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

SOUTHAMPTON CITY COUNCIL

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

GROUNDS OF APPEAL

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1. The Respondent ("the Commissioner") has served an enforcement notice ("the Notice") on the Appellant ("the Council"), under section 40 of the Data Protection Act 1998 ("DPA). The Notice relates to the Council's policy (effective from 26th August 2009) that all licensed taxis and private hire vehicles have to be fitted with a CCTV system that features an audio recording facility that is in permanent operation: "the Policy".

2. The Notice requires the Council to do the following, by 1st November:

   (i) Erase any personal data in the audio recordings that has already been obtained as a result of the Policy and which is still held by the Council; and

   (ii) Refrain from recording any such personal data in future.

3. The Council appeals against the Notice, under DPA section 48(1).

4. Under DPA section 49(1) the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner if it considers:

   (a) that the Notice 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 may review any determination of fact on which the Notice was based: DPA section 49(2).

First Ground of Appeal: the Commissioner erred in law in concluding the Council had contravened the first Data Protection Principle

5. At §6 of the Notice, the Commissioner concluded that the Council had contravened the First Data Protection Principle. The Commissioner thereby erred in law, as set out below.

Unfair processing

6. The Commissioner was wrong to conclude that the Council was processing personal data unfairly.

7. The Policy is not unfair either to drivers or to passengers, who are the two classes of data subjects affected by the Policy, having regard in particular to the following considerations.

(i) The Policy serves an important objective, namely the prevention, deterrence and detection of crime, particularly in relation to criminal offences committed by drivers against passengers and *vice versa*.

(ii) The data subjects affected by the Policy – that is, drivers and passengers – are the very groups that the Policy is intended to protect. The operation of the Policy confers a benefit on these groups.

(iii) The sounds and images obtained as a result of the Policy can only be accessed in very limited circumstances. They are stored on an encrypted hard disk that is accessible only to specific Council officers. They are downloaded only when there is a specific complaint against a driver or when the Police request access in order to investigate an alleged offence.

(iv) Alternative options not involving the use of audio recording at all, or not involving continuous audio recording, would be unsatisfactory and inadequate as a means of achieving the Policy's objective.

(v) The use of an alternative system whereby audio recording would be triggered by use of a panic button activated by drivers and/or passengers in response to a specific threat would be inadequate and unsatisfactory as a means of combating crime. Since such a button would only be used once an incident, e.g. of verbal or physical assault, was already underway, only part of the relevant incident would be captured and so the evidential value of the recording would be greatly reduced. Moreover, a panic button system would fail to protect the most vulnerable passengers, who would be the very groups that would have most difficulty in locating and using a panic button: for instance, the elderly, the physically infirm, the visually impaired, and those under the influence of drink or drugs.

(vi) Likewise, the use of an alternative system whereby the driver could disable the audio recording when the vehicle was not in commercial use would be inadequate and unsatisfactory, since it would put the operation of the audio recording system in the hands of the driver and would effectively give him the means of disabling it whenever he chose.

(vii) Alternatively, if the system was disabled from time to time by a Council employee, so that the driver could use the vehicle for private purposes, there would be no effective way of preventing the driver from also using the vehicle for commercial purposes while the system was disabled.

Unlawful processing

8. The Commissioner was wrong to conclude that the Council was processing personal data unlawfully. The enforcement notice does not explain the respect in which the Commissioner considered that the processing was unlawful, or the reasons for that conclusion.

9. If the Commissioner considered that the Council was acting unlawfully because the relevant processing was *ultra vires* the Council, then that conclusion was wrong in law. The Council had adopted the Policy pursuant to:

(i) its duty to regulate licensed taxis and private hire vehicles under the Town Police Clauses Act 1847 and the Local Government (Miscellaneous Provisions) Act 1976; and

(ii) its duties regarding crime and disorder under section 17 of the Crime and Disorder Act 1998.

10. If the Commissioner considered that the Council was acting unlawfully in that the Policy was in breach of Article 8 of the European Convention on Human Rights ("the Convention") then that conclusion was also wrong in law. The Policy served a legitimate aim, namely the prevention, deterrence and detection of crime. Any interference with the right for respect for private life under Article 8(1) was very limited, having regard to the restricted circumstances in which any audio recordings would be accessed and heard. Any such interference was necessary and proportionate, having regard to the considerations set out at §6 of these Grounds, above.

Sensitive personal data

11. The Commissioner erred in concluding that the Council was processing sensitive personal data as defined by DPA section 2. The Notice does not identify the category of sensitive personal data that the Council is said to be processing. If the Commissioner relies on section 2(g), namely data consisting of information as to the commission or alleged commission by the data subject of a criminal offence, then this is unsustainable. The Council does not process data falling within section 2(g) until the point when the audio recordings are accessed. The Notice is directed at the making and holding of audio recordings, rather that the way in which the Council accesses them: in making and holding recordings the Council is not processing sensitive personal data, whether within section 2(g) or within any other category.

Schedule 2 and Schedule 3 conditions

12. The Commissioner erred in holding that no Schedule 2 or Schedule 3 conditions were satisfied. The Council relies on the following conditions:

(i) Schedule 2 paragraph 3;

(ii) Schedule 2 paragraph 5(b) and (d);

(iii) Schedule 2 paragraph 6; and

(iv) if and to the extent necessary, Schedule 3 paragraph 7(1)(b).

Second Ground of Appeal: the Commissioner erred in law and/or ought to have exercised his discretion differently in relation to damage and distress

13. The Commissioner purported to consider the matters specified in section 40(2) of the DPA, at §8 of the Notice. The Commissioner found that in the event of the Council failing to address the Commissioner's concerns about the Policy: "damage or distress to licensed taxi and private hire vehicle drivers and passengers *may result* [emphasis supplied]".

14. The Commissioner thereby misdirected himself as to the meaning and application of DPA section 40(2). The question that he ought to have considered under that provision was whether any contravention of the DPA *had caused or was likely to cause* damage or distress. The test of likelihood in this context would be whether there was a very significant and weighty chance of damage or distress: compare *R (Lord) v Secretary of State* [2003] EWHC 2073, at §100. The test posed by the Commissioner, namely whether damage or distress "may result", sets a lower standard as to the chance of damage or distress and is wrong in law. The matters relied on at §8 of the Notice demonstrate that the Commissioner took into account remote and speculative possibilities as to damage or distress, rather than asking whether there was a very significant and weighty chance of damage or distress.

15. Further, the matters relied upon by the Commissioner were incapable, whether considered individually or cumulatively, of leading to a conclusion that the Policy had caused or was likely to cause damage or distress.

(i) The Notice states that the Commissioner is concerned that the recorded information could be used for purposes (albeit legitimate) other than those originally intended. The Commissioner does not identify the "other purposes" referred to; nor was there any material before the Commission entitling him to conclude that the recorded information could be used in that way.

(ii) The Notice also states that the Commissioner was concerned that the data could be subject to unauthorised or unlawful access, disclosure or other processing. There was no material before the Commissioner entitling him to reach this conclusion. The Commissioner does not identify any basis for considering that the Council's information security policies were inadequate; and nor was there in fact any basis for such a conclusion.

(iii) The Notice states that the simple knowledge that a conversation was being recorded "might cause distress". The point made above is repeated: the test under DPA section 40(2) is whether distress is likely, not whether it might be caused.

(iv) Further, given the very limited circumstances in which anyone would actually access and listen to the recording, the distress referred to by the Commissioner was not likely: it was a remote and speculative possibility.

(v) Finally the Commissioner suggested that the potential existed for information recorded to be used to affect licensing decisions. There was no material whatsoever before the Commissioner that entitled him to reach that conclusion. Nor does the Commissioner explain how

that "potential" existed, or in what way the information might be so used.

16. In these circumstances the Commissioner erred in law and/or exercised his discretion wrongly, in having regard to the matters set out at §8 of the Notice.

Third Ground of Appeal: the Commissioner erred in law in relation to Article 8 of the European Convention on Human Rights

17. At §9 of the enforcement notice the Commissioner concluded that the Council had acted in breach of Article 8 of the Convention. This conclusion was wrong in law, for the reasons stated at §9 of these Grounds, above.

Order sought

18. The Council asks the Tribunal to allow the appeal and set aside the Notice.

11KBW
Temple
2nd August 2012

TIMOTHY PITT-PAYNE QC

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GROUNDS OF APPEAL

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