would just be not a matter of

[1] See paras 5 and 6 of the Decision Notice.

the Freedom of Information Act 2000, but in the interest of justice (sic)." More significantly for the purposes of this appeal he also said in the course of them that "…it is clear this information relates to me" and "… the request was of the complainant own data (sic)."

7. The Commissioner's response to the appeal was basically to the effect that Mr Stephens had not challenged, and indeed accepted, that the information requested was his personal data for the purposes of section 40(1) and that the Tribunal ought therefore to dismiss the appeal. It also invited the Tribunal "to consider striking [the appeal] out under rule 8(3)(c)" of the Tribunal's rules of procedure.[2]

8. The Tribunal judge took the view on seeing the papers that it was not at all clear that the requested information (or a large part of it) was in fact Mr Stephens' personal data and he did not therefore consider striking the appeal out as invited by the Commissioner. On 3 February 2011 he gave directions acceding to the CPS's request that it should be joined as a party to the appeal and directed the CPS to "describe in general terms the documents it holds containing information within [Mr Stephens'] request" and to "specify which exemptions it seeks to rely on in relation to each [category] of information with any details that would be required under section 17 of the Freedom of Information Act 2000." Before complying with those directions the CPS made its own application (by notice dated 28 February 2011) to strike out the appeal based on the submission that it was evident from his grounds of appeal that Mr Stephens "in fact agrees with the only substantive decision in the … Decision Notice, namely the decision that the requested information is [his] own personal data." That application was rejected in an email dated 4 March 2011 in which it was made clear that the Tribunal judge had grave doubts about the Commissioner's conclusion that the information requested was covered by section 40(1) and was unwilling to allow the Tribunal to proceed on a potentially false basis; the email made clear at the end that the decision did not preclude "a further application to strike out the appeal based on different arguments and/or exemptions."

9. The CPS complied with the Tribunal's directions in a document dated 11 March 2011. This document stated:

[2] See decision notice paras 33 and 34.

> **The information which the CPS has identified as coming within the scope of the request are (sic) set out in the table attached to this present document as Annex A. The information shown in the table is taken from a document that was prepared by the CPS in May 2009 as part of its consideration of [Mr Stephens'] Freedom of Information Act request…**
>
> **The CPS, as part of its consideration of [Mr Stephens'] request, also identified three exemptions other than section 40(1) which the CPS at the time assessed as being applicable in relation to certain categories of information falling within the scope of the request [namely sections 30, 40(2) and 42]…**
>
> **The particular categories of information to which the CPS considered these three exemptions to apply were (and therefore are) identified in the table attached hereto as Annex A … The CPS's reasons for deciding that [Mr Stephens] did not have a right to access any of the information under the FOIA were set out in the section 17 Notice, a copy of which is attached hereto as Annex B.**

For reasons which are not entirely clear to us there are two similar but not identical versions of Annex A; neither has been supplied to Mr Stephens at any stage but both list numerous documents or categories of documents and specify in relation to each which particular exemption(s) is relied on; it is notable that in one of the versions of the document section 40(1) is relied on in only about a third of cases (in the other version section 40 is referred to without distinguishing between subsections (1) and (2)). We also note that the documents listed in Annex A appear to comprise all of the papers that would be held by the CPS relating to Mr Stephen's murder trial or a very substantial portion of them.

10. On 7 April 2011 the Tribunal judge gave directions that the appeal should be decided at a meeting of the members of the Tribunal to be held on 23 May 2011 at which any of the parties could make oral submissions by telephone if they so wished. On 4 May 2011 the CPS served a "second notice of application" which expressly renewed the application made by notice dated 28 February 2011. Although the second notice of application was therefore clearly not based on "different arguments and/or exemptions" to the earlier one, in view of the terms in which it was made and the point of principle which it is said to raise, the Tribunal

11. Since no party expressed a wish to make submissions by telephone to the Tribunal on 23 May 2011 we did not in fact meet in person but in order to save money conferred by telephone. The issues we addressed are as follows:

    (1) Whether we should accede to the Commissioner's and the CPS's applications to strike out the appeal;

    (2) If not, whether the Commissioner's decision notice was "in accordance with the law";[3]

    (3) If not, what steps the Tribunal should now take.

We will set out our conclusions in that order.

Should the appeal be struck out under rule 8(3)?

12. We have already indicated in paragraph 8 above the basic factual premise of the CPS's application to strike out the appeal, namely that it is evident from Mr Stephens' grounds of appeal that he agrees with the only substantive decision in the decision notice, ie that the information in dispute is his "personal data." Given the terms in which Mr Stephens has expressed himself in writing to the Tribunal and the obvious disadvantages under which he is labouring (including being a serving prisoner and unrepresented) we do not accept that he intended to concede the only point which led the Commissioner to find against him, namely that the information requested was his "personal data" for the purposes of section 40(1) of the 2000 Act[4] and, even if he did so intend, we would not necessarily hold him to such concession if we were convinced that it was wrong. However, we readily accept, as the CPS submit, that he has failed to set out anywhere any "reasonable grounds of appeal." The first point for us to address is therefore whether we are bound to strike out the appeal as suggested by the short passage from the decision of a differently

[3] See section 58(1)(a).
[4] It is more likely that he is simply making the point that the information is of concern to him which is not the same as saying it is his "personal data" for the purposes of the legislation.

constituted Tribunal in *Colliass v IC* (EA/2010/0084) which is principally relied on by the CPS.[5]

13. Although we acknowledge that in general if an appellant fails to set out reasonable grounds of appeal his appeal will be struck out, we reject the notion that this is an absolute and invariable rule for the following reasons:

    (1) rule 8(3), in contrast to rules 8(1) and (2), expressly gives the Tribunal a discretion ("The Tribunal *may* strike out…");

    (2) the power is stated to be exercisable when the Tribunal considers "…there is no reasonable prospect of the appellant's case … succeeding" and not (for example) when "no reasonable grounds of appeal have been pleaded";

    (3) rule 22(2)(g) unsurprisingly provides that a notice of appeal must include "the grounds on which the appellant relies" but the Tribunal has a general power to waive any requirement of the rules (see rule 7(2)(a));

    (4) it was well-established that the Information Tribunal could adopt an inquisitorial approach if appropriate and take reasonable steps to assist parties at a disadvantage; there is no reason to think that the First-tier Tribunal should adopt a different approach in dealing with information rights cases and the relevant rules of procedure appear strongly to support the validity of adopting an inquisitorial approach in appropriate cases;[6]

    (5) section 50(1) of the 2000 Act requires the Tribunal to allow the appeal or issue a substituted decision notice if it "… considers … that the notice against which the appeal is brought is not in accordance with the law"; it does not say something to the effect (for example) that it should allow an appeal if it finds that the grounds of appeal advanced are well-founded.

The CPS argues that it is important to preserve the principle that it is for the appellant to set out a case in his grounds of appeal in order to promote the orderly conduct of proceedings and to ensure that the Commissioner and any other respondent know

[5] See para 16 of the decision which states "The Tribunal has to consider whether the Appellant has addressed the substance of the IC's Decision Notice so as to provide reasonable grounds of appeal. If he has failed to do this the appeal has no realistic prospect of success."
[6] See eg rules 2(2)(c), 2(2)(d), 5(1), 5(3)(d), 6(1), 15(1)(d), 17(2).

the case they have to meet and can decide their responses accordingly.[7] We accept that that is indeed an important principle but we do not accept it is an absolute one since it is clearly open to the Tribunal under the rules of procedure to define the issues it wishes to resolve and to call on the parties to submit evidence and representations on such issues; in this case, for example, although the Tribunal did not formally define the issue as to whether the information requested by Mr Stephens was in fact his "personal data" in its directions, it was clearly the only substantive finding in the Commissioner's decision and the Tribunal judge's doubts on the point were made quite clear in the email dated 4 March 2011, so that both the Commissioner and the CPS must have been perfectly well aware that on the hearing of the appeal it would be for them to support the Commissioner's finding at paragraph 18 of the decision notice if they saw fit to do so. We are therefore of the view that in some (perhaps rare or even exceptional) circumstances the Tribunal can decide not a strike out an appeal brought under section 57 of the 2000 Act even if no reasonable grounds have been advanced by the appellant and that in so far as the *Colliass* case may suggest otherwise we respectfully decline to follow it.

14. Given the circumstances of this particular case, should we strike out Mr Stephens' appeal? We do not believe we should. We have already referred to Mr Stephens' significant disadvantages in advancing any case. More importantly, as we explain in greater detail below, we consider the Commissioner's decision notice to be clearly wrong in its conclusion on section 40(1) and, what is more, wrong on its face, and we are not content just to let it stand when we believe it is "not in accordance with the law" and are able to reach that view without any assistance from Mr Stephens. It is notable we think that the CPS itself has not suggested that the Commissioner's decision on section 40(1) was right and that it did not seek to make submissions to that effect on 23 May 2011; in the light of Annex A (which we are told was based on a document prepared by the CPS at the time of the original request) this is perhaps not surprising since it is clear that the Commissioner's decision was inconsistent with the CPS's own considered position at the time.

15. We believe that disposes of "the questions of principle" raised by the CPS in their "third argument" at paragraphs 18 and 19 of the notice of application dated 28

[7] See para 19 of the notice of application dated 28 February 2011.

February 2011. We should also mention their first and second arguments which are set out at paragraphs 16 and 17 of that notice of application, both of which relate to Mr Stephens' rights under the Data Protection Act 1998. What the CPS appear to be saying in those paragraphs is that, the Commissioner having decided that all the information covered by Mr Stephens' request is his "personal data" for the purposes of the Data Protection Act, the CPS would want to consider again his request in the light of that finding and that such consideration might lead to further information being disclosed to him and would give rise to important general issues for the CPS which should not, it is said, be litigated in proceedings which have been commenced "on the basis of a misconception." Far from supporting the CPS's case on striking out the appeal it seems to us that such considerations would tend to point in the opposite direction: if, in fact, contrary to the Commissioner's finding, much of the information requested by Mr Stephens did not constitute his personal data it would be wrong in our view for the CPS to re-consider the request on that erroneous basis, and even more wrong for important general issues to be decided on that basis.

16. We therefore decline to strike out the appeal and proceed to consider the issue raised by section 58(1) of the 2000 Act, namely whether the decision notice was in accordance with the law.

Was the Commissioner's decision notice "in accordance with the law"?

17. As we have already indicated we are of the firm view that the Commissioner went wrong in deciding that all the information requested by Mr Stephens was his "personal data." The first error made by the Commissioner we think was to assume (and assume wrongly as we now know) that the CPS were intending to rely on section 40(1) in relation to all the information requested by Mr Stephens[8] and then to fail to seek further details of what information the CPS understood to be covered by the request and details of which exemptions relied on related to which parts of that information. The Commissioner thus proceeded on a false basis without all the material which he should have obtained.

[8] See para 8 of the decision notice quoted above at para 5.

18. The determinative finding which he then made is to be found in paragraph 17 of the decision notice which states:

> **Does the data "relate to" the living identifiable individual [Mr Stephens], whether in his personal or family life, business or profession? … The view of the Commissioner on this point is that, as all the information requested relates to the crime for which the complainant was convicted, it is clear that this all also relates to the complainant.**

The Commissioner in that paragraph equates information which "relates to the crime" of which Mr Stephens was convicted with information which "relates to" him (for the purposes of the relevant definition in section 1(1) of the Data Protection Act 1998). It seems to us that some of the information requested by Mr Stephens related only tenuously to the crime of which he was convicted (eg previous convictions of the deceased and prosecution witnesses), but, in any event, the equation made by the Commissioner cannot, we think, be correct in the light of the Court of Appeal's decision in *Durant v Financial Services Authority*[9] where Auld LJ said the following in a much cited passage in the course of giving guidance as to what was "personal data":

> **It seems to me that there are two notions which may be of assistance. The first is whether the information is biographical in a significant sense … 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 … In short, [personal data] is information that affects his privacy whether in his personal or family life, business or professional capacity**

19. We consider that most of the information requested by Mr Stephens at paragraphs 1, 5, 6 and 7 of his original request[10] was clearly not biographical information about Mr Stephens and did not have Mr Stephens as its focus; rather, it was information which had as its focus other people who may or may not have been involved in the relevant transaction, at least one of whom is in any event dead. It was thus not Mr Stephens' "personal data" and not covered by section 40(1). As to the information

[9] [2003] EWCA 1746
[10] See para 2 above.

requested at paragraphs 2 and 3 and the apparently "catch-all" requests at paragraphs 4 and 8 we cannot say very much based simply on the terms of the requests save that it is likely that there are many pieces of information coming within them which are not covered by section 40(1). We refer again to the contents of Annex A which appears to show that the CPS's original assessment of the position was that section 40(1) covered only some of the information requested and that the balance was covered by sections 30, 40(2) and/or 42: that assessment may well be correct with the consequence that Mr Stephens was indeed not entitled to any of the information he was requesting under the Freedom of Information Act 2000 but given that many issues can arise on these other exemptions (including the public interest in relation to sections 30 and 42) we do not feel able to reach a concluded view about this on the material presently before us.

20. But even if Mr Stephens was not entitled to any of the information he was requesting under the 2000 Act, for the reasons given we consider that the Commissioner's decision notice to the effect that all the information requested was absolutely exempt under section 40(1) was clearly wrong and that his decision notice was not "in accordance with the law." We should perhaps record that in making that finding we have not had the benefit of any oral submissions from either the Commissioner or the CPS although it was open to them to make such submissions had they wished to do so under the directions of 7 April 2011.

What order should the Tribunal make?

21. Under section 58 of the 2000 Act if the Tribunal considers that the decision notice is not in accordance with the law it must "…allow the appeal or[11] substitute such other notice as could have been served by the Commissioner." Since in our view the decision notice cannot stand, it is clear that some kind of substitute is required.

22. The CPS has not advanced an alternative case expressly inviting the Tribunal to issue a substituted decision notice based on its own original position as disclosed in Annexes A and B and, as we have indicated, we do not feel able to reach a concluded view on whether that would be the right course and Mr Stephens has had no opportunity to consider Annex A. However, it seems to us looking back at

[11] This has been interpreted in effect as meaning "and/or."

the course of the proceedings that in fact the CPS itself has never given a proper notice under section 17 because the notice served did not specify which exemptions were relied on in relation to which information and it is clear from the wording of section 17(1) and 17(3) ("to any extent") that that exercise should be gone through (subject of course to section 17(4)). If the CPS was now ordered to produce a proper section 17 notice reflecting its true position (which we assume would be something along the lines of the position shown in Annexes A and B), the whole process could we would hope be got back on track; Mr Stephens could if he thought fit (and we are certainly not to be taken as encouraging him) renew his complaint to the Commissioner in a properly focussed way and the Commissioner could deal with any such complaint afresh on a proper basis.

23. We are therefore minded at the moment to order the CPS to serve a new notice complying fully with section 17 of the 2000 Act. However, because this idea has not been suggested previously and could not be aired with the parties on 23 May 2011 we will invite further representations before we decide finally on the appropriate order to make. Such representations are to be made in writing by 1600 on 17 June 2011.

Disposal

24. For all the reasons set out above we have decided (a) not to strike out the appeal, (b) that the decision notice is not in accordance with the law and should be set aside, and (c) to substitute a new decision notice the terms of which will be determined after the parties have had had an opportunity to make further representations.

25. Our decision is unanimous.

Signed

HH Judge Shanks

Dated: 1 June 2011

IN THE FIRST-TIER TRIBUNAL

GENERAL REGULATORY CHAMBER

(INFORMATION RIGHTS)

Case No. EA/2010/0193

ON APPEAL FROM:
Information Commissioner
Decision Notice ref FS50273690
Dated 15 November 2010

Appellant: Omar Stephens

Respondents: (1) Information Commissioner

(2) Crown Prosecution Service

Date of decision: 20 June 2011

Before

HH Judge Shanks

Roger Creedon

Jacqueline Blake

Supplementary Decision

For the reasons set out in the Tribunal's decision dated 1 June 2011 and below the Tribunal sets aside the Information Commissioner's decision notice dated 15 November 2011 and substitutes the following decision notice.

Substituted decision notice

Public authority: **Crown Prosecution Service**

Complainant: **Omar Stephens**

Decision

The Public Authority failed to deal with the Complainant's request for information dated 20 April 2010 in accordance with Part I of the Freedom of Information Act 2000 in that it failed to comply fully with section 17 thereof.

Action Required

The Public Authority must by 1600 on 18 July 2011:

(1) carry out a fresh consideration of the Complainant's request;

(2) supply the Complainant with any information which it considers ought properly to be supplied to him which has not already been;

(3) to the extent that it considers that any information requested is not required to be released, serve a notice under section 17 clearly identifying the information in question, the exemption relied on and why it applies (including, where appropriate, any relevant public interest considerations).

Dated 20 June 2011

Signed

HH Judge Shanks

Reasons

26. On 1 June 2011 we issued a decision which left over the question of what order we should make for further submissions. We have now received such submissions from the Commissioner and the CPS. They both accept the proposal made by the Tribunal at paragraphs 22 and 23 of our earlier decision and propose wordings for our order which we have broadly adopted.

27. Accordingly, we now issue the substituted decision notice set out above. Once the new section 17 notice has been served by the CPS on Mr Stephens it will be open to him if he thinks fit to pursue a fresh complaint about any refusal to supply further information under section 50 of the 2000 Act.

28. Our decision is unanimous.

Signed

HH Judge Shanks

Dated 20 June 2011