**IN THE FIRST-TIER TRIBUNAL** **Case No.** EA/2014/0042
**GENERAL REGULATORY CHAMBER**
**INFORMATION RIGHTS**

**ON APPEAL FROM:**

**The Information Commissioner's**
**Decision Notice No: FS50509831**
**Dated: 29 January 2014**

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| **Appellant:** | **NORMAN SCARTH** |
| **Respondent:** | **INFORMATION COMMISSIONER** |
| **Heard at:** | **FOX COURT, LONDON** |
| **Date of hearing**: | **24 MAY 2016** |
| **Date of decision:** | **18 JUNE 2016** |
| **Date of promulgation:** | **20 JUNE 2016** |

**Before**

**ROBIN CALLENDER SMITH**
Judge

and

**DR HENRY FITZHUGH and MR STEVE SHAW**
Tribunal Members

**Attendances:**

For the Appellant: Mr Norman Scarth (by telephone conference link from the Republic of Ireland).
For the Respondent: Mr Christopher Knight, Counsel instructed by the Information Commissioner (by written submissions).

**IN THE FIRST-TIER TRIBUNAL** **Case No.** EA/2014/0042

**GENERAL REGULATORY CHAMBER**

**INFORMATION RIGHTS**

**Subject matter: FOIA 2000**

Absolute exemptions

- Personal data s.40

## DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 29 January 2014 and dismisses the appeal.

## REASONS FOR DECISION

### Background

1. The Upper Tribunal, in its decision GIA/2615/2014, partially allowed Mr Norman Scarth (the Appellant)'s appeal on 6 October 2015 in respect of an FTT Information Rights decision dated 23 April 2014 to strike out the Appellant's Notice of Appeal on the basis that it had no reasonable prospect of success.

2. The issue before the FTT in this appeal, which has been remitted to a differently constituted Panel from that which made the first decision, is:

> Should the "Names of ALL the officers involved in the planning, execution AND AFTERMATH" of the incident on 8 August 1999 involving the Appellant as an occupant of a property in Leeds be disclosed under FOIA or whether it is absolutely exempt as the Appellant's personal data?

3. For the record, the relevant public authority in this matter is West Yorkshire Police. It has refused to participate in these proceedings.

4. The Appellant made his FOIA request to West Yorkshire Police on 19 June 2013.

5. In that request, he set out the detail of an allegation that, on 8 August 1999, at least nine police officers of the West Yorkshire Police force used the threat of force to gain entry to a property in Leeds.

6. He, as a 74-year-old occupant, was put in fear for his life. The allegation was that the police requested a battering ram and then laid siege to the house for three hours.

7. The West Yorkshire Police did not in fact enter the property or remove the Appellant.

8. The Appellant's assertion, throughout the various iterations of what then happened, is that West Yorkshire Police had attempted to assassinate him because he had successfully sued the UK in the European Court of Human Rights in Strasbourg: *Scarth v UK* (App. No. 33745/96) for breach of his Article 6 (1) rights.

9. The Court ruled that there had been a breach of those rights in terms of a hearing – which does not appear to have involved the police at all – which took place in private in the County Court.

10. In that action he had also claimed £21,590 pecuniary damages, which were not awarded, but his claim for £705.82 costs was successful.

11. His original request to West Yorkshire Police was in six parts. Only the second part remains the subject of this appeal.

12. That is the request for the "Names of ALL the officers involved in the planning, execution AND AFTERMATH".

13. West Yorkshire Police responded on 21 June 2013. It neither confirmed nor denied that it held the information requested and relied on section 40 (5) FOIA. Its reasoning was that:

> To give a statement of the reasons why neither confirming nor denying is appropriate in this case would itself involved disclosure of exempt information.

14. The Appellant was informed he could seek his own personal data by way of a subject access request under the Data Protection Act 1998 by paying the usual £10 fee.

15. Following an internal review by West Yorkshire Police, the original response was upheld in the same terms although no specific provision of section 40 (5) was identified.

16. The Appellant complained to the Commissioner on 20 August 2013.

17. The only substantive further communication received from West Yorkshire Police after that was a letter dated 10 January 2014.

18. This explained that identifying individuals would reveal whether underlying information about an incident was or was not held.

19. The Commissioner's decision notice upheld West Yorkshire Police's reliance on section 40 (5). It held that disclosure

> would inevitably put into the public domain information about the existence or otherwise of an incident at the complainant's address involving the complainant and the police, which would constitute the disclosure of information that would relate to the complainant [12].
>
> And that
>
> The Commissioner has determined that, where this sort of information is linked to an individual, it will be that individual's 'personal data' [13].

20. The Appellant sought to appeal the Decision Notice in emails dated 17 and 18 February 2014 but he did not use the prescribed form.

21. The Tribunal asked him for certain necessary information which he provided on 20 February 2014 but he was not required to complete the ordinary Notice of Appeal form.

22. Because he did not use that form he never indicated whether he wished his appeal to be considered at an oral hearing. The then President of the GRC, Judge Warren, directed on 4 March 2014 that the Appellant must post his correspondence to the Tribunal rather than emailing it because of the offensive nature of some of his emails.

23. The Appellant considered that direction to have been "unlawful, oppressive and sadistic".

24. The Commissioner invited the Tribunal to strike out the appeal under Rule 8 (3) (c) of the GRC Rules. This was on the basis that it disclosed no reasonable prospect of success because the request was for the Appellants own personal data and section 40 (5) (a) applied.

25. Judge Warren struck out the appeal giving his reasons on 23 April 2014. He held that there was no reasonable prospect of success because the subject matter was outside the jurisdiction of the FTT. The FTT had no legal power to assist the Appellant with a request for his own personal data.

26. The Appellant sought to overturn that decision in an appeal to the Upper Tribunal. The matter came before UTT Judge Markus QC on 8 April 2015 who remitted Request 2 to the FTT in a judgement dated 6 October 2015.

The Law: Section 40 FOIA

**40 Personal information.**

(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), and

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

(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 or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

….

(7) In this section—

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

The appeal to the Tribunal

27. The Appellant made it clear to the Tribunal that he did not want a paper consideration of the appeal.

28. Arrangements were put in place for him to take part in a specially-arranged telephone conference on the morning of the hearing from the Republic of Ireland.

29. Ahead of that he had provided, at various stages, emails containing a variety of information.

30. The reason for the telephone conference was that, as he explained in an email to the Tribunal dated 14 January 2016:

**I do *NOT* consent to a paper consideration.** Nor, as I am in justifiable fear of assassination or imprisonment by the Quislings who now rule Britain if I ever set foot in the land of my birth again, do I consent to a hearing in any part of the United Kingdom.

**…**.

> After ploughing through the mountains of obfuscating bafflegab which have been generated to continue the cover up the serious crime against me on 8th August 1999, I say again, that all the State employees involved in this matter having seen cast-iron evidence of that crime, but ignoring, thus playing their own part in the cover-up, they are all thereby guilty of being '**Accessories After The Fact'**. Tragically for Britain, all such people appear to have impunity from having to answer for their crimes. At the moment, I am not aware of any dates on which I would not be available for a…. hearing.
>
> ….

31. He had provided a quantity of documentary and email information for the Tribunal to consider in his appeal ahead of the telephone hearing.

32. On the morning of the appeal hearing the Tribunal established a telephone conference link with him.

33. The Tribunal introduced itself and the Appellant was encouraged to state the main points that he wished to be considered in the appeal taking, perhaps, 20 minutes to do this.

34. He spoke for a few minutes. There was one intervention by Judge Callender Smith requesting that the Appellant get to the point. The Appellant continued until he stated that he had concluded his points.

35. He was told that he would hear the result of his appeal in a few weeks

36. At that stage, another individual – whose presence had not been indicated at the beginning of the telephone conference – stated that his name was Mr Alan Dransfield.

37. Mr Dransfield stated that he was acting as the Appellant's McKenzie Friend.

38. Judge Callender Smith terminated the telephone conference at that point. The Hearing had been effectively brought to a close by the Judge's closing remarks about the decision being forthcoming in a few weeks.

39. There had been no indication to the Tribunal at the beginning of the telephone conference, or at any stage during it, that the Appellant would be relying on any input or contribution from a McKenzie friend.

Conclusion and remedy

40. Personal Data is defined in section 1 (1) of the Data Protection Act 1998 as:

> 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

41. The operative case law (*Durant v FCA* [2003] EWCA Civ 1746 and *Edem v IC and FCA* [2014] EWCA Civ 92) makes it clear that, whether data "relates to" an individual so that it is personal data means that it must not only be possible to identify a living individual but that individual must either be in the range of focus of that information, the data must be "biographical in a significant sense" or so obviously personal data because it is clearly "about" an individual or because it is clearly "linked" to the individual because it is about his activities or something similar.

42. Although the Appellant is not seeking information about a complaint emanating from him, he is seeking information which directly relates to an incident of considerable biographical significance to him namely the three-hour police operation in Leeds relating to property he was occupying.

43. Apart from being his own personal information, his request also touches on the personal data of the officers in question. The second part of the

Appellant's request cannot be disaggregated from all the other parts of his request. These are exempt under section 40 (5) (a).

44. All the parts of his request are inextricably and expressly tied to a particular incident which the Appellant explains in much more detail in the matters contained in his request letter of 19 June 2013.

45. Confirming or denying the names of the police officers involved in the this particular incident would not only provide information about the existence of those names but would also confirm or deny whether relevant information – specifically, the officers involved in the incident – was held about an incident of considerable biographical significance to the Appellant.

46. Because the second part of the Appellant's request cannot be disaggregated from its context, the West Yorkshire Police and the Information Commissioner have correctly concluded that the exemption in section 40 (5) (a) has been correctly applied.

47. The information sought by the Appellant is absolutely exempt from disclosure under FOIA.

48. It follows that the Appellant's appeal must be dismissed.

49. Our decision is unanimous.

50. There is no order as to costs.

Other matters

51. It appears, subsequently, that the Appellant and/or Mr Dransfield made a recording of the telephone conference appeal hearing, without indicating

to the Tribunal that this was being done and, therefore, without the knowledge or consent of the Tribunal.

52. Had the appeal been conducted by way of an oral hearing in court the Tribunal would have considered an application to make such a recording if good and sufficient reasons had been advanced by the Appellant.

53. It would not have permitted such a recording to take place surreptitiously. It would have required a reasoned application that allowed it to consider either granting or refusing the request setting out its own reasons, a discretion it has under the Contempt of Court Act 1981 (see below).

54. Under section 9 (1) (a) of the Contempt of Court Act 1981, sound recordings cannot be made without the leave of court.

55. It is a contempt of court "to use in court or bring into court for use, any tape recorder or other instrument for recording sound, except with the leave of the court".

56. It is also a contempt under section 9 (1) (b) to publish or dispose of a recording of legal proceedings without leave.

57. The Appellant was aware of these provisions because he has already been the subject of contempt proceedings: *Attorney General v Scarth* [2013] EWHC 194.

58. He acknowledged this, before this appeal hearing, in an email to the Tribunal's Registrar dated 19 February 2016 (Appeal Bundle page 139).

59. In *Attorney General v Scarth*, following his unlawful recording of proceedings at Leeds Magistrates' Court on 2 February 2012 and a subsequent posting on *YouTube*, he was sentenced by the Lord Chief Justice (Lord Judge) in a decision dated 23 January 2013 to 28 days

imprisonment on two counts of contempt, to run concurrently, suspended for 12 months.

60. The Tribunal notes the Lord Chief Justice's remarks at Paragraph 33 of that judgement:

> Before leaving the judgment, however, we should perhaps endeavour to reduce some of the temperature. We remind ourselves, as we remind anyone here in court, and the defendant himself, that he is entitled to apply to the court before any hearing for permission to record the proceedings by way of some mechanical device. We make it clear that if he had attended the hearing today and had made that application (or invited counsel to make the application on his behalf), we should have granted permission. We should have done so because of his age and infirmity, his apparent diminution in hearing and also his burning sense of grievance and his total mistrust of any process by which the court's proceedings are recorded. Given that combination of circumstances we would have been prepared to grant permission. We invite any court which has to deal with him in future as a defendant or a party to litigation, or acting as a McKenzie friend for an individual who is not already legally represented, at least to consider with some sympathy an application, if he chooses to make one, for permission to make a recording.

61. If the Appellant, for this telephone conference appeal hearing, had made such an application to record the proceedings, the Tribunal would have considered it, the reasons for it and – if it had been directed to Paragraph 33 above – looked at all the circumstances before reaching its conclusion.

62. The reality is The Appellant neither sought nor was granted permission to record the proceedings or to introduce a McKenzie Friend via the telephone conference in this case despite being well aware of the requirement to do so.

Robin Callender Smith
Judge
18 June 2016