



Neutral citation number: [2023] UKFTT 00846 (GRC)

Case Reference: EA/2023/0244

**First-tier Tribunal
General Regulatory Chamber
[Information Rights]**

**Heard: by determination on the papers
Heard on: 6 October 2023
Decision given on: 13 October 2023**

Before

**TRIBUNAL JUDGE Alison McKenna
TRIBUNAL MEMBER Paul Taylor
TRIBUNAL MEMBER Dan Palmer-Dunk**

Between

JON AUSTIN

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION:

The Appeal is Dismissed.

The rule 14 Direction is amended so that pages B18CB to B23CB and paragraph [31] of the Response are directed to be disclosed to the Appellant within 28 days of the date on which this Decision is sent to the parties.

REASONS

Rule 14

1. The Tribunal's procedure is governed by rule 14(6) of the Chamber's Rules¹ and the Court of Appeal's judgment in *Browning v IC & DBIS* [2014] EWCA Civ 1050² in which it was decided at [35] that:

"...when the FTT excludes both a party and his legal representative it does its utmost to minimise the disadvantage to them by being as open as the circumstances permit in informing them of why the closed session is to take place and, when it has finished, by disclosing as much as possible of what transpired in order to enable submissions to be made in relation to it. The same commitment to maximum possible candour should also be adopted when writing the reasoned decision."

2. Taking this approach, the Tribunal takes the view that it was inappropriate to withhold the copy media reports of the event in question from the Appellant, as these were already in the public domain. These pages, in our view, should have been included in the open and not the closed bundle, along with the Respondent's submissions on them.
3. Accordingly, we now **DIRECT the Respondent to provide the Appellant with pages B18CB to B23CB and an unredacted version of paragraph [31] of its Response within 28 days of the date on which this Decision is sent to the parties.**

Mode of Hearing

4. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of this Chamber's Procedure Rules.
5. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 95. The Tribunal also considered a closed bundle, comprising pages 1 to 25. We have amended the rule 14 direction concerning the closed bundle, as above.

Background to Appeal

6. This appeal concerns the Appellant's request for information about an individual whose arrest in an immigration raid was blocked by a crowd of protesters. A film of the event was broadcast on television, and it was also reported in print media.
7. The Appellant made a request to the Home Office on 5 July 2022 in the following terms:

"Please see this news report:

[link to news report about raid and protest redacted]

Please can you confirm if since the man in question was released on

¹ [The Tribunal Procedure \(First-tier Tribunal\) \(General Regulatory Chamber\) Rules 2009 \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/344441/the-tribunal-procedure-first-tier-tribunal-general-regulatory-chamber-rules-2009.pdf)

² [Browning v The Information Commissioner & Anor \[2014\] EWCA Civ 1050 \(30 July 2014\) \(bailii.org\)](https://www.bailii.org/uk/ew/cas/c1050.html)

bail as a result of the protest, whether he has been re-arrested and if so when this was and what was the outcome and if he has not been arrested since why not and what is the current status of the case. Are his whereabouts known or is he now an immigration absconder please. The man was not identified in the report so there should be no section 40 issues and the issue of unlawful immigration into the UK is currently a huge matter of public interest so the public interest balancing exercise should be in favour of disclosure.”

8. The Home Office refused to provide the requested information initially and on 8 September 2022 following an internal review, in reliance upon sections 31 (1) (e), 40 (2) and 38 (1) of the Freedom of Information Act 2000 (‘FOIA’). The Appellant complained to the Information Commissioner.
9. The Information Commissioner issued a Decision Notice on 5 April 2023, upholding the Home Office’s reliance upon s. 40 (2) FOIA. The Appellant appealed to the Tribunal.

The Decision Notice

10. The Decision Notice concluded that the requested information was personal data because the news reports state that the incident happened in the presence of the individual’s neighbours and family members, who would be able to identify him, and that disclosure would enable others to identify him via a ‘jigsaw’ of information.
11. Having concluded that the information requested constituted personal data, the Decision Notice considered whether there was a lawful basis for processing it under article 5 GDPR. In view of the wording of the request, which mentions absconding and ‘unlawful immigration’, the Decision Notice concluded that the request was one for criminal offence data, because it alleges criminality. Such data has a special status under GDPR article 10 and s. 11 (2) of the Data Protection Act 2018 (‘DPA’). This type of data may only be processed if the stringent conditions of Schedule 1 parts 1-3 of DPA 2018 are met, which in this case would require the consent of the data subject or data made public by the data subject. As these conditions were not met in this case, the Decision Notice concluded that there was no lawful basis for processing the personal data (by way of a FOIA disclosure) and so the information requested was exempt under s. 40(2) and s.3A(a) FOIA.

The Law

12. S. 40 FOIA provides (where relevant) as follows:

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.*

(2) Any information to which a request for information relates is also exempt information if—
(a) it constitutes personal data which does not fall within subsection (1), and
(b) the first, second or third condition below is satisfied.

(3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act—

(a) would contravene any of the data protection principles, or
(b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.

13. GDPR provides (where relevant) that:

Article 5

Personal data shall be:

(a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency');

Article 10

Processing of personal data relating to criminal convictions and offences or related security measures based on [Article 6\(1\)](#) shall be carried out only under the control of official authority or when the processing is authorised by Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects.

14. Section 11 DPA provides that:

Special categories of personal data etc: supplementary

(1) For the purposes of Article 9(2)(h) of the GDPR (processing for health or social care purposes etc), the circumstances in which the processing of personal data is carried out subject to the conditions and safeguards referred to in Article 9(3) of the GDPR (obligation of secrecy) include circumstances in which it is carried out—

(a) by or under the responsibility of a health professional or a social work professional,
or

(b) by another person who in the circumstances owes a duty of confidentiality under an enactment or rule of law.

(2) In Article 10 of the GDPR and section 10, references to personal data relating to criminal convictions and offences or related security measures include personal data relating to—

(a) the alleged commission of offences by the data subject, or

(b) proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings, including sentencing.

15. Schedule 1 DPA part 3 provides (where relevant) that:

PART 3 ADDITIONAL CONDITIONS RELATING TO CRIMINAL CONVICTIONS ETC

Consent

29This condition is met if the data subject has given consent to the processing.

...

Personal data in the public domain

32This condition is met if the processing relates to personal data which is manifestly made public by the data subject.

16. S.40 FOIA is an absolute exemption so the public interest balancing exercise under s. 2(2)(b) FOIA is not a relevant consideration in this appeal.
17. The Appellant has raised a condition in DPA Schedule 1 relating to journalistic purposes. However, that provision governs the disclosure of personal data by a data controller in particular circumstances which are not relevant to this appeal, (i.e. disclosure in this case is for the purposes of compliance with the Freedom of Information Act 2000 rather than journalism).
18. The parties have referred us to a number of Decisions of the First-tier Tribunal, which turn on their own facts and do not create any legal precedent.
19. The powers of this Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

If on an appeal under section 57 the Tribunal considers -

- (a) that the notice against which the appeal is brought is not in accordance with the law, or*
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

20. The burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant. The relevant standard of proof is the balance of probabilities.

Submissions and Evidence

21. The Appellant's Grounds of Appeal rely on a submission that the Decision Notice makes an unwarranted assumption that there were people present who knew the man in question. It also relies on submissions in relation to other FOIA requests he has made to other public authorities, which are not relevant to this appeal.
22. The Respondent's Response dated 27 July 2023 relies on the correctness of the Decision Notice.

23. The Appellant's Reply dated 20 August 2023 raised a completely new point about 'journalistic purpose,' to which the Respondent responded on 22 August 2023, submitting that this provision had no relevance to the issue which the Tribunal must decide (whilst not accepting that the Appellant was entitled to raise a new point in a Reply and noting that the submission was made out of time and without permission in any event).

Conclusion

24. The Appellant relied heavily on an argument that there was no proof that there were people in the crowd who knew the individual concerned. He submitted that the Decision Notice had merely speculated about this. However, having seen the news reports, we take the view that the Decision Notice reached its conclusion on the basis of evidence from which it was entitled to conclude that the incident occurred in the presence of people who knew the individual concerned, and that a 'jigsaw' identification of him could be made if the information requested were disclosed. We agree in these circumstances that the request was one for personal data.
25. We note that the Appellant had not apparently seen the news reports in the closed bundle. We have directed their disclosure to him so that he can see the publicly available information relied on by the Information Commissioner. We agree with the Decision Notice that the language in which the request for information was made included allegations of criminal behaviour, so that this rendered it criminal offence data and subject to additional safeguards under DPA.
26. As there was no lawful basis for the Home Office to process the particular data requested (by disclosure under FOIA), we agree that it was exempt from disclosure under s. 40 (2) FOIA. The Appellant's arguments about the public interest in disclosure would have only been relevant to the balancing exercise required under Article 6(1)(f) GDPR. However, as no additional condition under Schedule 1 DPA part 3 (as required by s.10(5) DPA) has been met, we do not need to consider that Article.
27. In all the circumstances, we discern no error in the Decision Notice and have concluded that this appeal should be dismissed.

Signed: Judge Alison McKenna

Date: 10 October 2023