



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number EA/2008/0088
Information Commissioner's Ref: FS50180310

Heard on papers at Procession House, London, EC4
On 27th January 2009

Decision Promulgated
30th January 2009

BEFORE

CHAIR
Melanie Carter

and

LAY MEMBERS
Henry Fitzhugh
John Randall

B E T W E E N :-

MRS S M BUTTERS

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

Subject matter:

Application for striking out, Rule 9

Duty to confirm or deny s.1(1)(a)

Personal data s.40

Cases:

Bennett v Information Commissioner EA/2008/0033

Decision on the papers

The Tribunal grants the application of the Information Commissioner and this Appeal is struck out under Rule 9 of the Information Tribunal (Enforcement Appeals) Rules 2005.

Reasons for Decision

Introduction

1. In April 2005 the Mrs Butter's mother died whilst in the care of Barnet and Chase Farm Hospitals NHS Trust. Mrs Butters subsequently wrote, in a letter dated 25 May 2007, to the Nursing and Midwifery Council ("NMC") to request a statement submitted to the NMC by a named nurse who was working for the Trust at the time Mrs Butters' mother had died. The NMC is the regulatory body which investigates complaints against and determines the fitness to practise of nurses.
2. By letter dated 4 July 2007 the NMC wrote to Mrs Butters in accordance with section 1(1)(a) of the Freedom of Information Act 2000 (FOIA). Due to the nature of the Commissioner's decision in this matter, neither his Decision Notice, nor this Decision of the Tribunal sets out the public authority's exact position under section 1(1)(a). Mrs Butters requested an internal review of the NMC's position, and the NMC replied by letter dated 3 September 2007 confirming its decision.

The complaint to the Information Commissioner

3. Mrs Butters complained to the Information Commissioner ("IC") on 15 October 2005 challenging the decision of the NMC.

4. The IC served a Decision Notice dated 15 October 2008 which stated that the NMC was excluded from its duty to confirm or deny whether it held the requested information by virtue of section 40(5)(b)(i) FOIA because doing so would contravene the First Data Protection Principle. In the event, the IC's decision was made upon a different legal basis to the one made by the NMC.

The appeal to the Tribunal

5. Mrs Butters has appealed the decision of the IC to this Tribunal. Her essential argument was that disclosure of the requested information would enable her to understand what had happened to her mother and therefore to find 'closure' in the matter.
6. In the IC's reply the Tribunal was asked to consider striking out the appeal under rule 9 of the Information Tribunal (Enforcement Appeals) Rules 2005 ("the 2005 Rules") on the basis that the Notice of Appeal does not disclose a reasonable ground of appeal. The Tribunal's task therefore has been, not to consider the merits of the appeal, but rather whether the Notice of Appeal disclosed a reasonable ground of appeal. Employing the test set out in paragraph 12 the Appeal Tribunal has concluded that it does not. The Appeal is therefore struck out for the reasons given below.
7. The Tribunal wished to emphasize at the outset that disclosure pursuant to a FOIA request is disclosure to the world. It is not disclosure solely to Mrs Butters. Hence, the IC had to write his Decision Notice and in turn this Tribunal has had to write this public decision omitting certain facts already known to Mrs Butters, which cannot be released on account of the Data Protection Act 1998 ("DPA"). The Tribunal noted that given this and the complexity of the law involved, the Decision Notice and indeed this decision may be hard for the Appellant to follow. To assist therefore in this process there is an Annex to this decision, containing certain confidential information which is available only to the parties.

Legal analysis

8. The Tribunal's powers insofar as relevant to this appeal are to be found in section 58 of FOIA. Thus the Tribunal may uphold an appeal:

“(1) If.....under section 57 the Tribunal considers-

(a) that the notice against which the appeal is brought is not in accordance with the law,”.

9. Thus, the Tribunal is concerned with grounds upon which it might be said that the Decision Notice was not in accordance with law. The Tribunal does not take the IC’s decision again, rather its task is to consider the Decision Notice and to consider whether it can be impugned on legal grounds.

10. Under Rule 4 of the 2005 Rules, an appeal against a Decision Notice must be made in writing and must state the grounds of appeal.

11. Rule 9 of the 2005 Rules provides:

“9. (1) where the Commissioner is of the opinion that an appeal does not lie to, or cannot be entertained by, the Tribunal, or that the notice of appeal discloses no reasonable grounds of appeal, he may include in his reply under Rule 8(2) above a notice to that effect stating the grounds for such contention and applying for the appeal to be struck out. “

12. There is little guidance provided for the Tribunal on the circumstances in which it will be appropriate to strike out an appeal under Rule 9. We have adopted the approach taken by a differently constituted panel of this Tribunal in the case of *Bennett v Information Commissioner EA/2008/0033* which stated that:

“We consider that the language used in Rule 9 is unambiguous. A reasonable ground of appeal is one that is readily identifiable from the Notice of Appeal, relates to an issue the Tribunal has jurisdiction to decide and is realistic not fanciful.”

13. If there is no reasonable ground of appeal, the Tribunal must grant the application of the Information Commissioner for the appeal to be struck out under Rule 9.

14. Before considering the grounds of appeal, this decision sets out in more detail the basis upon which the IC based his conclusions in the Decision Notice. This gives the framework within which the Tribunal had to carry out its function under rule 9.

The Duty to Confirm or Deny

15. A person who has made a request for information under section 1(1) FOIA is, subject to other provisions of the Act: (a) entitled to be informed in writing whether the public authority holds the information requested (section 1(1)(a)) and (b) if it does, to have that information communicated to him or her (section 1(1)(b)). Compliance with section 1(1)(a) FOIA is referred to as “the duty to confirm or deny” (section 1(6) FOIA). A public authority may be excluded from the duty to confirm or deny under provisions contained in Part II FOIA.
16. The IC concluded that the NMC was excluded from the duty to confirm or deny whether it held the requested information under section 40(5)(b)(i). This provides:

“(5) The duty to confirm or deny –

(b) does not arise in relation to other information if or to the extent that ... –

(i) the giving to a member of the public of 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 .”

17. Thus, where to confirm or deny whether an authority holds particular information would in itself be a breach of a data protection principle, that authority is released from its obligations under section 1(1) of FOIA. For example and in general, confirming that the authority held a complaint would tell the world that a complaint had been made. Thus it is prohibited from making this disclosure if it is to uphold the data protection rights of the named nurse. The First Data Protection Principle provides that processing of personal data, which would include disclosure to the public under a FOIA request, must be fair and lawful. In this case, the IC’s concern has been with regard to confirming or denying whether the named nurse has had a complaint made against her to the NMC.
18. For the disclosure to be fair and lawful and therefore in compliance with the First Data Protection Principle, the Tribunal would need to consider the reasonable expectations of the named nurse and also be satisfied that one of the conditions in Schedule 2 to the DPA applies. Mrs Butters had not identified any of the conditions in Schedule 2 that might potentially be relevant. The only possible condition, in the IC’s and the Tribunal’s

view was that to be found in paragraph 6 of Schedule 2, whereby processing is lawful if:

“ necessary for the purposes of legitimate interests pursued 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.”

19. The first part of condition 6 can only be satisfied where there is a legitimate public interest in disclosure, as this is disclosure to the world at large, and the disclosure is ‘necessary’ for the purposes identified. The second part of condition 6 is an exception: even where the disclosure is necessary, one must still go on to consider whether the processing is unwarranted in the particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject, in this case the named nurse.

Grounds of appeal

20. In her grounds of appeal Mrs Butters asserts:

- a. that she was not requesting personal details of the named nurse but rather an explanation of her actions in her professional capacity;
- b. that disclosure of the requested information was necessary to assist in her understanding of what had happened to her mother.

21. The Tribunal understood Mrs Butter’s first ground of appeal to be that the request was only for data arising from the named nurse’s professional role; the request did not ask for details of her private life. Mrs Butters argument, properly formulated, seemed to be that to confirm or deny whether the requested information was held would not lead to a disclosure of ‘personal data’ to which the exemption in section 40(5)(b)(i) could apply.

22. The Tribunal noted the definition of “personal data” in section 1(1) of the DPA. This provides:

“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 Tribunal considered that data arising from the named nurse’s professional life, insofar as it was data which related to and identified her, was personal data within the meaning of the DPA. The named nurse had rights to privacy under the DPA in relation to her personal data arising from both her professional and private life. This was a well established principle of law.
24. The Tribunal was of the view therefore that Mrs Butter’s first ground of appeal was not reasonable in the sense that it was, given the clear wording of the DPA, not realistic and would be bound to fail at a substantive hearing.
25. With regard to the second possible ground of appeal, that disclosure was necessary in order to help Mrs Butters better understand what had happened to her mother, the Tribunal understood that properly formulated, this would relate to whether paragraph 6 of Schedule 2 of the DPA would permit the NMC to confirm or deny that it held the requested information.
26. The first question therefore was whether the public had a legitimate interest in the NMC confirming or denying that it held the information requested. In other words, did the public have a legitimate interest in knowing whether a complaint had been made to the NMC against the named nurse. The Tribunal noted that Mrs Butters had only advanced arguments which related to her own personal interest in the particular information. As noted above, disclosure of information under FOIA is disclosure to the world. That this is the case is reinforced by the express wording in section 40(5)(b)(i) (see paragraph 19 above) insofar as it refers to *“the giving to a member of the public”* of the confirmation or denial that the requested information is held.
27. Whilst the Tribunal was greatly sympathetic to Mrs Butters in her quest to better understand what had happened to her mother, it was obliged to conclude that her

grounds of appeal did not address the question of the legitimate interests of the public in disclosure. It was, in the terms advanced in the grounds of appeal, Mrs Butter's private interests at stake. FOIA is said to be 'applicant and purpose blind' in the sense that it is beyond the scope of FOIA to consider the particular purpose to which an individual requester intends to put the requested information. For this reason the Tribunal concluded that this particular argument put forward by Mrs Butters did not amount to a reasonable ground of appeal in the sense that it was had no realistic chance of success.

28. The Decision Notice had, in its consideration of paragraph 6 of Schedule 2, proceeded on the basis that the public did have a legitimate interest in this regard (as opposed to Mrs Butter's particular interest). That interest was said to be knowing that an individual named nurse who is providing a medical service is fit and proper to do so. It was the Tribunal's view that the Decision Notice had in this respect been in accordance with law. The Tribunal was of the view moreover that the IC had correctly applied the balancing test in paragraph 6 of Schedule 2 such that it agreed that the section 40(5)(b)(i) exemption did apply to the duty to confirm or deny.
29. The Tribunal considered that whilst there was a legitimate interest in the public being confident of the fitness to practise of nurses, the IC had been correct in concluding that this did not require disclosure of complaints. In terms of paragraph 6, the legitimate interest did not make disclosure to the world "necessary". There were other means by which this confidence could be maintained most notably through a regulatory system which publicised its determinations where the particular professional had been found not to be fit and proper. The public's confidence would not be increased by a knowledge of any or all complaints, whether or not well founded.
30. The Tribunal agreed moreover that the disclosure to the public would not be warranted when set against the potential prejudice to the data subject, in this case the named nurse. The IC had argued that should complaints about a nurse be made public there was a very real risk of prejudice to that nurse. A list of complaints would include all complaints however unfounded, trivial or mischievous. Those complaints where there was a case to answer would proceed to a fitness to practise hearing, by which stage, it would be a matter of public record. The Tribunal was of the view that the public might take the view that 'there was no smoke without fire' and regardless of the fact that

some or all of any complaints had been unfounded, hold these against the nurse in question.

31. In conclusion, the Tribunal was of the view that paragraph 6 of Schedule 2 of the DPA would not permit disclosure of any complaints information such that confirming or denying whether the requested information was held in this case would be a breach of the First Data Protection Principle. In these circumstances, the Tribunal considered that the Decision Notice had been in accordance with law in concluding that the exemption in section 40(5)(b)(i) applied.

32. The confidential annex deals with a third ground of appeal, which the Tribunal also found not to be reasonable. Thus, the Tribunal concluded that the Notice of Appeal did not disclose a reasonable ground of appeal and decided that the appeal should be struck out.

Conclusion

33. The Tribunal struck out the appeal on the basis that the Notice of Appeal did not disclose a reasonable ground of appeal.

34. Our decision is unanimous.

Signed:

Melanie Carter

Deputy Chair

Date: 30th January 2009