



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Case No. EA/2009/0088

**ON APPEAL FROM:
Information Commissioner
Decision Notice ref FS50174035
Dated 14 September 2009**

Appellant: Tony Wise

Respondent: Information Commissioner

On the papers

Date of hearing: 27 January 2010

Date of decision: 3 February 2010

Before

HH Judge Shanks

Roger Creedon

Suzanne Cosgrave

Subject area covered:

Personal data s.40

Cases referred to:

Durant v FSA [2003] EWCA Civ 1746

Decision

The appeal is dismissed.

Reasons for Decision

The request for information

1. In about 2004 Mr Wise made certain allegations of corruption to the police. It seems that his allegations were not acted on by the police but they led to two internal police memos dated June 2004 in which it was stated, quite falsely according to Mr Wise, that he often made complaints to the police and was in regular communication with them on a variety of subjects. At some stage Mr Wise obtained these memos through the Independent Police Complaints Commission and, basing his questions on certain words used in them, on 22 September 2005 he made a detailed request for information under the Freedom of Information Act 2000 addressed to the Lancashire Constabulary.
2. The request attached copies of the memos and was in these terms:
 1. **Can you provide all details of all the regular meetings I had with [named person]? Please include any times, dates, persons in attendance, minutes or any other relevant detail.**

2. **Can you please provide all correspondence sent to [named person] on a weekly basis, any replies from this individual or any relevant detail? I was involved with [named person] for many months therefore I require evidence of the many, many items sent directly to [named person].**
3. **Can you please provide me with details of the correspondence, the subjects of the correspondence, any responses from the police and any other relevant detail as regards the variety of subjects that I wrote of to Fleetwood Police around this time?**
4. **Can you please provide all documentary evidence and any other relevant detail as regards the official complaints that I “often” made according to [named person]?**
5. **Can you also provide all material relevant to the regular correspondence entered into concerning these “complaints” at 4?**
6. **Can you please provide all documentary evidence, correspondence, memos or any other items or material concerning contact between the Metropolitan Police Service and Lancashire Constabulary at this time?**

Request number 6 was later clarified by Mr Wise in correspondence with the Information Commissioner: although the wording was quite general, Mr Wise was only seeking information passing between the two police forces about himself. It is clear from the terms of the request and the other material put before us that Mr Wise’s motivation in making the request was not really to elicit the information requested but to demonstrate that the contents of the memos were indeed untrue, there being, he says, no such information.

3. The Lancashire Constabulary responded to Mr Wise’s request on 11 October 2005, stating, in reliance on section 14 of the 2000 Act, that they were not obliged to comply with his request because it was “vexatious”. He sought an internal review of the decision on 16 October 2005 but none was ever undertaken.
4. On 18 October 2005 Mr Wise made a written request for information in very similar terms to that made on 22 September 2005, but this time under section 7 of the Data Protection Act 1998 (which, of course, pre-supposes that the information in question is his “personal data”). We note at this stage that, although Mr Wise remains

unhappy with the response he has received to this latter request and to the way the Information Commissioner has dealt with his complaint about it, this Tribunal has no jurisdiction at all to consider such matters, the route of appeal being an application to the court under section 17 of the 1998 Act.

The Commissioner's decision

5. On 15 August 2007 Mr Wise complained to the Information Commissioner under section 50 of the 2000 Act that the Lancashire Constabulary had not dealt with his request of 22 September 2005 in accordance with that Act. In a decision notice dated 14 September 2009 the Commissioner decided that the Constabulary were wrong to have relied on section 14 but that the information requested amounted to Mr Wise's personal data and that they were not obliged to confirm whether they held the information or to supply it by virtue of section 40(5) of the Act. In the course of his decision the Commissioner made the following observations:

[18] The Commissioner wrote to the Constabulary on 29 July 2008. He asked the Constabulary to provide him with copies of the information it holds falling within the scope of the complainant's request, and to indicate which pieces of information were sent to the complainant in response to his Subject Access Request [ie his request under the Data Protection Act 1998] ...

[22] The Constabulary provided the Commissioner with its response to his ... letter on 25 November 2008...

[31] The Commissioner has determined that ... the Constabulary was in fact not obliged to confirm whether or not it held the information sought by the complainant, by virtue of section 40(5)...

[33] The Commissioner acknowledges that the Constabulary did in fact respond to the Subject Access Request made by the complainant.

The Decision

[34] The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act because it incorrectly applied section 14 to the complainant's request. In the Commissioner's view the Constabulary should have applied section 40(5).

Steps Required

[35] In view of the Constabulary having responded to the complainant's Subject Access Request, the Commissioner requires no steps to be taken.

Mr Wise's appeal

6. Mr Wise has appealed against that decision notice under section 57 of the 2000 Act. The grounds of appeal stated in his notice are as follows:

There are factual inaccuracies in the notice and the ICO referred me to the Tribunal. I also have concerns about the rules of evidence and subject access. Please see attached.

Attached to the notice of appeal there is a six page letter from Mr Wise dated 6 October 2009.

7. The Commissioner's Reply invited the Tribunal to strike out the appeal on the basis that Mr Wise had no reasonable grounds of appeal but the Tribunal directed that the appeal should be determined on its merits on the papers and Mr Wise was thus given an opportunity to raise and develop any points he wished and he has put in a number of written submissions, most recently those dated 21 January 2010.
8. It is conceded by the Commissioner that there are factual errors in the decision notice. It is clear, however, that they were inadvertent errors and made no difference to the substantive decision and we agree with the Commissioner that this complaint discloses no reasonable ground of appeal.
9. We have considered the other issues which Mr Wise has sought to raise and, acknowledging his difficulties as a litigant-in-person, we have discerned in the papers only two matters which deserve some further consideration:
 - (1) At paragraph 1G of his submissions dated 15 December 2009 and in his submissions dated 21 January 2010 Mr Wise raises the issue of whether the information he requested was in fact his personal data;
 - (2) In his letter of 6 October 2009 (second page) and elsewhere he complains that the information provided by the Constabulary to the Commissioner

referred to in paragraphs 18 and 22 of the Commissioner's decision notice (see paragraph 5 above) ought to have been shared with him by the Commissioner.

(1) Personal data?

10. The definition of "personal data" is to be found in section 1 of the Data Protection Act 1998:

"personal data" means data that relate to a living individual who can be identified...from those data...and includes any expression of opinion about the individual...

The Court of Appeal in *Durant v FSA* [2003] EWCA Civ 1746 has given guidance about the proper interpretation of this provision: the data must be "biographical in a significant sense" and should be focussed on the putative data subject.

11. We have considered the terms of Mr Wise's request for information against the factual background we have outlined and are quite satisfied that the information he sought, whether it existed or not, would have amounted to his "personal data". The consequence of that was that the Constabulary were under no obligation under the Freedom of Information Act 2000 to confirm or deny whether any such information was held by them (see: section 40(5)(a)¹) or to supply any information that was so held (see: section 40(1)). His remedies, if any, in relation to information about him held or not held by a public authority had to be sought under the Data Protection Act 1998 and section 7 in particular.

(2) Should Commissioner have shared information?

12. The Tribunal has not itself asked for or been provided with the information provided to the Commissioner in the course of his investigation by the Constabulary on 25 November 2008, which Mr Wise complains should have been supplied on to him by the Commissioner. Given the terms of the request for information under the

¹ It is a moot point whether section 40(5)(a) confers an absolute exemption since it is not listed in section 2(3) of the 2000 Act. However, given the underlying policy as disclosed in section 40 of the 2000 Act and section 7 of the 1998 Act, we cannot see any basis for a finding that the public interest in maintaining the exclusion of the duty to confirm or deny would not outweigh the public interest in disclosing whether the public authority holds the information in question (see section 2(1)(b) of the 2000 Act). Unsurprisingly this point has not been raised by Mr Wise; as we say, in practice we do not believe it would assist him.

Freedom of Information Act 2000 and the finding that section 40(5) applied, the content of the information provided to the Commissioner (if any) should not have had any relevance to the Commissioner's decision. Equally, although the Commissioner appears (at paragraph [35] of the decision notice) to have taken some account of that information in reaching his decision as to the steps required by the Constabulary, in fact it was equally irrelevant to that decision since no steps were required on any basis under the Freedom of Information Act 2000, and any complaints in relation to the steps taken under the Data Protection Act 1998 would have to be dealt with under a separate regime which does not involve this Tribunal.

13. Thus it is clear that, even if this complaint was valid, the Commissioner's decision should have been the same. It cannot therefore form the basis of an appeal against the decision notice, which under section 58 of the 2000 Act can only succeed if the notice itself is "not in accordance with the law".

Conclusion

14. The appeal is therefore dismissed. We record that we have some sympathy with Mr Wise whose position is confused by the different enforcement regimes set up by Parliament in relation to personal data and other information.

15. Our decision is unanimous.

16. Finally we note that although this case started as appeal to the Information Tribunal, by virtue of The Transfer of Tribunal Functions Order 2010 (and in particular articles 2 and 3 and paragraph 2 of Schedule 5) the Tribunal which has decided Mr Wise's appeal is now constituted as a First-tier Tribunal.

Signed

HH Judge Shanks

Dated 3 February 2010