



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

**Appeal No: EA/2017/0012**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50647307**  
**Dated: 19 January 2017**

**Appellant: Conrad Sweeney**

**Respondents: (1) The Information Commissioner**  
**(2) Chief Constable of West Midlands Police**

**Determined without a hearing**

**Before**  
**HH Judge Shanks**  
**and**  
**Rosalind Tatam and Mike Jones**

**Date of decision: 28 July 2017**

**Subject matter:**

Freedom of Information Act 2000 (FOIA)  
Section 40 (Personal information)

**DECISION OF THE FIRST-TIER TRIBUNAL**

For the reasons set out below the Tribunal allows the appeal to an extent and issues the following substitute decision notice.

**SUBSTITUTE DECISION NOTICE**

**Public Authority:** Chief Constable of West Midlands Police

**Complainant:** Conrad Sweeney

**The Substitute Decision**

For the reasons set out below the Public Authority did not deal with the Complainant's request for information dated 20 June 2016 in accordance with Part I of the FOIA in that he ought to have confirmed or denied in writing to the Complainant whether he held the full name and address of "Jake".

**Action Required**

The Public Authority must so confirm or deny by 25 August 2017.

HH Judge Shanks

28 July 2017

## **REASONS FOR DECISION**

1. The Appellant, Mr Sweeney, alleges that he was assaulted on 13 September 2015 by a man he knows only as “Jake”. The crime was reported to the West Midlands police and given a crime number and Mr Sweeney provided the police with a witness statement. It seems that Jake was interviewed by the police but was not charged with any offence or cautioned.

2. On 20 June 2016 Mr Sweeney wrote to the Chief Constable, who is the Second Respondent, as follows:

**I hereby in writing formally request that you disclose under the Data Protection Act 1998 and the Freedom of Information Act 2000 the full name and addresses of ... Jake who assaulted myself on [13 September 2015]**

He also requested copies of the statements provided to the police and stated that this material would be useful for a county court case, which we infer was a reference to a claim he wishes to make against Jake for damages arising from the alleged assault.

3. It appears that his request was considered by two different parts of the police force. The Freedom of Information Unit refused to confirm or deny that they held the requested information in reliance on section 40(5)(a) of FOIA on the basis that (if held) the information would be Mr Sweeney’s own “personal data” and should be the subject of a “subject access request” (SAR) under the Data Protection Act. The Civil Disclosure Unit provided him with a copy of his own statement only and stated that they would not provide him with details of the alleged offender because he had not been cautioned or convicted and to do so would be a breach of the Data Protection Act.

4. Mr Sweeney made a complaint to the Information Commissioner under section 50 of FOIA and the Commissioner upheld the police’s reliance on section 40(5)(a) of FOIA in a decision notice dated 19 January 2017. He has appealed against that decision notice.

5. We would stress that we have jurisdiction only to consider Mr Sweeney's request for information in so far as it is made under FOIA and that we are concerned only with the request relating to Jake's name and address. The parties agreed to the appeal being resolved without a hearing and we are satisfied that we can properly determine it in that way.
6. It is necessary to set out some of the basic provisions of FOIA.

Section 1(1) provides:

**Any person making a request for information to a public authority is entitled-**

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and**
- (b) if that is the case, to have that information communicated to him.**

Section 2 provides:

**(1) Where any provision ... states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either-**

- (a) the provision confers absolute exemption or**
- (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information**

**section 1(1)(a) does not apply.**

**(2) In respect of any information which is exempt information ... section 1(1)(b) does not apply if or to the extent that-**

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or**
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information**

**(3) For the purposes of this section, the following provisions ... (and no others) are to be regarded as conferring absolute exemption:**

...

**(f) in section 40-**

**(i) subsection (1)**

**(ii) subsection (2) [in certain cases which are immaterial]**

**(g) section 41 ...**

Section 40 provides as far as relevant:

**(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) ...**

7. It is the Chief Constable's and the Commissioner's case that Jake's name and address constitute personal data of which Mr Sweeney is the subject. Although at first sight that is a somewhat odd proposition we agree that in the circumstances of this case it is correct. Jake's details are data held by the police only because they form part of the information gathered in relation to a reported crime of which Mr Sweeney was the victim. In our view they therefore relate sufficiently closely to Mr Sweeney to constitute personal data of which he is the data subject. Information can, of course, constitute personal data with more than one subject and there can be no doubt that the data in question here is also Jake's.
8. In those circumstances it is clear that section 40(1), which is an absolute exemption, applied and that the Chief Constable was under no obligation to supply Jake's details under FOIA. The correct way to seek them was indeed by way of an SAR under section 7 of the Data Protection Act.
9. However, the Chief Constable not only refused to supply Jake's details but also refused to confirm or deny whether he even held them in reliance on section 40(5)(a), a position supported by the Commissioner.

10. The Chief Constable says that section 40(5)(a) is, like section 40(1), an absolute exemption so that there was no need to consider any public interest balance. The question whether section 40(5)(a) confers an absolute or qualified exemption has been a matter of some controversy and it is not entirely clear from the Commissioner's decision notice at paras 24 to 26 whether she considered the public interest balance to be relevant in this case. We are of the firm view that section 40(5) does not provide an absolute exemption for the simple reason that it is not listed in section 2(3) of FOIA and there is on the face of it no reason to think that this is the result of any drafting error. We have therefore considered the public interest in disclosure of whether the police held Jake's details as against the public interest in excluding the duty to confirm or deny provided by section 40(5)(a).
11. It seems to us that the public interest in disclosure outweighed that in maintaining the exclusion of the duty to confirm or deny. Disclosure would have provided reassurance to the public that the police had actually gone to the trouble of obtaining a suspect's details and Mr Sweeney would have been informed whether it was worthwhile him going to the trouble of pursuing the police by other means for those details in order to bring a claim against the man that he says assaulted him. On the other hand, it is very hard to see how anyone's legitimate interests would be have been harmed by a simple confirmation (or denial) that the police held such details in relation to an individual who was at that stage effectively anonymous and whose details could only be supplied if that was appropriate under the Data Protection Act and/or required by a court order (see below).
12. In those circumstances we are of the view that the Chief Constable was not entitled to rely on section 40(5) to refuse to confirm or deny whether the information was held, though he was under no obligation under FOIA to supply the information itself. To that extent we unanimously allow the appeal and we issue a substitute decision notice accordingly.
13. We cannot leave this case without expressing some sympathy for the position in which Mr Sweeney finds himself and making the following further observations:

(1) The Chief Constable appears to be under the impression (at least in the submissions dated 5 May 2017) that Mr Sweeney has never made an SAR seeking Jake's details. In fact, his initial request for information mentioned the Data Protection Act and his request for Jake's details appears to have been turned down as an SAR by the Civil Disclosure Unit.

(2) However, it is not clear to us that that Unit applied the correct test in considering that aspect of the SAR: the relevant question we suspect is that provided by section 7(4) of the Data Protection Act, namely whether it would be "reasonable" to comply with Mr Sweeney's request without the consent of Jake. But, as we have said, we are not being asked to consider that question and make no further observations on it.

(3) Indeed, we have no jurisdiction at all to consider whether Mr Sweeney was entitled to be provided with Jake's details under the Data Protection Act; his remedy if he wanted to pursue the matter was to go to the county court under section 15 of the Data Protection Act. This is in our view a very regrettable division of jurisdiction which frequently comes up in section 40 cases; we would urge the legislature to consider whether the two processes can be brought together.

(4) We would also mention for Mr Sweeney's benefit that he *may* have other means of obtaining the information he seeks by a disclosure application against the Chief Constable in the civil courts; but we would stress that he ought to take independent legal advice before considering such an application further.

HH Judge Shanks

28 July 2017