



**IN THE MATTER OF AN APPEAL TO THE INFORMATION TRIBUNAL UNDER
SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

EA/2012/0210

B E T W E E N:

MR GORDON BELL

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

Tribunal

Judge Kennedy QC

Henry Fitzhugh

Roger Creedon

Hearing: 14th January 2013.

Location: Field House, London.

Decision: Appeal Allowed.

Subject matter: Possible Exemption under S 40 (5) of the Freedom of Information Act 2000 and the engagement of the Data Protection Act 1998.

DECISION OF THE TRIBUNAL

1. The Tribunal refers to its Interim Judgment dated the 5th February 2013. which sets out the background to this appeal and makes a preliminary finding subject to further evidence. In particular the Tribunal refers to paragraph 27 of their Interim Judgment which states: *“Accordingly the Tribunal finds that the respondent has erred in its DN (Decision Notice) when it relied on the fact that the named individual was a living person. However given the import of the effect on the named individual herein, the Tribunal will not make a final decision on this appeal without permitting the parties to present further evidence and submissions on a) the purported death of the named individual and b) the effect of such death, if accepted, on the DN.”*
2. The Respondent has helpfully produced evidence from an obituary on the Data subject or named individual referred to herein. The obituary, from St. Peters’ College, is significant evidence that supports the appellant’s assertion that the named individual is dead (see the Appellants’ e-mail dated 1st November 2012 at page 39 of the Open trial bundle) and has been, it seems according to the obituary, since the 19th October 2011. The Tribunal finds as a fact that the evidence before us establishes, on the balance of Probabilities, that the named individual, or Data subject herein died on the 19th October 2011, before the request for information (23rd May 2012) and before the impugned decision in the Decision Notice (18th September 2012), the subject matter of this appeal.
3. Accordingly we reiterate our finding that the Respondent has erred in its Decision Notice when it relied on the mistaken fact that the named individual or Data Subject was a living person. We therefore allow this appeal.
4. In light of this finding The Tribunal will allow the public authority to consider their position and present the Respondent with arguments on any other exemption

that may apply to the disputed information being released on or before the 19th March 2013. The Information Commissioner will then consider the position as between the parties and if necessary provide a further Decision Notice on or before the 9th April 2013. In any event the Tribunal will expect this matter to be concluded with a further and final decision by the Respondent on or before the 9th April 2013 and the either party will have the usual right to appeal from that decision if he chooses to do so.

Judge Brian Kennedy QC
26th February 2013.



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B E T W E E N:

MR GORDON BELL

Appellant

-and-

THE INFORMATION COMMISSIONER

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Tribunal

**Judge Kennedy QC
Henry Fitzhugh
Roger Creedon**

Hearing: 14th January 2013.

Location: Field House, London.

Decision: Interim Decision – Pending further evidence & submissions.

Subject matter: Possible Exemption under S 40 (5) of the Freedom of Information Act 2000 and the engagement of the Data Protection Act 1998.

INTERIM DECISION OF THE TRIBUNAL

1. The Tribunal at a paper hearing on the 14th January 2013 deliberated on the issues herein and find on an interim basis that the Appellant has established a prima facie case in his appeal but because of the import on an individual other than the appellant, if he is living, we intend to provide the parties with an opportunity to present further evidence before giving a final decision.

Reasons:

2. For the purpose of this Interim decision we intend to adopt, at least in part, and set out below the Respondents helpful analysis of the introduction and background as presented to the Tribunal.

Introduction

3. The Appellant appeals under section 57 of the Freedom of Information Act 2000 ("FOIA") against decision notice ("DN") FS50453212 issued on 18 September 2012. In that DN, the Information Commissioner ("the Commissioner") found that Thames Valley Police ("the Police") had correctly relied on section 40(5) of FOIA in refusing to confirm or deny whether specified information was held in relation to a named individual.
4. The Commissioner resists the appeal, for the reasons given in his DN and in this Response, a copy of which has been served on the Appellant.
5. The Commissioner considers that a paper hearing is appropriate in this case.

Legislative Framework

6. Under section 1(1) FOIA any person (referred to as “the complainant”) 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)).
7. Compliance with section 1(1)(a) FOIA is referred to as “the duty to confirm or deny” (section 1(6) FOIA).
8. A public authority may be excluded from the duty to confirm or deny under provisions contained in Part II FOIA.
9. In so far as is relevant to this appeal, section 40(5)(b)(i) FOIA 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...”

10. The definition of “personal data” is found at s. 1(1) of the Data Protection Act 1998 (“DPA”). This provides:

“‘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.”

11. The data protection principles are set out at Part I of Schedule 1 to the DPA. The first data protection principle is that:

“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...”

12. The Commissioner concluded that disclosure of the withheld information would be unfair, and consequently he did not need to consider whether any conditions from Schedule 2 DPA would be met. However, the only condition from Schedule 2 which the Commissioner considers may apply in the present case is condition 6(1). That condition provides as follows:

“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.”

Factual Background to this Appeal

13. On 23 May 2012 the Appellant wrote to the Police and requested information in the following terms:

“(1) When and how did Thames Valley Police discover that [named individual] had returned to the UK from Canada?

(2) What steps - if any - were taken to locate [named individual] after his return to the UK?

(3) If there was no attempt to locate [named individual] on the part of T.V.P. who made that decision and on what grounds was it made?"

14. The Police responded on 24 May 2012, refusing to confirm or deny whether the requested information was held. It relied on the exemption from the duty to confirm or deny provided by section 40(5) FOIA.
15. On 15 June 2012, following an internal review, the Police wrote to the Appellant stating that the refusal to confirm or deny under section 40(5) was upheld.
16. The Appellant contacted the Commissioner on 19 June 2012 to complain about the way his request for information had been handled.

The Commissioner's Decision

17. For the reasons set out at §§ 7 - 14 of the DN, the Commissioner found that any confirmation or denial that the requested information was held would result in the disclosure of the personal data of an individual other than the Appellant. Disclosure of that personal data would be unfair and in breach of the first data protection principle. Accordingly, the exemption to disclosure at section 40(5) of FOIA was engaged and the Police were therefore correct to neither confirm nor deny whether the requested information was held.

The Notice of Appeal

18. The Appellant's Grounds of Appeal, set out in full, are stated to be as follows:

"Once again the "Commissioner" has resorted to his normal stance in support of police corruption this time involving Thames Valley Police. It is to be noted that - again - the commissioner has failed to sign his own decision notice. Quite clearly the "Commissioner" is in the business of suppressing information that is crime related, rather than revealing it. His past record will show him to have protected Wiltshire Police in their blatant attempt to hide information relating to the very apparent deaths of

servicemen who had attended Porton Down. The Commissioner also allowed the BBC to with hold [sic] information relating to the deaths of Porton Down servicemen - meaning he is obstructionist to the course of justice taking place. He has not yet realized that his feeble attempts at suppressing information on matters of police corruption involving the cover-up of deaths at Porton Down he has become complicit in the corruption process.

As you will see in the attachment the report of one Dr K Cooper shows that he is indeed guilty of the offence of administering a highly dangerous bacterial endotoxin (salmonella abortus equi) into the bloodstream of five human test subjects none of whom can be found.

Thames Valley Police asked for and receive [sic] full details as to the whereabouts of Dr Cooper who they are now shielding. It is to be noted that the identical experiment was later performed on 115 RAF servicemen at Porton Down with 108 of the test subjects reported as missing.

It is also to be noted that Thames Valley Police did not conduct a proper investigation into the death of Porton Down Dr David Kelly.

*Based on what is stated here and elsewhere (the 3-72 million pounds awarded to Martyn Day from persons unknown with the MoD) I ask the Tribunal to overturn **DECISION NOTICE FS50453212 on the grounds that Dr Cooper has published his own test result paper on the internet therefore he has made his identity known. Thames Valley Police in keeping his name secret seem to be oblivious to this very basic fact. Dr Cooper is also referenced in Porton Technical Paper 841 (refer to attachment PTP 841) with the Wiltshire Police during the course of their 5 year so called Porton Down investigation failed to follow-up [sic] on Cooper's illegal activities during his tenure with the MRC.***

(Emphasis in the original).

The Commissioner's response to the Grounds of Appeal

19. For the avoidance of doubt, the Commissioner entirely rejects the scurrilous and unfounded allegations made against him by the Appellant in his grounds of appeal. The Commissioner is not in the business of defending the honour of any public authority; his role is clear and straightforward - it is to ensure that the legislation, as enacted by Parliament, and which he is responsible for regulating, is applied correctly and impartially. He has done that here.
20. The Commissioner relies of the matters set out in his DN in support of his conclusions in this case. That conclusion, the Commissioner submits, is unimpeachable.
21. The Appellant's grounds are inchoate. They contain no arguments to challenge the Commissioner's findings and they advance no coherent reason to overturn the DN.
22. In the absence of any cogent challenge to the findings in the Commissioner's DN, this appeal must inevitably fail.

Interim decision of the Tribunal:

23. The Commissioner notes that the Appellant has not served a formal Notice of Appeal in this matter. Whilst that is not, itself, a bar to pursuing an appeal, the Appellant has failed to provide full address details for service. In view of this omission, and in light of the explicit requirements of GRC Rule 22 and the matters set out in the HM Courts and Tribunal Service Guide to Completing the Notice of Appeal Form¹, the Commissioner is sceptical that the documents served by the Appellant in the present instance amount to a valid notice of appeal.
24. The Appellant indicated his wish to appeal in an e-mail to the Tribunal on the 25th September 2012 (see page 6 of the open bundle) and again on the 1st October
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2012 (see page 29 of the hearing bundle). and the Tribunal unanimously allow the appeal in the circumstances.

25. In his e-mail of the 1st November 2012 (see page 39 of the open bundle), the Appellant asserts inter-alia; ***“It is also to be noted that [the named individual] died last year in the UK.”*** If correct this means that the named individual as dead at the time of the request.
26. The Respondent has produced no evidence to contradict this assertion or otherwise to establish on the balance of probabilities that the named individual is a living person. In the circumstance the Tribunal accept that the Appellant has made a prima facie case that the named individual is dead and the respondent has failed to rebut that assertion.
27. Accordingly the Tribunal finds that the respondent has erred in its DN when it relied on the fact that the named individual was a living person. However given the import of the effect on the named individual herein, the Tribunal will not make a final decision on this appeal without permitting the parties to present further evidence and submissions on a) the purported death of the named individual and b) the effect of such death, if accepted, on the DN.
28. The Tribunal seek agreed directions from the parties on a timetable for the presentation of further evidence and submissions on or before 26th February 2013.

Judge Brian Kennedy QC

5th February 2013.



IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL
(INFORMATION RIGHTS)

EA/2012/0210

B E T W E E N:

MR GORDON BELL

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

APPLICATION FOR PERMISSION TO APPEAL

1. The Tribunal refers to the Respondents application to appeal and the grounds attached therewith.
2. It is and was always open to the Parties to seek to join the Public Authority and at no time has this been done.
3. The Tribunal finds the Respondent is premature in this application. The Tribunal found the Respondents Decision Notice erred in its reliance on Section 40(5) and this is now conceded by the Respondent.
4. The Tribunal has effectively issued directions that will allow the relevant Public Authority to consider any other exemptions that might apply before the Tribunal issues a substitute Decision Notice. In the event that the parties agree then a consent order may be applied for but if there is no consent then the Respondent

can issue a further Decision Notice. The result will have the same effect as, and is not exclusive to, the Respondents result as sought in paragraph 22 (a) and (b) of the Grounds of this application to Appeal. This Tribunal will issue such further directions as are sought before coming to a final conclusion on any outstanding issues.

5. As the only binding decision of the Tribunal to date is not an issue the application for leave to appeal is refused.

[Signed on original]

Brian Kennedy QC

Judge

27 March 2013