Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0085
Information Commissioner's Ref: ENFORCEMENT NOTICE 24/09/2008

Determined on the papers alone
20 March 2009

Decision Promulgated
23 April 2009

BEFORE

DEPUTY CHAIRMAN

DAVID MARKS QC

and

LAY MEMBERS

ANTHONY STOLLER
IVAN WILSON

Between

THE SECRETARY OF STATE
FOR COMMUNITIES AND LOCAL GOVERNMENT

Appellant

and

INFORMATION COMMISSIONER

Respondent

Subject matter:

DPA s1(1), s7 – provision of personal data in an intelligible form

Cases:

CSA v Scottish Information Commissioner **[2008] 4 All ER 851**
Durant v Financial Services Authority **[2003] All ER(D) 124 (2004) FSR 28**

Decision

The Tribunal allows the appeal to the extent of substituting the Enforcement Notice dated 24 September 2008, a Notice and/or decision acknowledging that the documents listed in Annexes A and B of the said Notice dated 24 September 2008 shall be disclosed to Mr Martin Sixsmith according to the terms of a closed judgment and/or direction to such effect made by the Tribunal to the parties herein of even date, the said disclosure to be made and/or effected within 14 days of the date of the promulgation of this Decision

Reasons for Decision

Introduction

1. This Appeal concerns the extent to which redaction should be applied to personal data which was requested pursuant to a subject access request made to the Appellant as a data controller, under the Data Protection Act 1998 ("DPA").

2. The issues in this appeal have narrowed considerably since the date the appeal was lodged. It will be necessary to set out the history of this matter in some detail together with a survey of the relevant legislative provisions. However, on account of the way the Appeal has developed and largely because of the help provided by the legal representatives on behalf of the two parties, the Tribunal is now able with the assistance of the parties to deal with the Appeal on the papers alone.

3. In terms of the relevant statutory provisions of the DPA the main question which the Tribunal is being asked to rule on is how personal data which is to be communicated to the data subject in the present case is to be communicated to him in the words of section 7(1)(c) "in an intelligible form".

Overall background

4. The factual background to the Appeal stems originally from events which received some publicity at the time of the events which are commonly referred to as "9/11", namely the tragic event that occurred in New York involving the Twin Towers on 11 September 2001. Ms Jo Moore issued an email on 11 September 2001 suggesting that it would be a "good day" to "bury" bad news. Her email attracted attention in the press and in the media.

5. In November 2001 Mr Martin Sixsmith, the data subject in this appeal, was recruited as the Director of Communications of the Appellant whose functions and responsibilities were formerly carried out by the Department of Transport and Local Government and the Regions. This judgment, however, will refer to that Department as the Appellant. According to a brief written chronology which Mr Sixsmith has submitted and which forms part of the bundle of documents considered by the Tribunal in this appeal, on the first day of his appointment he was briefed by the Appellant's then Permanent Secretary, Sir Richard Mottram, in Mr Sixsmith's words, "to make sure Byers and Moore do not get up to the same trick again". The reference to Byers was a reference to the then Secretary of State of the Appellant, namely Mr Stephen Byers.

6. In mid February 2002 according to the same chronology, Ms Moore suggested the Appellant release rail performance statistics, which were said to be disappointing, on 15 February. Mr Sixsmith sent an email to Stephen Byers advising against releasing this information on that date since the burial of the late Princess Margaret was due to take place on the same day. In the words of the chronology "we do not want a repeat of anything linking "buried" and "bad news".

7. On 15 February, Mr Byers announced that Ms Moore and Mr Sixsmith had offered their resignations which he had accepted. Mr Sixsmith claimed, and the Tribunal has no reason to doubt this, that the announcements suggested that Mr Sixsmith was at least partly to blame for reports that had previously appeared in two leading national newspapers which had reported the alleged content of Mr Sixsmith's email. Those reports, according to the chronology, initially prompted various official denials both inside and outside the House of Commons that any

such email had ever been sent only to be followed by an admission or admissions that there had in fact been such an email.

8. The Tribunal stresses that the information drawn from Mr Sixsmith's chronology, briefly related above, are no more than background. They are not directly material to the issues which need to be resolved in this appeal. Their relevance is merely to set the scene against which should be set Mr Sixsmith's subject access request to the Appellant. Mr Sixsmith wished to see the extent, if any, to which reference was made to him in relation to a number of exchanges and discussions that occurred in the wake of the announcement of his resignation.

9. In the course of discussions with the Information Commissioner ("the Commissioner") regarding his request, Mr Sixsmith has subsequently alleged that Mr Byers met with Sir Richard Mottram on a number of dates in February and March and further that he, Mr Byers, had met with Alastair Campbell a number of times in March and May and that he, Mr Byers had also met with the late Robin Cook, either in person or on the phone on various occasions in February and May.

10. Subsequently, according to Mr Sixsmith, in the course of May 2002 the Government issued a statement to the House of Commons "accepting" that Mr Sixsmith had remained in the Government's employment since the commencement of his contract on 19 November 2001 and that he did not resign on 15 February 2002. The Secretary of State stated in his statement to the House of Commons that there had previously been "an incorrect understanding" of earlier discussions adding that Mr Sixsmith's contract would therefore come to an end by mutual agreement at the end of May 2002. Again the Tribunal has no reason to doubt the overall accuracy of these events. As indicated above, however, they serve as no more than background.

11. In due course Mr Byers made a formal apology to the House of Commons for misleading the House in his previous parliamentary statement. He later resigned over an unconnected matter. Mr Sixsmith received a formal apology as well as compensation. In July 2002 the House of Commons' Public Administration Committee reported on its investigation into the affair. Its conclusions included a

determination in effect that the Government had prior to its statement of May 2002 referred to above, wrongly asserted that Mr Sixsmith's position had been "untenable".

The subject access request

12. On about 20 April 2006 Mr Sixsmith submitted a subject access request under the DPA to the Appellant. As data controller, the Appellant had 40 days in which to reply. The Appellant failed to do so. On 16 June 2006 the matters were referred by Mr Sixsmith to the Commissioner. The Commissioner set a further deadline of 19 October 2006 by which the Appellant was to respond.

13. By 6 November 2006, however, Mr Sixsmith maintained that he still had not received any communication from the Appellant. There then followed a number of exchanges between the Commissioner and the Appellant culminating in an Enforcement Notice issued on 24 September 2008. Mr Sixsmith has noted in his chronology that the Notice was issued about 2 years 5 months after the date of the subject access request. Not unnaturally, he has made complaint about the extreme delay that appears to have occurred. The Tribunal, however, notes the contents of a witness statement dated 6 February 2009 submitted by Mr David Smith, the Chief Knowledge Officer of the Appellant which notes that at least in the period from June 2007 to September 2008, the Appellant was not inactive and that both data and other information were produced during that period. The issues of delay and/or inactivity are not relevant for the purposes of this appeal.

14. However, under cover of a letter dated 12 October 2006, the Appellant claimed to have completed its search apologising for the lengthy delay in replying. The Tribunal notes, however, that Mr Sixsmith claimed not to have received that letter and the information in it. The letter enclosed a schedule of 20 pages listing 61 documents or items of information. It stated that some of the information which it held disclosed information relating to other individuals whom the Appellant considered to be identified from that information. It therefore declined to disclose such information in accordance with section 7(4) to (6) of the DPA. Those provisions will be referred to in detail below. In addition a claim that some of the information which the Appellant identified was subject to legal professional

privilege and therefore could not be disclosed in accordance with the exemption from the subject information provisions in paragraph 10 of schedule 7 to the DPA. Nothing further turns on the latter provisions for the purposes of this Appeal. The Schedule called Annex A, therefore, listed extracts of all remaining personal data references held by the Appellant in respect of Mr Sixsmith's request. It was not until February 2007 that Mr Sixsmith acknowledged receipt of the information claimed to have been provided in October 2006.

15. In the course of later exchanges between the Appellant, the Commissioner and Mr Sixsmith prior to the Enforcement Notice, the Commissioner took the view that some of the information withheld by the Appellant did in fact constitute personal data and should not, therefore, be withheld. This view duly found formal expression in the Enforcement Notice.

The Enforcement Notice

16. The Commissioner issued an Enforcement Notice dated 24 September 2008. Paragraph 5 of the Notice recited the Sixth Data Protection Principle set out in Part 1 of Schedule 1 to the DPA to the effect that:

> "Personal data shall be processed in accordance with the rights of data subjects under this Act".
>
> The same paragraph, namely paragraph 5 also recited Paragraph 8(a) of Part II of Schedule 1 to the DPA which further provides:
>
> "A person is to be regarded as contravening the sixth principle if, but only if, he contravenes [amongst other things] section 7 by failing to supply information in accordance with that section".

17. Section 7 of the DPA which is entitled "Right of access to personal data" was set out at paragraph 6 of the Notice and for completeness will be set out at this point. It provides:

> "(1) Subject to the following provisions of this section and to sections 8, 9 and 9A, an individual is entitled –

(a) to be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller,

(b) if that is the case, to be given by the data controller a description of –

(i) the personal data of which that individual is the data subject,

(ii) the purposes for which they are being or are being processed, and

(iii) the recipients or classes of recipients to whom they are or may be disclosed,

(c) to have communicated to him in an intelligible form –

(i) the information constituting any personal data of which that individual is the data subject, and

(ii) any information available to the data controller as to the source of those data …

(2) A data controller is not obliged to supply any information under subsection (1) unless he has received –

(a) a request in writing, and

(b) except in prescribed cases, such fee (not exceeding the prescribed maximum) as he may require.

(3) Where a data controller –

(a) reasonably requires further information in order to satisfy himself as to the identity of the person making a request under this section and to locate the information which that person seeks, and

(b) has informed him of that requirement, the data controller is not obliged to comply with the request unless he is supplied with that further information.

(4) Where a data controller cannot comply with the request without disclosing information relating to another individual who can be identified from that information, he is not obliged to comply with the request unless –

(a) the other individual has consented to the disclosure of the information to the person making the request, or

(b) it is reasonable in all the circumstances to comply with the request without the consent of the other individual.

(5) In subsection (4) the reference to information relating to another individual includes a reference to information identifying that individual as the source of the information sought by the request; and that subsection is not to be construed as excusing a data controller from communicating so much of the information sought by the request as can be communicated without disclosing the identity of the other individual concerned, whether by the omission of names or other identifying particulars or otherwise.

(6) In determining the purposes of subsection (4)(b) as to whether it is reasonable in all the circumstances to comply with the request without the consent of the other individual concerned, regard shall be had, in particular, to –

(a) any duty of confidentiality owed to the other individual,

(b) any steps taken by the data controller with a view to seeking the consent of the other individual,

(c) whether the other individual is capable of giving consent, and

(d) any express refusal of consent by the other individual.

(8) Subject to subsection (4), a data controller shall comply with a request under this section promptly and in any event before the end of the prescribed period beginning with the relevant day."

18. As has been indicated in the Introduction to this judgment, a key question in this Appeal involves a consideration of how the personal data requested by Mr

Sixsmith is to be communicated to him "in an intelligible form" in the words of section 7(1)(c).

19. Paragraph 8 of the Notice notes that following a visit by the Commissioner's staff to the Appellant, a partial response to the request was provided. Some information was, however, withheld in reliance on section 7(4) as well as in reliance upon legal professional privilege in accordance with paragraph 10 of Schedule 7 to the DPA. It was also noted that the Appellant at that stage had summarised 8 of the withheld documents to conceal the authors' identities to deal with third party concerns thought to arise under section 7(4).

20. In paragraph 9 of the Notice, the Commissioner accepted that legal professional privilege had been properly claimed. However, in relation to 12 listed documents in Annex 1 to the Notice and 3 additional documents listed in Annex 2 to the Notice which together included the 8 documents summarised by the Appellant and for the reasons given in paragraph 9 of the Notice the Commissioner considered that:

> "… the identities of the authors, particularly where they are expressing opinions about the data subject, are in the circumstances also the personal data of the data subject."

21. In paragraph 10 and following, the Commissioner therefore ruled that within 35 days of the date of the Notice in accordance with his duties and functions under section 40 of the DPA, the Appellant had to supply Mr Sixsmith with the documents in Annex 1 in full and a copy of the documents in Annex 2 "redacted as indicated".

22. Reference has already been made to Mr David Smith's witness statement. In paragraph 13 he formally confirmed that the Appellant was prepared to provide all the personal data contained in the documents identified in Annex 1 and 2 in the Enforcement Notice. He added the following, namely:

> "However, the Department believes that the Enforcement Notice goes too far in ordering the disclosure of documents in the form that it did. In particular, the Commissioner sought to compel the Department to provide information to Mr

Sixsmith that goes beyond his personal data and therefore beyond the scope of his entitlement under section 7(1)(c) of the Data Protection Act. The Department considers that somewhat fuller redaction is appropriate than the Commissioner has suggested."

Notice of Appeal

23. The grounds of Appeal in their original form are dated 22 October 2008. Paragraph 3 of the grounds took issue with the Commissioner's conclusion that the identities of authors of opinions about Mr Sixsmith constituted his "personal data". That issue is no longer live. However, the Appellant accepted at paragraph 4 that the opinions as such constituted "information available to the data controller [ie the Appellant] as to the source of [personal data of the data subject], [ie the opinions about Mr Sixsmith]" within the meaning of section 7(1)(c)(ii). In those circumstances the Appellant accepted that the right of access in section 7(1) was applicable subject to the exceptions in section 7(4) to (6) but not for the reasons given by the Commissioner.

24. The Appellant also took issue in paragraph 6 with the conclusion reached by the Commissioner in paragraph 10 of the Notice to the effect that it was "reasonable in all the circumstances for third party data to be supplied to Mr Sixsmith "without the consent of" those third parties. This was principally on the basis that the Commissioner's reasoning in relation to this finding and which justified that conclusion was not set out "beyond stating that he [*ie the Commissioner*] noted "in particular" that the third parties were acting in their professional rather than a private capacity". The Appellant contended that it had offered to provide a summary of the opinions in question to Mr Sixsmith and that no one had contended that the summaries so provided were "inaccurate or insufficient".

25. Amended grounds of appeal were then provided dated 11 February 2009. The amended Grounds repeated the representations made in David Smith's statement in paragraph 13 which has already been referred to above at paragraph 22 (see paragraph 7 of the Amended Grounds). The matter was amplified in paragraph 8 as amended. The Amended Grounds stated that the Commissioner had wrongly

sought to oblige the Appellant to produce documents and parts of documents that went beyond information that was the personal data of Mr Sixsmith. It was therefore contended that it was beyond the scope of his entitlement under section 7(1)(c) of the DPA. Paragraph 8, as amended, went on as follows, namely:

> "To the extent that information is not personal data of the person making a subject access request, subsection 7(1)(c) of the Act is not in play. The Appellant considers that somewhat fuller redaction is appropriate than the Commissioner has indicated. The redactions that the Appellant submits are appropriate are identified in the document that will be supplied to the Tribunal at the same time as the Tribunal is supplied [*pursuant to earlier directions*] with unredacted copies of the documents identified in the Annexes to the Enforcement Notice."

26. Paragraph 9 of the Amended Grounds therefore summarise the position to the effect that the only remaining issue in the appeal was whether "the somewhat fuller redactions proposed by the Appellant are appropriate". The parties therefore submitted, and the Tribunal duly agreed that a determination on the papers alone, as distinct from an oral hearing, would be appropriate.

27. Even though the issue before the Tribunal is a narrow one, the Tribunal agrees with the Appellant that the question whether redacted data such as the banardised data considered in *CSA v Scottish Information Commissioner* [2008] 4 All ER 851 constitutes personal data is ultimately a matter of seeing whether the data in question falls within the statutory definition of "data" found in section 1(1) of the DPA as amended by 68(2) of the Freedom of Information Act 2000 as well as within the statutory definition of "personal data". That provision provides in general terms that "data" means (a) information which is being processed by means of equipment operating automatically in response to instructions given for that purpose, or (b) information recorded with the intention that it should be processed by means of such equipment, or (c) information recorded as part of a relevant filing system with the intention that it should form part of an accessible record as defined by section 68, or (d) information not falling within either of the three aforementioned paragraphs, but which forms part of an accessible record as

defined by section 8, or (e) recorded information held by a public authority not falling within any of the aforesaid subparagraphs (a) to (d).

28. The Tribunal does not regard the Commissioner to take a different stance to that approach. Compare the observations of Auld LJ in *Durant v FSA* [2003] All ER (D) 124, especially at paragraph 28 where reference is made to notions claimed to be of assistance as to which the Tribunal expresses no view in this appeal. At paragraph 26 of *Durant*, however, Auld LJ says:

> "The intention of the directive [*ie the Council Directive (EC) 95/46*], faithfully reproduced in the Act, is to enable an individual to obtain from a data controller's filing system, whether computerised or manual, his personal data, that is, information about himself. It is not an entitlement to be provided with original or copy documents as such, but, as section 7(1)(c)(i) and 8(2) provide, with information constituting personal data in intelligible and permanent form. This may be in documentary form prepared for the purpose and/or where it is convenient in the form of copies of original documents redacted if necessary to remove matters that do not constitute personal data (and/or to protect the interests of other individuals under 7(4) and (5) of the Act)".

Here, however, as the Appellant points out, the redactions only involve the simple issue of whether they reflect or constitute personal data or not. At paragraph 28 as indicated above, the learned Lord Justice issued a reminder that where there is a mention of the data subject in a document held by a data controller, this will not necessarily amount to personal data. Whether it does so, the learned Lord Justice added, depends on whether it falls in what he called "a continuum of relevance or proximity to the data subject." The Tribunal is not concerned with embarking on that exercise given the simple exercise it has to carry out in this appeal.

29. The Tribunal wishes to add that it is not to be taken to be making any decision let alone expressing any view on whether, and if so to what extent, the identity of a particular recipient of the communication which is about or which might relate to an individual could or could not be said to amount to "personal data". No such issue arises for determination in this appeal.

30. However, in the light of Auld LJ's comments recited above in *Durant*, the Tribunal duly endorses the approach taken by the Commissioner as reflected in the Enforcement Notice in this case that in all the circumstances it is appropriate for Mr Sixsmith to see the original documentation in their full form albeit with blacked out portions of all those matters ruled or determined to be subject to redaction or removal.

Ruling

31. The net result of the exercise carried out by the Tribunal with regard to the documents which constitute Annexes 1 and 2 of the Enforcement Notice is as follows.

32. First, the Tribunal has carefully reviewed all the redacted passages agreed between the parties and in one or two instances has made further alterations or redactions which are set out and explained in a separate closed judgment directing the parties to take into account the Tribunal's amendments. They are fairly limited but reflect the Tribunal's own view as to whether the material in question constitutes personal data for the purposes of this definition.

33. Second, item 11 in Annex 1 does not feature in the Tribunal's considerations as the material constituting that item has already been the subject of disclosure to Mr Sixsmith. Third, as indicated above, the Tribunal wishes to state that it is only in all the circumstances of the present appeal that it regards it as appropriate to endorse the disclosure of the original documents with blacked out redactions. This is not to say that in all cases such an approach is sufficient or indeed necessary to render data disclosable "in an intelligible form" within the statutory definition. Both parties have for the purposes of the present Appeal accepted such to be the appropriate course in this instance.

Mr Sixsmith

34. The Tribunal is conscious of Mr Sixsmith's overall concerns particularly those which appear to involve a desire on his part to be acquainted with information or at least documentation reflecting discussions about any response or reaction to his subject access request.

35. The Tribunal agrees with the Appellant that Mr Sixsmith has no right to view documents or obtain information generated in the course of dealing with his request. See generally section 8(6) of the DPA. Section 7 of the said Act does not extend such rights to a data subject.

36. At all material times the appeal has been solely concerned with the documents listed in Annexes 1 and 2 to the original Enforcement Notice.

37. The Tribunal does not propose to deal with any other issues which Mr Sixsmith has raised during or in relation to this Appeal on the simple ground that they are not relevant.

Conclusion

38. For all the above reasons the Tribunal duly issues an Enforcement Notice in accordance with the terms of its decision set out above.

Signed:

David Marks QC

Deputy Chairman Date: 23 April 2009