



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2011/0047

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50300474

Dated: 20 January 2011

Appellant: Christopher Quinn

Respondent: Information Commissioner

Additional Party: Hampshire Constabulary

On the papers

Heard at: Field House London

Date of hearing: 31 August 2011

Date of decision: 20 September 2011

Before

Angus Hamilton

Tribunal Judge

And

David Wilkinson

and

Michael Jones

Subject matter: 40 Freedom of Information Act 2000

Cases considered:

Kelway v IC & Chief Constable of Northumbria Police EA/2008/0037
Durant v Financial Services Authority [2003] EWCA Civ 1746

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal for the reasons set out below.

REASONS FOR DECISION

Introduction

1. The factual background to this appeal has been very ably set out by the Commissioner in his Response to Mr Quinn's appeal. That summary reads as follows:

2. The Regulation of Investigatory Powers Act ('RIPA') regulates the powers of public bodies to carry out surveillance and investigation and covers the interception of communications. For example, the Act enables certain public bodies to demand that someone hands over cryptographic keys to encrypted digital data. Under section 53 of RIPA: **"(1)A person to whom a section 49 notice has been given is guilty of an offence if he knowingly fails, in accordance with the notice, to make the disclosure required by virtue of the giving of the notice"**.

3. On 24 November 2009, an article was published in The Register ('the article'), about an individual, identified only by the initials JFL, who was sentenced under Part III of RIPA. The article states that the individual's "crime was a persistent refusal to give counter-terrorism police the keys to decrypt his computer files."

4. By email dated 24 November 2009 the Appellant, having encountered the article, wrote to the Hampshire Constabulary ('the Constabulary') making the following request:

5. **"Please let me have all information relating to people convicted under the refusal to decrypt legislation, like mentioned in http://www.theregister.co.uk/2009/11/24/ripa_jfl/" ('the request')**.

6. The Appellant made the same request to a number of other public authorities.
7. By email dated 24 November 2009 the Constabulary sought clarification of the Appellant's request, asking the Appellant to provide **“additional details as to the information you are actually seeking when you refer to ‘all information’. We also need date parameters.”**
8. The Appellant replied by email the same day (24 November), advising the Constabulary as follows:
9. **“I’m seeking information about what happened; whether it was indeed as the article appeared to report; whether for example there was any significant risk of terrorist attack from any of the individuals convicted and what evidence there was for this; what matter.** I was mostly interested in the case mentioned in the article, but would like to know of any others. Dates from when the legislation was brought into force to present, but again mostly that where JFL was serve with a section 49 notice, **and any interviews that may have been conducted at Fareham station (it wasn’t clear from the article whether any had, which is part of the reason I’m making a fairly broad request)** or anywhere else you might hold information for. I don’t need details like name and address, or similar irrelevant personal details, **but would like to know what regard was taken of the mental health of JFL** as I think that is relevant to the appropriateness of the legislation compared to what MPs said it would be for.”
10. The Constabulary responded to the request on 19 January 2010, describing the request as follows:
 - a. Point 1 – The information requested in the highlighted parts of the above email (‘point 1’)

b. Point 2 – All information relating to people convicted under the refusal to decrypt legislation ('point 2').

11. With respect to point 1, it neither confirmed nor denied that it held the information, citing the exemptions in section 40(5), 30(3), 23(5), 24(2), 38(2) and 31(3) of the Act. With respect to point 2, the Constabulary told the Appellant that it "does not hold this information as the answer is zero."

12. The decision in relation to point 1 was upheld following an internal review. In the Constabulary's internal review response, it highlighted those parts of the Appellant's clarification of the request provided in his email of 24 November 2009 which led it to continue neither to confirm nor deny that information was held.

13. The complainant complained to the Commissioner on 3 June 2010 challenging the decision to withhold the information requested.

14. At the outset of his investigation, the Commissioner advised the Appellant in correspondence that, unless he heard from him to the contrary, the scope of his investigation would be to determine whether or not the Constabulary was correct neither to confirm nor deny whether it held the information referred to as Point 1 in its correspondence. As the Commissioner did not hear anything back from the Appellant, the Commissioner undertook his investigation on that basis.

15. The Commissioner issued a Decision Notice dated 20 January 2011 in relation to this matter in accordance with s. 50 of the Act. The Decision Notice stated that the Constabulary had correctly relied on section 40(5) of the Act and as such, required no steps to be taken.

The appeal to the Tribunal

16. On 16 February Mr Quinn submitted an appeal to the Tribunal (IRT). His Grounds of Appeal are set out in the Open Bundle of Documents before us at pp 20-21.

17. The Commissioner in paragraph 23 of his Response sets out what he believed were the Appellant's grounds of appeal. The Appellant, in his reply to the Commissioner's Response did not dispute that the Commissioner's analysis represented the grounds upon which he was appealing against the Commissioner's Decision Notice. The Commissioner's analysis of the grounds of appeal is:

- i) The Commissioner erred when considering the scope of the Appellant's request.
- ii) The Commissioner erred in concluding that the information requested would constitute personal data.
- iii) The Commissioner erred in concluding that the Constabulary were correct to rely upon section 40(5) of the Act.

The questions for the Tribunal

18. Accordingly the Tribunal adopted this analysis as the questions to be considered in this appeal.

Evidence

19. All parties have agreed that this matter should be considered 'on the papers' only and we have heard no live evidence or oral submissions. No parties or representatives have attended the hearing.

20. We have considered, from the Appellant, the Notice and Grounds of Appeal and supporting documents together with quite extensive email correspondence submitted by Mr Quinn to the Tribunal.
21. We have considered, from the Commissioner, the Decision Notice, the Response to Appeal and the final submissions.
22. We have considered, from Hampshire Constabulary their Response to Mr Quinn's Appeal.

Conclusion and remedy

23. We considered first of all Mr Quinn's complaint that the scope of his request has been misinterpreted by the Commissioner (and indeed initially by Hampshire Constabulary). We examined the correspondence between the parties and we also considered the wording of the initial request from the Appellant to the Constabulary dated 24 November 2009 and the clarification contained in the email of the same date. We concluded that, in light of the wording of the request and clarification and in light of Mr Quinn's failure to provide any written challenge or response to the Commissioner's interpretation of his complaint (paragraph 14 above), the Commissioner was correct to limit his investigation in the way he did.
24. In the Tribunal's view the second question is closely tied to the first. Mr Quinn contends that the information he was seeking was far wider than the information highlighted in paragraph 9 above ('point 1') and because it was far wider could not be categorised, or could not be wholly categorised, as personal data. In his grounds of appeal the Appellant gave as examples of the information he sought, namely "*copies of legislation, guidance for/by the police on using the Regulation of Investigatory Powers Act and guidance on dealing with vulnerable people*" The Tribunal, as confirmed by the preceding paragraph, have accepted that the Commissioner was correct to limit

his investigation to the 'point 1' issues. The Tribunal also considered that the 'point 1' issues were unequivocally personal data and indeed sensitive personal data. The Tribunal accepted and adopted the analysis on this issue by the Commissioner which is set out in paragraphs 34-45 of the Commissioner's Response to the Appeal. For the sake of completeness a copy of the Commissioner's Response is appended to this Judgement as Appendix A.

25. In relation to the third question described in paragraph 17 above - the Tribunal was again assisted by the Commissioner's analysis set out in paragraphs 48-56 of the Commissioner's Response and the Tribunal approved and adopted that analysis. Consequently the Tribunal concluded that the Commissioner was correct to decide that the exemption in section 40(5)(b)(i) of the Act is engaged with respect to all of the information falling within the scope of the request.

26. Mr Quinn's appeal is consequently dismissed. The Tribunal did note, and Mr Quinn may wish to note, the indication from Hampshire Constabulary in its Response to his Appeal that had Mr Quinn made a request to the public authority for the information that he says he intended to seek namely "*copies of legislation, guidance for/by the police on using the Regulation of Investigatory Powers Act and guidance on dealing with vulnerable people*" then he "*would have been informed that this information is publicly available, either on the Hampshire Constabulary website, the Surveillance Commissioner's website or enshrined in legislation which is easily located on the Internet*" (The public authority's Response at page 47 of the Open Bundle)

Our decision is unanimous

Angus Hamilton DJ(MC)

Tribunal Judge

Date: 20 September 2011

Appendix A

**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL
(INFORMATION RIGHTS)
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

EA/ 2011/0047

B E T W E E N:-

CHRISTOPHER QUINN

Appellant

-And-

THE INFORMATION COMMISSIONER

Respondent

**RESPONSE
BY THE INFORMATION COMMISSIONER**

Introduction

1. This Response is served in accordance with Rule 23 of the Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) Rules 2009.
2. Christopher Quinn (“The Appellant”) is appealing against the Information Commissioner’s (“the Commissioner”) Decision Notice (ref FS50300474) dated 20 January 2011. The appeal is brought under section 57 of the Freedom of Information Act 2000 (“the Act”).
3. The Commissioner intends to oppose this appeal. The grounds upon which he relies are set out below.

Legislative Framework

4. The Act came into force on 1st January 2005.
5. Under section 1(1) of the Act 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, to have that information communicated to him (section 1(1) (b)).
6. 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 of the Act. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions. Where the information is subject to a qualified exemption, it will only be exempted from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (this is the public interest test – see section 2(2) of the Act).
7. Under section 50(1) of the Act, any person may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I of the Act.
8. Except where a complainant has failed to exhaust a local complaints procedure, or where the complaint is frivolous or vexatious, subject to undue delay, or has been withdrawn or abandoned, the Commissioner has a duty to consider whether the

request has been dealt with in accordance with the requirements of Part I of the Act and to issue a Decision Notice to both the complainant and public authority.

9. Where the Commissioner decides that a public authority has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or has failed to comply with any of the requirements of sections 11 and 17, the Decision Notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.
10. Where a Decision Notice has been served, the complainant or the public authority may then appeal against the Notice under s 57 of the Act.

Factual Background to this Appeal

11. The Regulation of Investigatory Powers Act ('RIPA') regulates the powers of public bodies to carry out surveillance and investigation and covers the interception of communications. For example, the Act enables certain public bodies to demand that someone hands over cryptographic keys to encrypted digital data. Under section 53 of RIPA, "*(1)A person to whom a section 49 notice has been given is guilty of an offence if he knowingly fails, in accordance with the notice, to make the disclosure required by virtue of the giving of the notice*".
12. On 24 November 2009, an article was published in *The Register* ('the article'), about an individual, identified only by the initials JFL, who was sentenced under Part III of RIPA. The article states that the individual's "*crime was a persistent refusal to give counter-terrorism police the keys to decrypt his computer files.*"

Request by Complainant

13. By email dated 24 November 2009 (12.45) the Appellant wrote to the Hampshire Constabulary ('the Constabulary') making the following request:

"Please let me have all information relating to people convicted under the refusal to decrypt legislation, like mentioned in http://www.theregister.co.uk/2009/11/24/ripa_jfl/" ('the request').

The Appellant made the same request to a number of other public authorities.

14. By email dated 24 November 2009 (14.14), the Constabulary sought clarification of the Appellant's request, asking the Appellant to provide *"additional details as to the information you are actually seeking when you refer to 'all information'. We also need date parameters."*

15. The Appellant replied by email the same day (24 November 14.32), advising the Constabulary as follows:-

*"I'm seeking information about what happened; whether it was indeed as the article appeared to report; **whether for example there was any significant risk of terrorist attack from any of the individuals convicted and what evidence there was for this; what matter.** I was mostly interested in the case mentioned in the article, but would like to know of any others."*

*"Dates from when the legislation was brought into force to present, but again mostly that where JFL was served with a section 49 notice, **and any interviews that may have been conducted at Fareham station (it wasn't clear from the article whether any had, which is part of the reason I'm making a fairly broad request) or anywhere else you might hold information for.**"*

“I don’t need details like name and address, or similar irrelevant personal details, but would like to know what regard was taken of the mental health of JFL as I think that is relevant to the appropriateness of the legislation compared to what MPs said it would be for.”

16. The Constabulary responded to the request on 19 January 2010, describing the request as follows:-
 - i) Point 1 – The information requested in the highlighted parts of the above email (‘point 1’)
 - ii) Point 2 – All information relating to people convicted under the refusal to decrypt legislation (‘point 2’).

17. With respect to point 1, it neither confirmed nor denied that it held the information, citing the exemptions in section 40(5), 30(3), 23(5), 24(2), 38(2) and 31(3) of the Act. With respect to point 2, the Constabulary told the Appellant that it *“does not hold this information as the answer is zero.”*

18. The decision in relation to point 1 was upheld following an internal review. In the Constabulary’s internal review response, it highlighted those parts of the Appellant’s clarification of the request provided in his email of 24 November 2009 which led it to continue neither to confirm nor deny that information was held. On this basis, the Commissioner understood that the Constabulary considered that the requested information related to:-
 - i) whether there was any significant risk of terrorist attack from any of the individual(s) convicted under the legislation and what evidence there was for this;

- ii) whether any interviews concerning the individual referred to in the article were conducted at Fareham police station; and
 - iii) whether the mental state of the individual referred to in the article was considered during the course of any investigation¹.
19. The complainant complained to the Commissioner on 3 June 2010 challenging the decision to withhold the information requested.
20. The chronology of the Commissioner's investigation of this case is set out at paragraphs 20 and 21 of the Commissioner's Decision Notice.

Scope of the case

21. The Commissioner advised the Appellant in correspondence that, unless he heard from him to the contrary, the scope of his investigation would be to determine whether or not the Constabulary was correct neither to confirm nor deny whether it held the information referred to as Point 1 in its correspondence. As the Commissioner did not hear anything back from the Appellant, the Commissioner has undertaken his investigation on that basis.

The Commissioner's Decision

22. The Commissioner served a Decision Notice dated 20 January 2011 in relation to this matter in accordance with s. 50 of the Act. The Decision Notice stated that the

¹ Referred to in paragraph 13 of the Decision Notice.

Constabulary had correctly relied on section 40(5) of the Act and as such, required no steps to be taken.

The Notice of Appeal

23. The Commissioner believes that the Appellant's grounds of appeal ('GOA') are as follows:-
- i) The Commissioner erred when considering the scope of the Appellant's request.
 - ii) The Commissioner erred in concluding that the information requested would constitute personal data.
 - iii) The Commissioner erred in concluding that the Constabulary were correct to rely upon section 40(5) of the Act.

The Commissioner's response to the Grounds of Appeal

24. Generally, the Commissioner relies on the Decision Notice as setting out his findings and the reasons for those findings. The Commissioner nevertheless makes the following observations in respect of the Appellant's grounds of appeal:-

The Commissioner erred when considering the scope of the Appellant's request.

25. The Appellant argues that the Commissioner failed to properly investigate whether the Constabulary correctly responded to the request as the Commissioner had erroneously treated the Constabulary's summary of the Appellant's email of 24 November 2009 as though it was the request.

26. The Commissioner accepts that the wording of the original request dated 24 November 2009 (email sent at 12.45) appeared to relate to all information relating to anyone convicted under the refusal to decrypt legislation, providing a link to the article in *The Register* merely by way of an example.
27. However, the Constabulary, having requested clarification of the broad nature of the Appellant's request, then received the second email from the Appellant dated 24 November 2009 (14.32). From the wording of this email, the Commissioner would submit that it was reasonable for the Constabulary to have interpreted this email as a clarification of the original request.
28. The Commissioner would further submit that the scope of the requested information was correctly set out in paragraph 13 of his Decision Notice. The Appellant argues that 'point 1' "*was NOT my request*" and that his request was "*rather broader, asking for information other than personal information.*" The Appellant further argues (at the top of the second page of his GOA) that his request was "*not just relating to the individual The Register wrote about.*"
29. However, the Commissioner would submit he did not restrict his investigation (and therefore the scope of the request) to information requested relating solely to the individual referred to in the article in *The Register*. For example, point 1 relates to a broad request (not just restricted to the incident referred to in the article), referring in paragraph 1 to "*whether, for example there was any significant risk of terrorist attack from **any** of the individuals convicted...*" (Emphasis added).

30. The Appellant also appears to be arguing that the Commissioner misinterpreted his request as asking for personal information when in fact he was asking for information other than personal information. The Commissioner will respond to this assertion in connection with the second ground of appeal referred to below.
31. In summary, the Commissioner would submit that the Commissioner correctly identified the information requested for the purposes of his investigation and that therefore this ground of appeal does not have reasonable prospects of success.
32. The Commissioner would submit that, in any event, even if he was found to be wrong in identifying the scope of the request, he still reached the correct decision that the Constabulary were entitled to rely upon the exemption pursuant to section 40(5) in relation to the information requested, if held.

The Commissioner erred in concluding that the information requested would constitute personal data

33. The Appellant disputes the Commissioner's contention that the information requested would constitute personal data and in some respects sensitive personal data about a third party and, as such, the information should therefore be disclosed. The Commissioner would submit that this ground of appeal arises out of a fundamental misunderstanding on the part of the Appellant as to what constitutes personal data.

Personal data definition

34. Section 40(7) of the Act confirms that the relevant definition is set out in section 1(1) of the Data Protection Act 1998 (“the DPA”):

“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.”

35. The two main elements of personal data are that the information must “*relate to*” a living person, and that person must be identifiable. Information will “*relate to*” a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.²

36. The leading authority on what is covered by “personal data” is the Court of Appeal’s decision in *Durant v Financial Services Authority*³. At paragraph 28 of the judgement, Auld LJ found:-

“It follows from what I have said that not all information retrieved from a computer search against an individual’s name or unique identifier is personal

² Commissioner’s guidance on section 40 (11.11.08)

data within the Act. 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 a 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.”

37. Auld LJ then goes on to provide “*two notions that may be of assistance*” to help decide whether or not information is personal data, namely biographical significance and focus. He continues, “*In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity.*”
38. The Commissioner’s guidance on determining what personal data is includes these two notions in a step by step approach to determine whether data is personal data under the DPA.
39. In the Tribunal’s decision in *Kelway v IC & Chief Constable of Northumbria Police*⁴, the Tribunal held that (at paragraph 60) “*in order to assist in making our decision, we consider we can take into account the notions provided in the guidance which include those provided by Auld LJ and the [working party] Opinion*⁵, but we are not bound to do so if they are not of assistance.” In that case the Tribunal decided (at paragraph 61) that “*3 witness statements that formed part of the requested information fell at a point in the continuum that made them Dr Kelway’s personal data but that the other two [witness statements] are not sufficiently proximate to Dr Kelway for them to constitute his personal data.*”

³ [2003] EWCA Civ 1746

⁴ EA/2008/0037

The Appellant's requests

40. The Commissioner submits that the Appellant's requests relate to information relating to individuals, whether this relates to the individual that is the subject of the article in *The Register* or other individuals convicted of the offence. In the case of the individual who was the subject of the article, just because the name of an individual is not known does not mean that the individual cannot be identified.
41. The Commissioner therefore remains satisfied that the information requested would, if it existed, relate to living individuals and that therefore the information is personal data as defined by the DPA.
42. The Commissioner also maintains that the information requested would also constitute sensitive personal data.
43. "Sensitive personal data" is defined at s. 2 DPA, which provides insofar as is relevant:

In this Act "sensitive personal data" means personal data consisting of information as to— ...

(e) his physical or mental health or condition,

(g) the commission or alleged commission by him of any offence.

44. The Commissioner submits that the request for information (as clarified in the second email of 24 November 2009) asks about convicted individual(s), the location of interviews and what consideration was given to the mental health of an

⁵ The Tribunal was referring to the opinion of the "working party on the protection of individuals with

individual. As such, the Commissioner would submit that such information, would, if held, reveal information about the commission or alleged commission by an individual of an offence as well as about their mental health.

45. The Commissioner therefore submits that he was correct to conclude that subsections (e) and (g) of section 2 DPA are applicable and that therefore all of the information falling within the scope of the request would, if held, fall within the definition of sensitive personal data.
46. The Appellant argues that he wanted “*information that is not about anyone, but is merely related*”. He then gave examples of the information he was requesting that related to the topic he was interested in, namely, “*copies of legislation, guidance for/by the police on using the Regulation of Investigatory Powers Act, guidance on dealing with vulnerable people.*” However, it is submitted that such information did not fall within the scope of the Appellant’s request as clarified and, as such, the Commissioner was not obliged to consider whether the Constabulary held the same.
47. The Appellant further argues that he thought that some of the confusion was that some legislation uses ‘related’ with a specific legal meaning but that he was using it in ordinary prose (i.e. rather than in the context of the DPA). However, the Commissioner would submit that the Constabulary are obliged to comply with the provisions of the DPA and is therefore obliged to consider whether the information requested amounts to personal data as defined in the DPA.

The Commissioner erred in concluding that the Constabulary were correct to rely upon section 40(5) of the Act.

48. Section 40 (1) to (4) exempt personal data from disclosure under the Act if to do so would breach the data protection principles. In relation to a request for information which constitutes the personal data of individual(s) other than the applicant(s), as in this case, section 40(5)(b)(i) further excludes a public authority from complying with the duty imposed by section 1(1)(a) of the Act if complying with that duty would contravene any of the data protection principles.

49. Having established above that the information requested would constitute personal data and indeed sensitive personal data, it is then necessary to consider whether or not confirming or denying that the information is held would contravene any of the data protection principles. By s. 40(7), the “data protection principles” are those set out in Part I of Schedule I to the Data Protection Act 1998 (“DPA”).

50. The Commissioner considered that the first data protection principle to be the relevant one in this case which states that:-

(1) 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, and

b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met...

51. By s. 1(1) DPA, “*processing*” of data includes disclosing that data.

52. As the Commissioner is satisfied that all of the information requested would constitute sensitive personal data, the Commissioner must consider whether any of the conditions in Schedule 3 can be met. The Commissioner would submit that he was correct to conclude that none of the conditions can be met.

53. The Appellant argues that “*it would not reveal sensitive personal information to say whether the police hold non-personal information.*” However, the

Commissioner would submit that, because of the way in which the request is worded, it would not be possible for the Constabulary to confirm or deny whether it held information that did not constitute personal data.

54. For example, if the Constabulary were to confirm or deny that it held any information relating to convictions for the offence in question and evidence of a risk of terrorist attack from any individual convicted, this would still inevitably reveal information relating to the commission or alleged commission of an offence, constituting sensitive personal data. Similarly, if the Constabulary were to confirm or deny that it held any information relating to the regard taken of the mental health of JFL, this would inevitably reveal information relating to both the commission or alleged commission of an offence and the individual's mental health or condition, also constituting sensitive personal data.
55. Although the Appellant accepts in his GOA that some of the information he asked for was personal information and that those parts should be excluded from his request, the Appellant argues that he should have been provided with the remainder of the information falling within the scope of his request that did not contain personal information. However, the Commissioner would submit that, on the particular facts of this case, confirming or denying that the requested information is held could itself reveal exempt information.
56. In light of the above, the Commissioner would submit that he was correct to conclude that the exemption in section 40(5)(b)(i) of the Act is engaged with respect to all of the information falling within the scope of the request. The Commissioner would submit that the effect of complying with section 1(1)(a), by

either confirming or denying that the information was held, would constitute the disclosure of an identifiable individual's sensitive personal data. This would, it is submitted, therefore breach the first data protection principle because none of the conditions in Schedule 3 can be met.

Public Domain Issue

57. The Appellant also argues that several other public authorities to whom the Appellant addressed the same request, including the Metropolitan Police Service and the HMCS were willing to confirm or deny whether they held the information requested and, have even provided some of the information requested.
58. The Commissioner understands that, in response to the same request from the Appellant to the Metropolitan Police, the Metropolitan police have disclosed to the Appellant the content of a press release(prepared by the Metropolitan Police for circulation to the media on an 'if asked' basis) with personal details having been redacted. The Commissioner understands from the Constabulary that the Metropolitan Police holds no record of this release being provided to any member of the press.
59. However, the Commissioner is not aware of any information falling within the scope of the Appellant's request, if held, being attributed to the Constabulary or the Constabulary having issued a press statement or public briefing in relation to the subject of the request.

60. In light of the above, the Commissioner would submit that, on the particular facts of this case, even if the Metropolitan Police had disclosed some of the information the Appellant had requested, as the Commissioner has determined that a Schedule 3 condition cannot be satisfied, confirming or denying that the information requested exists would still result in the Constabulary being in breach of the DPA because it would reveal sensitive personal data.

Conclusion

61. In light of the above, the Commissioner invites the Tribunal to dismiss the Appeal.

Oral / Written hearing

62. The Appellant has requested a paper hearing of the appeal. The Commissioner has no objection to a paper hearing in this case.

Richard Bailey

DATED this 17 day of March 2011

Name and address of Respondent / Address for service:-

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