



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0241

**Decided without a hearing
On 15 November 2018**

Before

JUDGE BUCKLEY

JEAN NELSON AND NARENDRA MAKANJI

Between

DAVID STURGESS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

1. For the reasons set out below the appeal is dismissed.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice FS50665772 of 28 September 2017 which held that the request was for personal data and that confirming or denying whether the requested data was held would breach the first data protection principle and therefore the Chief Constable of Dyfed Powys Police

(‘the public authority’) was correct to rely on s 40(5) of the Freedom of Information Act (FOIA) and neither confirm or deny whether it held the requested information.

Factual background to the appeal

2. This request arises out of the Appellant’s arrest and detention at Aberystwyth police station in September 2008. The Appellant has a number of complaints about the conduct of the police.
3. The Appellant asserts, amongst other things, that the custody records were tampered with and that lies have been told about which officer he spoke to. Relevantly he asserts that the officer had not been promoted to the appropriate rank at the relevant time.
4. These complaints have been considered by the IPCC and in a number of court cases, none of which have resolved the matter to the Appellant’s satisfaction. The Appellant also complains that the IPCC’s report has not been acted upon.

Request, Decision Notice and appeal

5. The Appellant made the request under the Freedom of Information Act (FOIA) which is the subject of this appeal on 20 December 2016:

I am seeking the information upon a retires [name and rank redacted] from dyfed powys police who is referred to in the psd report of [name redacted] who was over seeing as so stated in his report of my many complaints the reason why I require this information. Is im am doing a reports requested with evidence to the ipcc as this [name and rank redacted] DYP now retired. ...I am requesting to what date and time was this new grade given making him [name and rank redacted] (sic)

6. The Appellant subsequently clarified that his request was for the date the named officer was promoted.
7. The public authority replied on 12 January 2017. It refused to confirm or deny if it held the information. It relied on s 40(5) of FOIA.
8. An internal review was conducted on 7 March 2017 and the public authority upheld its original decision.
9. In its decision notice dated 28 September 2017 the Commissioner concluded that the information requested, i.e. the date of a named individual’s promotion, was personal data. In assessing fairness the Commissioner took account of the reasonable expectations of the individual that information of the type requested would not be disclosed. Disclosure could cause unnecessary and unjustified damage and distress to the individual. The Commissioner concluded that in the absence of a compelling public interest in disclosure it would be unfair for the public authority to confirm or deny that it held the requested information.

10. The Grounds of Appeal are contained in a wide-ranging letter dated 15 October 2017 and an email dated 23 October 2017. The Appellant covers a number of issues not relevant to the issues in this appeal, but the essence of his grounds appear to be:

- 10.1. The information will be used in an appeal to be heard in the Royal Courts of Justice (RCJ).
- 10.2. The information will not be released to the public. It is for the Appellant's own use and if required in the RCJ hearing.
- 10.3. It is needed by solicitors who are doing his CCRC appeal.
- 10.4. It is needed for his civil case against the Chief Constable of Dyfed Powys Police.
- 10.5. He needs it to establish that he has been lied to by the public authority and others, including in particular lies about whether he was seen by this individual during his detention in September 2008 and the date of promotion of the individual.
- 10.6. This is needed in his appeal to establish perjury and his unlawful detention and abuse by the public authority in September 2008.

11. The Commissioner's response states:

- 11.1. The information requested identifies and relates to a named individual. It is therefore personal data.
- 11.2. It would not be fair to confirm or deny to the world at large whether or not the named individual was a police officer with the public authority at the relevant time because of that individual's reasonable expectations and the consequences of disclosure.
- 11.3. The Appellant has not provided any arguments explaining what interest he has in the public authority confirming or denying that the individual was a police officer at the time of the request. The general public interest does not outweigh the consequences for the individual.

Legal framework

S 40 – Personal Information

12. The relevant parts of s 40 of FOIA provide:

- (2) Any information to which a request for information relates is also exempt information if-
 - (a) it constitutes personal data which do not fall within subsection (1), and
 - (b) either the first or the second condition below is satisfied.
- (3) The first condition is-
 - (a) in a case where the information falls within any of paragraphs (a)-(d) of the definition of 'data' in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene –
 - (i) any of the data protection principles...
 - ...
 - (5) The duty to confirm or deny –
 - ...
 - (b) does not arise in relation to other information if or to the extent that either

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 191(a) would (apart from this Act) contravene any of the data protection principles...

13. Personal data is defined in s1(1) Data Protection Act 1998 ('DPA') as:
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..
14. The first data protection principle is the one of relevance in this appeal. This provides 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..." (See para.1 Sch 1 DPA).
15. The only potentially relevant condition in Schedule 2 DPA is section 6(1) which provides that the disclosure 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.' (See para.s 6 Sch. 2 DPA)
16. The case law on section 6(1) has established that it requires the following three questions to be answered:
 - 16.1. Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
 - 16.2. Is the processing involved necessary for the purposes of those interests?
 - 16.3. Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

The Task of the Tribunal

17. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

18. The issues we have to determine are:
 - 18.1. Was the information requested personal data?
 - 18.2. Would confirming or denying the information be fair?
 - 18.3. If so, are the conditions in 6(1) met i.e.
 - 18.3.1. Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
 - 18.3.2. Is the processing involved necessary for the purposes of those interests?
 - 18.3.3. Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

Evidence and submissions

19. We have read and were referred to an open and a closed bundle of documents, which we have taken account of where relevant.

Discussion and conclusions

20. We conclude that the information requested was personal data - the date of promotion of a named individual falls within that category.

21. We agree with the Commissioner that the individual would not reasonably expect the public authority to disclose whether or not he was a police officer with them, in accordance with the public authority's usual practice. We think that a retired police officer in particular would have this reasonable expectation.

22. We accept the public authority's assessment of the consequences of releasing this information namely that it places that individual and members of their family at the risk summarised in the Decision Notice. Further, whatever the Appellant intends to do with the information, disclosure under the FOIA is disclosure to the public, not just to the Appellant, and we take that into account.

23. Further we have considered whether there is a more compelling public interest in disclosure. It is apparent from the documents in the bundle that the issues arising from the Appellant's arrest in 2008 have already been aired in a number of forums, although not to the Appellant's satisfaction. If the information is relevant to ongoing litigation in the RCJ or the high court then that court is the appropriate body to consider ordering disclosure of that information. The Appellant has not provided sufficiently clear information on the nature of the proceedings to enable the tribunal to see the relevance of that information. In any event, the tribunal notes that the Appellant is currently subject to a civil restraint order, the terms of which make it unlikely that he is able to pursue any civil claim in which the requested information would be relevant.

24. For those reasons the tribunal concludes that it would not be fair to confirm or deny that the information was held. In the circumstances it is not necessary to consider section 6(1), but we would have concluded for the reasons set out above that disclosure was not necessary to pursue a legitimate interest and that the prejudice to the officer's rights and freedoms outlined above would mean that disclosure was unwarranted.

25. This appeal is dismissed. Our decision is unanimous.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 14 January 2019

Promulgation date: 22 January 2019