Tribunals Service
Information Rights

IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL GENERAL REGULATORY CHAMBER UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Information Tribunal Appeal Number: EA/2009/000109

Information Commissioner's Ref: FS50248664

Heard on the papers at Fox Court, London, EC4
On 26th March 2010

Decision Promulgated
31st March 2010

BEFORE

Fiona Henderson

And

Jenni Thompson

And

Ivan Wilson

Between

GUY ETCHELLS

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

Subject matter:

FOIA
Absolute exemptions
- Personal data s.40

DPA
Personal data s.1(1)

Decision

The Tribunal upholds the decision notice FS50248664 dated 9th November 2009 and dismisses the appeal.

Reasons for Decision

Introduction

1. Under the National Registration Act 1939 (NRA), an emergency measure at the start of World War II, a National Register began operating on 29 September 1939 and a system of identity cards was established. It was repealed on 22 May 1952. It required the population of the United Kingdom, Northern Ireland and the Isle of Man to provide certain information (as set out in the information request below). The 1939 register listed individuals who were at specific addresses at the time of the enumeration. The National Register eventually became the NHS Central Register and transferred to the National Health Service Information Centre (NHSIC) in 2007.

The request for information

2. On 23rd January 2009 Mr Etchells made the following request for information under FOIA to the NHS Information Centre (NHSIC):

"Please supply... details of the residents of [address] from the 1939 National Registration Please be aware I am not asking for National Health Service Patient records or National Health Service numbers but the information collected under the 1939 National Registration. The information collected did not contain any sensitive facts; the 1939 National Registration required the following particulars –

1. Names

2. Sex

3. *Age*

4. *Occupation, profession, trade or employment*

5. *Residence*

6. *Condition as to marriage*

7. *Membership of Naval, Military or Air Force Reserves or Auxiliary Forces or of Civil Defence Services or Reserves"*

3. The NHSIC sent a refusal notice on 20th February 2009 relying upon the exemptions in sections 22, 40 and 41 FOIA. It also stated that it believed that the disclosure of the withheld information would breach Article 8 of the Human Rights Act 1998 (HRA).

4. The NHSIC carried out an internal review at the request of Mr Etchells which upheld the original decision not to disclose the information. Pursuant to the review the NHSIC confirmed by letter dated 5th May 2009, that the information was held and refused the information request relying upon sections 40(2) and 40(3)(a) FOIA arguing that disclosure would breach the 1St, 2nd and 6th principles of the Data Protection Act 1998 (DPA). It relied upon the HRA and the duty of confidentiality but did not refer to section 41.

The complaint to the Information Commissioner

5. Mr Etchells complained to the Commissioner on 12th May 2010.

6. During the currency of the Commissioner's investigation the NHSIC:

- confirmed that it was no longer relying upon sections 22 and 41 FOIA.
- Confirmed that it was now only relying upon breaches of the 1st and 2nd Data Protection Principles in relation to the section 40 FOIA exemption,

- informed the Commissioner that some of the withheld information related to people who were deceased at the date of the request.

7. The Commissioner issued decision notice FS50248664 which made the following findings:

- The information relating to the deceased individuals should be disclosed to the Complainant as it was no longer categorized as personal data under section 1 DPA and no other exemption was being claimed.
- Consequently the NHSIC had breached section 1(1) FOIA.
- However, he also found that sections 40(2) and 40(3)(a)(i) FOIA had been correctly applied to the information relating to the living individuals.
- Additional breaches of section 10 and 17 FOIA were identified, these are not material to this appeal.

The appeal to the Tribunal

8. Mr Etchells appealed to the Tribunal on 2nd November 2009 upon the following grounds:

i) The Commissioner erred in concluding that Section 40 FOIA applied because in concluding that the disputed information was personal data, the Commissioner misdirected himself as to whether the information was "data" as defined by the DPA.

ii) The Commissioner had erred in concluding that disclosure of the information would be unfair (and thus breach the first data protection principle) since:

a) there was no expectation at the time that the information was obtained that it would not be released,

b) There would have been no expectation at the date of the information request some 70 years later that the information would not be released.

Evidence

9. The Tribunal rehearses the evidence relevant to the background of the case but deals with the specifics within the analysis set out below. The Tribunal has viewed the withheld disputed material and does not consider that it is necessary to provide a separate closed schedule to this decision.

10. The register does not contain a list of "residents" but rather those people at the address at the time of enumeration. The National Register was initially the responsibility of the Registrar-General who was answerable to the Minister of Health. Its primary function was as set out in section 6(1) of the NRA 1939:

"..to cause a card containing the prescribed particulars (hereafter in this Act referred to as an "identity card") to be issued with respect to every registered person..."

11. In a Note by the Registrars General relating to the preparations being made for the compilation of the register it was stated that:

"4. This has been planned on Census lines; and the executive arrangements have been made to serve a dual purpose, viz., the compilation of a National Register if an emergency arises, or, if no emergency arises, the taking of the 1941 Census".

12. Additional functions were identified in the Note as:

- Helping to reunite families after the war:

"13 [the identity registration system] should enable any individual to be traced by means of the identification number through the central and local registers, has been specially adapted by supplementary arrangements to facilitate the reunion of families separated by evacuation or other forms of dispersion."

- The provision of ration cards etc:

"*13...The Identity Card may also be brought into special use as a voucher of identity in support of individual claims to any payments or allowances receivable under War Schemes."*

- As an interim census-like measure:

"14.. the Register will provide statistics of the numbers.. to take the place of Census statistics as a basis of War administration. Until the 1941 Census is taken no Census statistics would be available which were not of extreme staleness".

13. In fact no census was conducted in 1941 and statistics from the 1939 Register were used in its stead. There is no evidence before the Tribunal that:

- The 1939 Register was conducted under the Census Act 1920 or that
- The 1939 Register was brought under the Census Act 1920 when the NRA was repealed.

14. After the information for the 1939 Register had been obtained the Register was also put to the following additional uses which upon the evidence before us were not stated as being in contemplation at the date that the register was compiled:
    - In 1944 material supplied from the National Register was used to prepare the electoral register. This was supplied to candidates and their agents but was not publically available.
    - Following the introduction of the National Health Service in 1948 the National Register became the NHS Central Register and began to be used concurrently for NHS purposes. In particular, National Registration numbers became an individual's NHS number.

15. In 1952 the NRA was repealed and the register became solely a health services register. It was operated and maintained by the Office of National Statistics (ONS). The NHS Central Register (as it was now called) transferred from the ONS to the NHSIC as a result of the Statistics and Registration Service Act 2007. The National Register has never been a public register.

Legal submissions and analysis

16. Section 40 FOIA provides that:

... (2) *Any information to which a request for information relates is also exempt information if-*

(a) it constitutes personal data [of which the data requestor is not the data subject], 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) to (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,...

Ground 1

17. In order for section 40(2) FOIA to be engaged the withheld information must be **data** within the terms of Section 1 of the DPA. This defines data as:

(1) In this Act, unless the context otherwise requires—

"data" means information which—

- *(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,*
- *(b) is recorded with the intention that it should be processed by means of such equipment,*
- *(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or*
- *(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;*

18. The Appellant argues that it is no longer being processed because in a statement from the House of Commons debate on 21 May 1953 it was said inter alia:

"National registration has been wholly abandoned. Some numbering system however, is necessary for purposes of the National Health Service and for reasons of economy, this is based upon the old numbers."

19. The Tribunal does not agree that this means that the information provided on the 1939 Register was no longer used, but that the system of updating the Register for the purposes of identity cards was no longer current. The Commissioner relies upon the direct link from the National Register and the current NHS Central Register:

- The National Register was created in 1939
- It was updated as part of national registration,
- Upon the creation of the NHS it was used as a manual patient register until the NHS Central Register was computerised in 1991.

20. The original forms have been destroyed but the original information which was only obtained through its inclusion on the 1939 Register is still held on a computer and can be retrieved intact. A computer is a piece of equipment operating automatically in response to instructions given for that purpose.

21. The Tribunal notes that the holding of the information constitutes processing within the terms of the DPA section 1(1):

"processing", in relation to information or data, means obtaining, recording ***or holding***[1] *the information or data or carrying out any operation or set of operations on the information or data, including—*

(a) organisation, adaptation or alteration of the information or data,

(b) retrieval, consultation or use of the information or data,

(c) ***disclosure of the information*** *or data by transmission, dissemination or otherwise making available...*

22. The Tribunal is therefore satisfied that the withheld information is data and goes on to consider whether the disclosure of the information to a member of the public would contravene any of the data protection principles.

Ground 2

23. The first data protection principle as set out in Schedule 1 of the DPA, applies to personal data:

[1] Emphasis added by the Tribunal

*1. Personal data shall be processed **fairly and lawfully** [2] and, in particular, shall not be processed unless—*

(a) at least one of the conditions in Schedule 2 is met, ...

24. The definition of personal data is found in the DPA section 1(1):

"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,...

25. The Tribunal notes that the contents of the disputed information are as set out in the information request and comprise personal biographical information which would identify living individuals. Consequently the Tribunal is satisfied that the information constitutes personal data.

26. The way in which the first principle should be interpreted is provided in Part II of Schedule 1:

"(1) In determining for the purposes of the first principle whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed."

27. The Tribunal notes that individuals were compelled to provide the information, this was a mandatory scheme. Additionally it has outlined at paragraph 12 et seq above the contemporaneous uses which were in contemplation at the date that the Register was compiled. In its reply to the Commissioner during his investigation NHSIC also stated that the information was collected to enable:

- Children eligible for evacuation to be identified.
- Adults eligible for call-up into the armed forces to be identified.

[2] Emphasis added by the Tribunal

The Tribunal has not found any corroboration for this in the contemporaneous documents with which it has been provided, but observes that this is not material as neither of these aims would have envisaged the publication of the register, and these aims are consistent with the government/administrative purposes set out in paragraph 12.

28. Mr Etchells argues that the public expectation was NOT that this information would be confidential. He relies upon:

i) the fact that the National Register was used to help reunite families after the war and in particular a "model postcard scheme" was introduced. This enabled prepaid template postcards to be used to notify local authorities or school boards of the parents and/or childrens registration number and link it to their current address. The Tribunal is satisfied that:

- this does not constitute publication (being restricted to local administrative bodies),
- it was voluntary to opt in to this aspect of the scheme,
- it would not provide all of the information obtained on registration.

ii)The National Register was used as an electoral register during the war. Electoral registers are usually published and it is highly likely the public would believe it would eventually become public. The Tribunal notes that:

- This use was not in contemplation when the information was obtained,
- This register was not made publically available,
- This register would provide different information from the 1939 register e.g.:
  - People would have moved address, arrived from abroad, married, and died in the interim.
  - The electoral register did not relate to children whereas the 1939 Register related to everyone,
  - The electoral register would not give occupation or membership of the armed forces.

iii) The Registrar General did not know of any secrecy surrounding the National Register. Mr Etchells relies upon 2 draft circulars from 1939 and 1940. These discuss the publication of statistics from the Register and not the individual personal information. Additionally consideration is given to the fact that these would be nationwide statistics and not local statistics because:

" it will be very hard to relate the armed forces figures to the separate parts of the population of Great Britain". The Tribunal is satisfied that this is an acknowledgement it was not

envisaged that the personal information would be published because of the war time emergency that existed at the time.

iv) No statement of confidentiality was printed on the householders' schedule. When considering the expectation of those registering in 1939, the Appellant points to the fact that unlike the Census form, the form given to householders gave no indication of confidentiality and there was no other evidence to suggest that individuals had been given the promise of confidentiality at the time. Whilst the NHSIC noted in their submissions to the Commissioner that it had been stated at the time that the enumerator would have an opportunity whereby he could explain the purpose of the form, the Tribunal considers that it would be speculation to conclude from this, that individuals were given a verbal indication that it would never be made public. The Tribunal does take into account that there was conversely no indication on the form that the personal information would be made public. Additionally, section 8(2) of the NRA provided that:

"If any person-

(a) being a person employed for the purposes of this Act, publishes or communicates to any person, otherwise than in the ordinary course of such employment, any information acquired by him in the course of the employment; or

(b) having possession of any information which to his knowledge has been disclosed in contravention of this Act, publishes or communicates that information to any other person;

he shall be guilty of an offence under this Act ...

29. This prohibition was repealed along with the Act in 1952 and as such section 44 of FOIA is not applicable. Despite its use to provide census-like statistics in place of a 1941 census, there is no suggestion that this is covered by the 1920 Census Act. The Commissioner argues that the expectation at the time the information was obtained was that personal information would not be made publically available because the emphasis on envisaged statistical use and the frequent parallels drawn between the national registration and a census which are apparent from the legislation and contemporaneous documents would have tended to suggest that the information would be used for statistical purposes but that the personal information would not be disclosed.

30. Mr Etchells relies upon the history of census disclosures set out in Hansard 29th March 2004 as support for the contention that in 1939 even allowing for the parallels between the NRA and the census procedure, there would have been no expectation of the personal information being withheld in perpetuity:

- in 19th century the disclosure of the information in censuses was made on average 80 years after the census,
- earlier disclosure was given because of the requirement for proof of age re pension entitlement.
- 100 year rule was only put into legislation in 1966 through the insertion of an instrument pursuant to section 5(1) of the Public Records Act 1958[3].

31. The Tribunal agrees with the Commissioner that when the information was obtained and at the date that the information request was considered the public expectation was that in the ordinary course of events personal information obtained in this way would not be disclosed whilst the individual was alive. In support of this conclusion the Tribunal notes:

- the quotation from the Registrar General of Scotland appearing in the debate:

  "Ideally...we would want to wait until the death of the last person who had appeared in the census before making the details public... While that would be impractical, the 100 year milestone ensures that few will still be alive".

- Additionally it was recognized in the debate that average life expectancy has increased considerably during the past 150 years.

32. Mr Etchells further argues that there would be no current expectation by the data subjects from the 1939 Register that the information would not be disclosed. He relies upon The White Paper Your Right to Know which discussed the drafting of the Freedom of Information Act in support of the public expectation of disclosure. The Tribunal observes that it is bound by the terms of the Act and not the White Paper which preceded it.

33 Additionally Mr Etchells argues that all the information is publically available from other sources so there could be no current expectation that the information would not be disclosed.

[3] Section 5(1) was repealed by Schedule V of the Freedom of Information Act 2000

The Tribunal does not accept that all the information would be publically available in any event e.g. evidence as to location and association at the time of enumeration and of occupation would not publically available.

Conclusion and remedy

34. For the reasons set out above the Tribunal upholds the Commissioner's decision and refuses the appeal.

35. Our decision is unanimous.

Signed,

Fiona Henderson

Tribunal Judge Dated this 30th day of March 2010