

FOIA s.40(1) personal data

FOIA s.30(1)(a)(i) information held by a public authority for the purposes of an investigation it is required to conduct with a view to ascertaining whether a person should be charged with an offence

## ***Kelway v IC & Northumbria Police***

**EA/2008//0037**

**14 April 2009**

Cases: *Durant v Financial Services Authority* [2003] EWCA Civ 1746

### **Facts**

Dr Kelway was involved in litigation which resulted in an order for costs against him. At the costs assessment hearing Dr Kelway was of the view that district judge had said he did not have power to deal with a particular matter. However the order that followed was made as if he did have such a power. Dr Kelway obtained a transcript of the proceedings which had no recording of the judge's remarks. Dr Kelway reported the matter to Northumbria Police who carried out several investigations. The CPS decided not to bring charges.

Dr Kelway requested the information relating to the investigations. It was refused on the basis it was exempt under s.40(1) and several other exemptions including s.30(1). He later made a subject access request under s.7 DPA and was sent some information. He complained to the IC who agreed with Northumbria Police that all the requested information was exempt under s.40(1) and issued a decision notice to that effect.

### **Findings**

The request was in relation to investigations following Dr Kelway's allegations made about another person. If the judge had been prosecuted then this might eventually have had some effect on the substantial cost order against him. The Tribunal needed to decide whether witness statements taken by the police during their investigations were caught by s.40(1). In coming to its finding the Tribunal had to consider Auld LJ's finding in *Durant v Financial Services Authority*, namely

*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.*

He then went on to provide "two notions that may be assistance" to helping decide whether or not information is personal data, namely biographical significance and focus. The Tribunal noted that these two notions were contained in the IC's Guidance on the subject together with other notions which the IC used to help him determine whether or not the information was personal data.

The Tribunal found that it was not bound to take these notions into account unless they could be of assistance and noted that in other decisions of the Information Tribunal and elsewhere that Auld LJ's notions had appeared to be given more significance than it was believe that Auld LJ intended.

The Tribunal found that three witness statements fell at a point in the continuum that made them Dr Kelway's personal data but that the other two were not sufficiently proximate to Dr Kelway for them to constitute his personal data.

For these two statements the Tribunal found that s.30(1)(a) was engaged and that the Tribunal needed to consider the balance of the public interest.

### **Public Interest Test**

The case involved an investigation into a serious allegation against a judge or court staff. The Tribunal found that there was a strong public interest in Northumbria Police being able to show that they had carried out a proper and thorough investigation of an alleged crime particularly against a member of the judiciary or court staff. This was even stronger because of the public needed to be reassured that there was no collusion between authorities or the police and a judge.

The Tribunal found that the chilling effect on investigations was weaker in this case because the investigations had closed by the time of the request. Also it found that they were weaker because the relevant witness statements were those of persons involved with technical aspects of the investigation whilst carrying out their professional duties.

### **Conclusion**

The Tribunal concluded that the balance of the public interest favoured disclosure of the two statements and ordered their disclosure.

The other three were caught by s.40(1) and were absolutely exempt.