IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2012/0143**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No:
FS50415044

Dated: **12th. June, 2012**

Appellant: **Kathryn Torney**

First Respondent: **The Information Commissioner**

Second Respondent **The Regional Health and Social Care Board**

Determined on the papers: **7th. December, 2012**

Before

David Farrer Q.C.

Judge

and

Marion Saunders

and

Narendra

Makanji

Tribunal Members

Date of Decision: **17th. January, 2013**

Representation:

The Appellant acted in person.

For the First Respondent: Richard Bailey

For the Second Respondent : Alphy Maginess

Subject matter:

FOIA s 40(2) Personal Data

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

Dated this 17th. day of January, 2012

David Farrer Q.C.
Tribunal Judge

REASONS FOR DECISION

Introduction

1. The Appellant is a journalist with a serious professional interest in the handling of cases of child abuse in Northern Ireland. She is concerned as to the role of the different public agencies usually engaged in such cases and that publicity be given to failures by such agencies and the lessons that should be learned for the better protection of children in future.

2. The Second Respondent ("the HSCB") is responsible for investigating and reporting on cases of serious child abuse. In England similar reports are routinely written and published in a form designed to prevent the identification of the children or other family members. That must, in a significant number of cases, involve more than simply omitting names and locality. The facts of such cases may be so unusual and memorable that not only concerned journalists but members of the public might link them to the persons concerned, if they were published.

3. On 21st. March, 2011, the Appellant made the following request to the HSCB in Belfast –

   "Please send me copies of all the executive summaries of case management reviews completed since you released similar documentation to me last year when I worked at the Belfast Telegraph. The last reports were sent to me via email on October 22nd, 2010.

   Please also tell me how many reviews are currently ongoing, when each review began and what stage each one is at."

4. The Regional HSCB stated that four executive summaries had been completed in the prescribed period and sent specially prepared summaries of them to the Appellant. It indicated that disclosure of the executive summaries would involve

disclosure of personal data to which the exemption under FOIA s.40(2) applied and that redaction of such data would render the executive summaries meaningless. It further placed reliance on a series of other exemptions which were not considered by the ICO in his Decision Notice and would arise for consideration only if the s.40(2) exemption did not apply. We understand that the request contained in the second paragraph was complied with.

5. The summaries provided contained recommendations and conclusions from three of the four executive summaries. During the ICO`s investigation, the rest of the recommendations and conclusions from those three and the same sections from the fourth summary, apart from certain paragraphs, were disclosed to the Appellant

6. The HSBC maintained its stance following a review, pointing out that similar information previously disclosed in response to a request had been adjudged by the ICO to be personal data and its disclosure to have been in breach of the first Data Protection principle as set out in the First Schedule to the Data Protection Act 1998 ("DPA").

7. The Appellant complained to the ICO as to the withholding of the executive summaries and the creation and provision of "new" information in the form of the special summaries.

The Decision Notice

8. The ICO effectively considered three issues –

   (i) Did the anonymised executive summaries nevertheless contain personal data ?
   (ii) If so would disclosure involve unfair processing of that data ?
   (iii) Could the executive summaries safely be further redacted so as to eliminate personal data whilst leaving a meaningful summary, bearing in mind what had been disclosed from the executive summaries already?

9. He concluded that each executive summary contained extensive data relating to children and family members who might well be identified, especially within their local communities, if the summary was published. Such data were therefore plainly personal data within s. 1 of DPA.

10. Balancing, on the one hand, the proper expectations of the children`s families when the reports were prepared and the distress that publicity would cause them and, on the other, the strong legitimate public interest in the performance of the social agencies involved, disclosure would be unfair to the numerous family members, some of them children,

11. He did not consider that any further sensible redaction could be achieved, consistently with protection of the data subjects.

The appeal

12. The Appellant set out her case in grounds of appeal and subsequently in carefully and persuasively argued replies to the Responses of the ICO and HSCB.

13. She questioned whether, following the anonymisation of the Case Management Reviews ("CMRs"), they represented anybody`s personal data. If they were personal data, the public interest in disclosure was such that there would be no unfairness in complying with the request.

14. She contended that publication of these matters was essential if lessons were to be learned for the future

15. The Appellant further pointed to previous positive responses to similar requests for CMRs and statements of government policy to the effect that anonymised versions of CMRs should routinely be published. She stated that what had been disclosed was valueless or actually misleading.

The Law

16. "Personal data" is defined in DPA s.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."

Here, sub – paragraph (b) is the material provision.

S.40 of FOIA, so far as material, provides –

(2) "Any information to which a request for information relates is also exempt information if –

(a) (the information constitutes personal data of which the requester is not the data subject) *and*

(b) *either the first or the second condition below is satisfied.*

(3) *The first condition is -*

. . . . . .

(b) *. . . that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles . . . .*

Schedule 1 to DPA sets out the data protection principles, the first of which reads -

"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; and*

(b) *in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met"*

The only potentially relevant Schedule 2 condition here is condition 6(1), which reads –

"The processing 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"

If compliance were required, it is clear that none of the conditions in Schedule 3 is met in the case of this request.

17. We have no doubt that, as to each of the four executive summaries, the details of the incident and related features would or might easily identify the family concerned, at least to residents of their local region. All involve striking features which, given the relatively small population of Northern Ireland, may make it more likely that the families are identified than would be the case in a more populous region.

18. Those summaries therefore contain extensive personal data of family members, adults and sibling children.

19. Assuming that such personal data are not sensitive personal data, would their disclosure be fair ? If fair, would it further satisfy Schedule 2 condition 6(1) ?

20. We do not underestimate the importance of transparency where reports are made on matters of such acute public concern as child abuse. Moreover, we recognise the vital role of the media in alerting the public where the relevant agencies, for good reason or bad, have failed to protect vulnerable young people. We accept that publication of recommendations and conclusions of the summaries in these four cases does not, of itself, fulfil that function.

21. Nevertheless, there are, in our judgement, still more weighty considerations affecting the question of fairness.

22. HBSC submits that the identification of these children and their families, which we judge likely, would seriously damage or destroy the family`s trust in the preservation of its anonymity. That would have grave repercussions for future work with those families. Furthermore, it could well deter other families in future from cooperation with the vital investigations leading to these reports and summaries. That would significantly limit the value of such reports and the lessons to be drawn from them.

23. The second serious risk from identification is harassment of and even threats to the family by members of their local community, a risk which, sadly, is borne out by past experience.

24. We conclude that disclosing these personal data would not be fair. Identical considerations determine our view as to the fulfilment of condition 6(1) of Schedule 2. We do not doubt that the Appellant has legitimate interests in these reports and it may well be that disclosure is necessary for the purpose of pursuing them. However, just as it would be unfair, so also disclosure would be unwarranted by reason of prejudice to the families` rights and freedoms or legitimate interests.

25. In some cases a death was involved. The dead have no right to protection of their personal data but the surviving family members do. Having read the executive summaries, it seems to us at least probable that sensitive personal data, that is data as to their physical or mental health, may be involved in these summaries. If that is right, no Schedule 3 condition could be fulfilled in any of these cases. If it were necessary to our decision, which we do not believe to be the case, that would be a further reason for upholding the ICO`s decision that the exemption under s.40(2) applied. We are concerned that some sensitive personal data, relating to mental health, may have been released in answer to past requests, whilst criticism of the agencies concerned has been withheld.

26. The Appellant`s claim that disclosure of Recommendations and Conclusions without the rest of the summary is misleading may or may not be justified. If it is, however, the answer is to ignore them or, in future, for them also to be withheld, if the summary as a whole cannot be disclosed for reasons of data protection.

27. We have given careful consideration to the possibility of disclosing further extracts from these four summaries, which could be achieved without risking disclosure of personal data. However, we have come to the conclusion that such a process would provide no useful further information when deprived of context. What could be thereby disclosed would, furthermore, add little or nothing to what has been disclosed as Recommendations and Conclusions. We note that, without, of course, the advantage of seeing the anonymised summaries, the Appellant herself takes a similar view of the probable value of such redacted snippets. It also reflects the opinion of the HBSC.

Conclusion

28. For these reasons we dismiss this appeal.

29. Our decision is unanimous

David Farrer Q.C.

Tribunal Judge

17th. January, 2013