



Tribunals Service

Information Tribunal

Information Tribunal Appeal Number: EA/2009/0013

Information Commissioner's Ref: FS 50205686

Freedom of Information Act 2000

Determined on the papers
On 24 August 2009

Decision Promulgated On: 11 September 2009

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

Anisa Dhanji

and

LAY MEMBERS

Jacqueline Blake and Pieter De Waal

BETWEEN

THE CHIEF CONSTABLE OF SUSSEX POLICE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Subject matter

Freedom of Information Act 2000 – section 40(5)(b)(i):

- whether the public authority was under a duty to confirm or deny
- whether the data is “personal data”
- whether any individuals can be identified

REASONS FOR DECISION

Introduction

1. This is an appeal by the Chief Constable of Sussex Police (the “Appellant”), against a Decision Notice issued by the Information Commissioner (the “Commissioner”), on 9 February 2009.

The Request for Information

2. On 28 February 2008, the Appellant made eight requests (set out in numbered points), for information relating to, amongst other things, reports of anti-social behaviour ("ASB") reported in respect of Beresford Lane, Brighton, BN8, between 1 August 2007 and 1 February 2008. There is no Beresford Lane in Brighton, and therefore, the Appellant informed the requester that it was treating the request as relating to Beresford Lane, Plumpton Green, BN8.

3. The specific information requested was as follows:

"Reported Incidents of Anti-Social Behaviour

Location: Beresford Lane, Brighton, BN8

Period: 1st August 2007 to 1st February 2008

Please provide the following suitably anonymised information in relation to the above location:-

1. The number of complaints of anti-social behaviour reported over the above period by residents/occupiers of the location.

2. A description of the type/category of ASB reported over the above period at the location (See the Respect Standard for Housing Management – Housemark ASB categories).

3. How many live Anti-Social Behaviour Orders or Anti-Social Behaviour Injunctions are currently in force against residents/occupiers of the location?

4. Whether the location has been or is currently within the boundary of a Designated Public Place Order under S.26 of the Violent Crime Reduction Act 2006.

5. Whether the location has been or is currently within the boundary of a Designated Dispersal Area under part 4 (S30-36) Anti-Social Behaviour Act 2003.

6. How many Penalty Notices for Disorder have been issued on this location over the above period.

7. The number of recorded street robberies at this location over the above period.

8. How many residential addresses are located on this street/road."

4. The Appellant responded on 31 March 2008, stating that it would neither confirm nor deny that it held any information relevant to requests 1, 2 and 3. It relied on the exemptions in section 40(5) and 31(3) of the Freedom of Information Act 2000 ("FOIA").

5. In respect of requests 4 to 7, the Appellant said that it did not hold any information, but that information relevant to request 4 might be held by the Local Authority.

6. The Appellant refused to provide the information in request 8, on the basis of section 21(1) of FOIA, since it considered that that information was accessible either from Royal Mail or local voters' registers.
7. The requester asked the Appellant to undertake a review of its decision. The Appellant did so, but maintained its position. However, following its review, it informed the requester that it was now relying only on the exemption in section 40(5), and not on section 31(3).

The Complaint to the Commissioner

8. On 25 June 2008, the requester complained to the Commissioner. In further communication, the requester clarified that his complaint was only in respect of requests 1 and 2.
9. The Commissioner undertook enquiries. The Appellant confirmed that it maintains a record of anti-social behaviour complaints lodged within its area, and it also confirmed that the complaints are categorised according to the type of behaviour reported.
10. Following its investigations, the Commissioner decided that the requests did not engage the exemption in section 40(5) of FOIA. Accordingly, he required the Appellant to confirm or deny whether the information requested was held, and if it was, to either disclose it to the requester, or to provide a valid reason under FOIA why the information was not being disclosed. The Commissioner issued a Decision Notice to this effect.

The Appeal to the Tribunal

11. By a Notice of Appeal dated 3 March 2009, the Appellant appealed to the Tribunal against the Decision Notice. In its Grounds of Appeal, the Appellant says that to confirm or deny that it holds the information requested would constitute a breach of the Data Protection Act 1998 ("DPA") and therefore, it considers that it correctly applied section 40(5) of FOIA.
12. Both parties indicated that they were content for the appeal to be determined by the Tribunal without a hearing, pursuant to Rule 16 of the Information Tribunal (Enforcement Appeals) Rules 2005. Having regard to the nature of the issues raised, and the nature of the evidence, the Tribunal was satisfied that the appeal could be properly determined without an oral hearing.

Evidence and Submissions

13. We have considered all the documents received from the parties (even if not specifically referred to in this determination), including, in particular, the documents in the agreed bundle, and such written submissions as have been received from the parties. Neither party relies on any witness evidence.
14. This appeal concerns only requests 1 and 2. The Tribunal has been informed whether the Appellant holds any relevant information, but we have not indicated this in the determination since to do so would, of course, defeat the purpose of this appeal.

The Tribunal's Jurisdiction

15. The scope of the Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the notice is not in accordance with the law, or to the extent the notice involved an exercise of discretion by the Commissioner, the Tribunal considers that he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
16. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, the Tribunal will often receive evidence that was not before the Commissioner.

Issues and Findings

17. Under section 1(1)(a) of FOIA, a person who has made a request for information to a public authority is entitled to be informed, in writing, whether the public authority holds that information. Under section 1(1)(6), this is referred to as the public authority's duty "to confirm or deny". This duty is distinct from and in addition to the public authority's duty under section 1(1)(b) to provide the information requested if it holds it.
18. The question for determination in this appeal is not whether the public authority is required to provide the information requested, but simply whether it is required to confirm or deny that it holds the information. The Appellant says that section 40(5)(b)(i) exempts it from the duty to confirm or deny.
19. In so far as it is relevant, section 40 provides as follows:

Personal Information

1. *Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.*
5. *The duty to confirm or deny-*
 - (a) *does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and*
 - (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 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 or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or*
 - (ii) *by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data*

subject's right to be informed whether personal data are being processed).

6. In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

20. The effect of section 40(5)(b)(i) is this: if simply confirming or denying that it holds the information would contravene any of the data protection principles or section 10 of the DPA (processing likely to cause damage or distress), the public authority is exempt from the duty to do so.

21. There can of course be no breach of any data protection principle, nor of section 10 of the DPA, unless what is in issue is personal data. The question for the Tribunal to determine, therefore, is whether, by confirming or denying that it holds the requested information, would the public authority be disclosing personal data?

22. Section 40(7) of FOIA incorporates the definition of "personal data" found in section 1(1) the DPA which is as follows:

"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;

23. The DPA gives effect to Directive 95/46/EC of 24 October 1995 on The Protection Of Individuals With Regard To The Processing Of Personal Data And On The Free Movement Of Such Data ("the 1995 Directive"), and it may be helpful to also set out the definition of "personal data " from the 1995 Directive (Article 2(a)):

"... any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;"

24. In effect, what makes data "personal data" is whether living individuals can be identified either from that data itself, or from that data taken together with other information as envisaged by section 1(1)(b) of the DPA. In the present case, there

is no indication that there is any other such information, and therefore, section 1(1)(b) is not in issue.

25. The Appellant says that if it confirms or denies that it holds the requested information, that could lead to the identification of either those who have made complaints about ASB, or those about whom such complaints have been made. Clearly, if it does lead to such identification, that would amount to disclosure of personal data. The question is - would it lead to such identification?
26. The facts before us are notably brief. We have been told that Beresford Lane, Plumpton Green, BN8, is a rural road with approximately 17 residential dwellings. Presumably, many, if not most of the 17 dwellings, will have multiple occupiers which means there are likely to be many more than 17 people living in the area covered by the request. The request covers a period of 6 months. We have no other facts of any significance. On these simple facts, we have great difficulty in seeing how, if the Appellant confirms or denies that it holds information on the number of ASB complaints reported, and the descriptions of any such ASB complained of, in that period and for that location, that would enable a living individual to be identified as having either made a complaint or having been the subject of such a complaint, or indeed to be identified in any other way. The Appellant has simply not demonstrated how that connection could be made.
27. The position might be quite different on different facts. For example, if there was a known incident concerning one or more particular dwellings or individuals and if the time period covered by the request was relatively specific to that incident, a confirmation or denial could well lead to an individual being identified. That, however, is not the situation in the present case.
28. It follows that we find that the Decision Notice against which the appeal is brought is in accordance with the law. This means that within 35 days of this determination being promulgated, the Appellant must, in compliance with section 1(1)(a) of FOIA, inform the requester in writing, whether it holds the information referred to in requests 1 and 2.
29. For completeness, it may be helpful if we were to address briefly certain specific submissions made by the Appellant. The Appellant says that those reporting complaints about anti-social behaviour to Sussex Police do so with the expectation of a certain level of confidentiality, and that some people will specifically ask for their details not to be disclosed as they fear repercussions. We accept that that is so. However, as already noted, we do not find, on the facts of this case, that confirmation or denial that the requested information is held, would identify the person making the complaint. Therefore, there would be no breach of any such confidentiality.
30. Second, the Appellant says that if it were to confirm that the requested information is held, then residents of the area in question could themselves recall the incidents and perhaps narrow down where the likely complaints came from. The Appellant says that that, in turn, could allow them to identify who made a report to the police or about whom a complaint was made. That might well be so on different facts, but on the evidence before us, we agree with the Commissioner that at most, confirmation or denial might simply lead to some speculation. There is no evidence

of any incidents or other circumstances to support a finding that any individual could actually be identified.

31. Third, the Appellant says that in refusing to confirm or deny, its position is consistent with the advice given, in a letter dated 8 July 2008, by the Commissioner to the Metropolitan Police Service in connection with crime mapping proposals. That letter has been included in the agreed bundle. We do not have enough background on the issues addressed there to comment further. We would note, however, that that letter concerns the actual disclosure of the requested information. What is in issue in the present case, is simply whether the public authority is required to confirm or deny that it holds the requested information.
32. Finally, what is evident from the Appellant's submissions, is that it is concerned not so much about confirming or denying whether it holds information relevant to these particular requests, but rather, on the implications that would have as regards future requests. The Appellant appears to be seeking a decision that would serve as guidance on how it should respond if and when it receives similar requests in the future, whether from this or any other requester. However, each request must be considered on its own facts. As we have already indicated, on different facts, it may be well that to confirm or deny that it holds information on ASB complaints would amount to disclosure of personal data.
33. This decision only concerns the Appellant's duty under section 1(1)(a) to confirm or deny whether or not it holds the information requested. It does not deal with whether the Appellant must actually disclose any such information it may hold. However, we note that the Appellant has indicated that should the Tribunal find that the Appellant is under a duty to confirm or deny, it will also comply with its duty under section 1(1)(b) and will not be seeking to rely on any other exemption.

Decision

34. The Decision Notice against which the appeal is brought is in accordance with the law. This appeal is dismissed.

Signed

Date: 11 September 2009



Anisa Dhanji

Deputy Chairman