

**FOIA:** FOIA s40(2)(3) – exemption for personal data - whether first data protection principle would be contravened by disclosure  
**DPA:** DPA s1 personal data – DPA s2 sensitive personal data – DPA Schedule 1 paragraph 1, first data protection principle  
Whether conditions for processing met - DPA Schedule 2 conditions 5(a) and 6, DPA Schedule 3 conditions 6(c) and 10  
Data Protection (Processing of Sensitive Personal Data) Order 2000  
Schedule paragraphs 3 and 9 – “substantial public interest”.

***ALASTAIR BRETT v INFORMATION COMMISSIONER and FOREIGN AND COMMONWEALTH OFFICE***

**Case Number: EA/2008/0098**  
**21<sup>st</sup> August 2009**

**Cases:**

Durant v Financial Services Authority [2003] EWCA Civ 1746  
Corporate Officer of the House of Commons v Information Commissioner  
EA/2007/0060  
Common Services Agency v Scottish Information Commissioner [2008] UKHL  
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**Facts**

On Sunday 6 March 1988 three members of the IRA were shot dead by British Special Forces in Gibraltar. The shooting was the subject of a Thames Television programme ‘Death on the Rock. Mrs Carmen Proetta, who claimed to have witnessed part of the incident, took part in the programme. She also gave evidence at the subsequent inquest in Gibraltar on 22 September 1988. The programme gave rise to intense public controversy. Mrs Proetta claimed in it that she saw two of the IRA members shot without warning while trying to surrender. The inquest jury decided, by nine to two, that the killings were lawful, being reasonably justified in the circumstances. In the wake of the television programme, there was considerable criticism of Mrs Proetta in the media. She successfully sued for libel the Sun, the Daily Mail, the Daily Express and the Daily Mirror, and her suits against the Sunday Times and RTÉ were settled.

Mr Brett wished to write a book investigating the allegation that the British Army operated a ‘shoot to kill’ policy in relation to the IRA. He requested all letters, memos, or other documents received by Sir Geoffrey Howe, then Foreign Secretary, from all or anyone who cast doubt on the evidence given by Carmen Proetta.

The request was refused and Mr Brett complained to the IC. The IC was satisfied that all the disputed information constituted sensitive personal data relating to Mrs Proetta and personal data or sensitive personal data relating to

individuals who had contacted the British Government and to other third parties. The Commissioner was satisfied that no condition in DPA Schedule 3 was met. He concluded that disclosure of the disputed information would contravene the Data Protection Principles and that the information was exempt under FOIA.

## **Findings**

The Tribunal had to decide in relation to each part of the 5 documents in dispute

- a. whether it was personal data;
- b. whether disclosure would be fair processing;
- c. whether condition 5(a) or condition 6 of Schedule 2 was met;
- d. whether it was sensitive personal data;
- e. if so, whether condition 6(c) or condition 10 of Schedule 3 was met (where condition 10 required consideration of paragraphs 3 and 9 of the 2000 Order: this was the first time the Tribunal had been asked to consider this Order).

The Tribunal found that one document and part of another did not constitute personal data and should be disclosed. In relation to the other documents they contained sensitive personal data and the tribunal had to consider whether any conditions in Schedule 3 DPA were met. Condition 6(c) of Schedule 3 is that the processing is necessary for the purposes of establishing, exercising or defending legal rights.

The 'rights' relied on by Mr Brett were (a) "the rights of those associated with the events that took place outside the Shell petrol station in Gibraltar in March 1988", and (b) Mr Brett's "right to publish an accurate and fair account of events" (ie one which will not subject him to a libel action) and his right "not to be impeded in that by the refusal of a public authority to share information that it holds and which does not otherwise conflict with a protected interest". The Tribunal concluded that it did not need to reach a conclusion on whether these were 'legal rights' within the meaning of condition 6(c). Even if they did, it was not able to conclude that disclosure was necessary for the purposes of establishing, exercising or defending those rights, because of the doubtful quality of the information. It would be of minimal assistance in relation to any such rights. The test of necessity under condition 6(c) was not met.

Condition 10 of Schedule 3 is that the personal data are processed in circumstances specified in an order made by the Secretary of State. The relevant order is the Data Protection (Processing of Sensitive Personal Data) Order 2000. Article 2 of that Order provides that the circumstances specified in any of the paragraphs in the Schedule to the Order are circumstances in which sensitive personal data may be processed. Mr Brett relied first on paragraph 3 of the Schedule to the Order. Most of the paragraphs refer to

'processing', which covers both disclosure and other forms of processing. Paragraph 3 differs, in referring only to 'disclosure'. The relevant elements of the paragraph are that the disclosure-

- a. is in the substantial public interest;
- b. is in connection with the commission by any person of any unlawful act, whether alleged or established;
- c. is for the special purposes defined in DPA s3, ie, the purposes of journalism or artistic or literary purposes; and
- d. is made with a view to the publication of those data by any person and the data controller reasonably believes that such publication would be in the public interest.

The Tribunal was satisfied from the nature of the request and from Mr Brett's evidence that elements (b) and (c) and the first part of element (d) would be met in this case.

The second part of (d) required that the data controller reasonably believed that publication would be in the public interest. In a single set of circumstances, the reasonable belief of one data controller may differ from the reasonable belief of another data controller. The question arose whether it was the actual belief of the FCO that mattered and, if so, whether that belief had to be both objectively reasonable and reasonably arrived at. A further question might then be, if the belief was vitiated by a misunderstanding of the meaning of the expression "public interest", whether it was the Tribunal's function to substitute its own belief for that of the FCO.

The Tribunal did not need to consider how paragraph 3 was intended to function in a case where the data controller was considering on his own initiative whether he would allow publication. The present context was an information request and a Commissioner's decision notice under FOIA, which the Tribunal was required to consider pursuant to FOIA ss57-58. In that context FOIA s40(3) required the Tribunal to consider a hypothetical question, namely, whether "the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles". The Tribunal could answer that question by considering, in relation to element (d), whether a hypothetical data controller in the position of FCO could reasonably believe that publication would be in the public interest. If so, then it was not established that disclosure "would contravene" a data protection principle by reason of non-compliance with element (d).

It was not necessary for the Tribunal to come to a firm view on element (d), because element (a) was not satisfied, ie, disclosure being "in the substantial public interest". Since the information in question amounted to little more than additional speculation concerning the probity of Mrs Proetta's evidence, it was not in the substantial public interest to publish it. Reliance by Mr Brett on

paragraph 9 of the Schedule to the Order was unsuccessful for the same reason.

The Tribunal also rejected arguments in relation to personal data that Schedule 2 conditions 5(a) and 6 were met. The Tribunal found that the data protection principles would have been contravened for all documents except the two which in the Tribunal's view did not contain personal data.

### **Conclusion**

The Tribunal substituted a new decision notice upholding the IC's decision except in relation to the two documents which did not contain personal data, which were ordered to be disclosed.