IN THE FIRST-TIER TRIBUNAL **Case No. EA/2012/0039**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50422884
Dated: 12 January 2012

Appellant: Christopher Colenso-Dunne

Respondent: The Information Commissioner

On the papers

Date of decision: 6 November 2012

Before
CHRIS RYAN
(Judge)
and
JEAN NELSON
MALCOLM CLARKE

Subject matter: Personal data s.40
Prohibitions on disclosure s.44

Cases: *Corporate Officer of the House of Commons v Information Commissioner and others* [2008] EWHC 1084 (Admin).
Durrant v Financial Services Authority [2003] EWCA Civ 1746

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DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal is not able to determine the appeal without being provided with further information and submissions. Appropriate directions are included in the Reasons below.

REASONS FOR DECISION

Introduction

1. This appeal is one in which the Information Commissioner is the public authority which held information which the Appellant requested under section 1 of the Freedom of Information Act 2000 ("FOIA"). It is an unusual, and unsatisfactory, feature of this area of the law that the Information Commissioner also had responsibility, under FOIA section 50, to investigate the Appellant's complaint that his information request had not been dealt with in accordance with the law. In order to avoid confusion we will refer to the public authority to which the information request was submitted as "the ICO" and the official responsible for the subsequent investigation as "the Commissioner".

2. In this preliminary decision we indicate, in broad terms, the possible application of the exemptions from the obligation to disclose on which the ICO relied when refusing to disclose the names of certain journalists why may have instructed a particular investigator to obtain personal data by illegal means. We record our views on the principles that should be applied in considering whether the exemptions may be relied upon to justify refusing the information request. However, the exact nature of the information held by the ICO only became apparent during the preparations for the determination of this appeal, We have therefore found it necessary to direct that further information be disclosed to us, and further submissions made, in order to determine how the principles we have identified should be applied to the various elements of information held by the ICO.

Background information

3. The information request arose out of two reports the ICO made to the UK Parliament. The first was entitled "What Price Privacy" and was submitted on 6 April 2006. It claimed to have found extensive evidence of a

widespread and organised undercover market in confidential personal information, in breach of the right to personal privacy of all individuals under the Data Protection Act 1998 ("the DPA").

4. The DPA includes, in section 55, the creation of a crime for the unlawful obtaining or disclosing of personal data. The section reads:

> *"(1) A person must not knowingly or recklessly, without the consent of the data controller—*
>
> *(a) obtain or disclose personal data or the information contained in personal data, or*
>
> *(b) procure the disclosure to another person of the information contained in personal data.*
>
> *(2) Subsection (1) does not apply to a person who shows—*
>
> *(a) that the obtaining, disclosing or procuring—*
>
> *(i) was necessary for the purpose of preventing or detecting crime, or*
> *(ii) was required or authorised by or under any enactment, by any rule of law or by the order of a court,*
>
> *(b) that he acted in the reasonable belief that he had in law the right to obtain or disclose the data or information or, as the case may be, to procure the disclosure of the information to the other person,*
>
> *(c) that he acted in the reasonable belief that he would have had the consent of the data controller if the data controller had known of the obtaining, disclosing or procuring and the circumstances of it, or*
>
> *(d) that in the particular circumstances the obtaining, disclosing or procuring was justified as being in the public interest.*
>
> *(3) A person who contravenes subsection (1) is guilty of an offence.*
>
> *(4) A person who sells personal data is guilty of an offence if he has obtained the data in contravention of subsection (1).*
>
> *(5) A person who offers to sell personal data is guilty of an offence if—*
>
> *(a) he has obtained the data in contravention of subsection (1), or*

(b) *he subsequently obtains the data in contravention of that subsection."*

5. The report stated that those guilty of being involved in the illegal trade as suppliers were invariably working within the private investigation industry. Buyers were said to include journalists. As to the latter, the report included this passage in its Executive Summary:

> *"In one major case investigated by the ICO, the evidence included records of information supplied to 305 named journalists working for a range of newspapers.*

Later in the report a chapter headed "Breaking the law: the evidence" said that the investigation referred to had been given the code name "Motorman" and that it arose from a raid on the premises of a private detective and two of his associates, which produced what was described as :

> *"…*[a] *wealth of detail that was to prove so valuable to our knowledge of the illegal market in personal information: ledgers, workbooks and invoices detailing who had requested the information, precisely what information they were given, how much they were charged, and how much was paid to the associates who actually obtained the information."*

The press was identified in the report as a major customer of illegally obtained personal data. It was said that:

> *"The primary documentation seized* [during Operation Motorman] *consisted largely of correspondence (reports, invoices, settlement of bills etc) between the detective and many of the better-known national newspapers – tabloid and broadsheet – and magazines. In almost every case the individual journalist seeking the information was named, and invoices and payment slips identified leading media groups."*

A little later the report said:

> *"The secondary documentation seized … consisted of the detective's own hand-written personal notes and a record of work carried out, about whom and for whom. This mass of evidence documented literally thousands of section 55 offences, and added many more identifiable reporters supplied with information, bringing the total to some 305 named journalists."*

The report's conclusions included this passage:

> *"These offences occur because there is a market for this kind of information. At a time when senior members of the press were publicly congratulating themselves for having raised journalistic*

standards across the industry, many newspapers were continuing to subscribe to an undercover economy devoted to obtaining a wealth of personal information forbidden to them by law. One remarkable fact is how well documented this underworld turned out to be".

6. On 13 December 2006 the ICO issued a second report, reviewing progress in the six months since his first report. It was entitled "What Price Privacy Now" and recorded, among other facts, its own handling of a freedom of information request submitted to it seeking details of the publications which had employed the 305 journalists referred to in the first report. The report went on to say that, having considered the matter further, the ICO had decided that it was appropriate to publish further information about the involvement of the media in the illegal trade. There followed a table with the headings "Publication" (under which 32 newspapers and magazines were listed), "Number of transactions positively identified" and "Number of journalists/clients using the services". It was made clear, elsewhere in the report, that the tabulated data had been obtained from documentation seized during Operation Motorman.

The Appellant's request for information and the Commissioner's Decision Notice

7. On 26 July 2011 the Appellant wrote to the ICO seeking information to supplement that set out in the table referred to, in order to show "the number of transactions per journalist of each of the 305 identified journalists for each of the 32 identified publications". The Appellant went on to explain that he anticipated that the response to this request ("the First Information Request") would identify each journalist by a code number, not by name. However, his letter then went on to make a further request ("the Second Information Request") in which he asked for a key to identify each of the 305 journalists included in the table requested in the first information request.

8. The ICO confirmed that it held the information requested but refused to disclose it. In respect of the First Information Request the ICO said that in order to find the information it would be necessary to revisit the original information held as part of the Operation Motorman investigation and search through the 17,000 documents that had been recovered. That task, it said, was estimated to cost more than the maximum provided for under FOIA section 12, with the result that the ICO was entitled to refuse the request. The Appellant queried whether the ICO had not saved information derived from the extensive documentation it held in one or more databases so that extracting the information sought would be relatively quick and inexpensive. The ICO, at the end of its own internal review of the decision to refuse both requests, wrote to the Appellant on 26 September 2011 assuring him that, despite his expectations "*the fact of the matter is that the databases which you suggest must exist in fact don't."* It informed him that ICO staff had searched for useful summaries

or databases and assured him that, had the information been held in such an accessible form it would have been found.

9. The ICO's reason for refusing the Second Information Request was that the information sought was exempt from disclosure under FOIA section 40(2) (third party personal data). The refusal was upheld, following the internal review referred to above and on 31 October 2011 the Appellant complained to the Commissioner about that refusal. He did not complain about the refusal in respect of the First Information Request because, he has told us, he accepted what he had been told about the inability to find any databases recording information extracted from the Operation Motorman documentation.

10. On 12 January 2012 the Commissioner issued his Decision Notice. He concluded that the names of the 305 journalists constituted their Sensitive Personal Data, for the purposes of the DPA, and that its disclosure would contravene the rights of the individuals concerned, particularly as the appearance of their names in the list did not mean that they had been guilty of breaching DPA section 55 – they might be innocent and would have a reasonable expectation that the mere suspicion of their involvement in criminal activities would not be disclosed to the public, particularly as the publication would not be accompanied by either evidence of guilt or any reply to the allegation from the person named. Although the Commissioner conceded that there was a high level of public interest in journalists wrongly obtaining personal data he concluded that disclosure would be an unwarranted intrusion into the journalist's lives and would therefore be unfair and in breach of the data protection principles enshrined in the DPA.

11. The Commissioner also concluded that disclosure by any member of the ICO staff, being without "lawful authority", would have been prohibited under DPA section 59 and that this brought it within the exemption created by FOIA section 44.

The law applied by the Commissioner

12. FOIA section 1 imposes on the public authorities to which it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA.

13. FOIA section 40(2) provides that information is exempt information if it constitutes personal data of a third party the disclosure of which would contravene any of the data protection principles.

14. Definitions of "data" and "personal data" appear in section 1 of the DPA:

> *"data" means information which-*

(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
(b) is recorded with the intention that it should be processed by means of such equipment,
(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system,
(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68, or
(e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d)

"'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"

15. The data protection principles are set out in Part 1 of Schedule 1 to the DPA. The only one having application to the facts of this Appeal is the first data protection principle. It reads:

"Personal data shall be processed fairly and lawfully, and in particular shall not be processed unless-
(a) at least one of the conditions in Schedule 2 is met, and
(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

16. For this purpose "sensitive personal data" is defined in DPA section 2 as follows:

In this Act "sensitive personal data" means personal data consisting of information as to—

(a) the racial or ethnic origin of the data subject,

(b) his political opinions,

(c) his religious beliefs or other beliefs of a similar nature,

(d) whether he is a member of a trade union (within the meaning of the TradeUnion and Labour Relations (Consolidation) Act 1992),

(e) his physical or mental health or condition,

(f) his sexual life,

(g) the commission or alleged commission by him of any offence, or

(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

17. Schedule 2 to the DPA sets out a number of conditions, but only one is relevant to the facts of this case. It is found in paragraph 6(1) and reads:

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or 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."

The term "processing" has a wide meaning (DPA section 1(1)) and includes disclosure.

18. Schedule 3 sets out the conditions relevant for the processing of sensitive personal data, but none of them have application to the facts of this case.

19. A broad concept of protecting, from unfair or unjustified disclosure, the individuals whose personal data has been requested is a thread that runs through the data protection principles, including the determination of what is "necessary" for the purpose of identifying a legitimate interest. In order to qualify as being "necessary" there must be a pressing social need for it - *Corporate Officer of the House of Commons v Information Commissioner and others* [2008] EWHC 1084 (Admin).

20. FOIA section 44 provides that

"(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –
(a) is prohibited by or under any enactment…"

The enactment relied on by the ICO is the DPA itself which provides, under section 59:

(1) No person who is or has been the Commissioner, a member of the Commissioner's staff or an agent of the Commissioner shall disclose any information which—

(a) has been obtained by, or furnished to, the Commissioner under or for the purposes of the information Acts,

(b) relates to an identified or identifiable individual or business, and

(c) is not at the time of the disclosure, and has not previously been, available to the public from other sources,

unless the disclosure is made with lawful authority.

(2) For the purposes of subsection (1) a disclosure of information is made with lawful authority only if, and to the extent that—

(a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business,

(b) the information was provided for the purpose of its being made available to the public (in whatever manner) under any provision of the information Acts,

(c) the disclosure is made for the purposes of, and is necessary for, the discharge of—

(i) any functions under the information Acts, or

(ii) any Community obligation,

(d) the disclosure is made for the purposes of any proceedings, whether criminal or civil and whether arising under, or by virtue of, the information Acts or otherwise, or

(e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest.

(3) Any person who knowingly or recklessly discloses information in contravention of sub section (1) is guilty of an offence.

The Appeal to this Tribunal

21. On 20 February 2012 the Appellant lodged an appeal against the Decision Notice with this Tribunal.

22. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.

23. The Appellant and the Commissioner agreed that the appeal could be determined on the papers, without a hearing, and we agreed that it was a suitable case to be handled in that way. Directions were accordingly given for the preparation of an agreed bundle of documents, the provision of the disputed information in a closed bundle and the exchange of written

submissions. The closed bundle consisted of a list of the journalists' names, which had been among the materials seized during the raid on the investigator's premises. We will refer to this as "the Hard Copy List".

An issue not falling within the scope of the Appeal

24. FOIA section 58 does, of course, restrict the scope of our jurisdiction to the decision notice under appeal, not the conduct of the investigation that preceded it. We do not therefore have any power to rule on the way in which the ICO handled the First Information Request. However, we do think it is important that we comment on a matter that may not otherwise come to light and which represents a significant failure by the ICO in handling the information request. The very firm statement by the ICO, in its letter to the Appellant of 26 September 2011, to the effect that the information requested had not been recorded in a database, was written less than two months before the first hearing of the Leveson Inquiry into the Culture, Practice and Ethics of the Press. That occurred on 14 November 2011 and within the following four weeks the Inquiry received a considerable body of evidence from the ICO about the material gathered during Operation Motorman and, in particular, the way in which the data had been managed by the use of database tools.

25. In early December 2011 the Inquiry heard evidence from both Richard Thomas, who held the position of Information Commissioner between 2002 and 2009, and Alex Owens, formerly the ICO's Senior Investigating Officer. Mr Owens provided detailed information about Operation Motorman, which included the following:
    a. The investigator whose premises were raided was a Mr Whittamore;
    b. A large volume of documentation was removed, which included invoices, loose notes, a contacts book and four notebooks in which Mr Whittamore had recorded his dealings with a number of journalists and newspapers;
    c. Every seized document was photocopied and sent to an independent computer forensic organisation, which prepared spreadsheets ("the Spreadsheets") recording relevant information in a format (Microsoft Excel) which could be searched, sorted or filtered;
    d. Mr Whittamore was prosecuted (along with others) under the DPA and in April 2005, having pleaded guilty, he was sentenced to a two-year conditional discharge;
    e. In June 2005 other charges against Mr Whittamore and some of his associates were dropped.

26. Other evidence presented to the Leveson Inquiry revealed the following:
    a. The Spreadsheets recorded information under more than 30 columns, each column containing information falling into a particular category, which included the journalist's name, his or her employer, the type of information requested from Mr Whittamore, the name of

the individual targeted, the date the service was invoiced and the price charged.

b. Information extracted from the Spreadsheets had been provided (either under court order or in response to a valid subject access request) to a number of individuals who had been contemplating proceedings against newspapers for breach of privacy rights.
c. Certain newspapers had also been provided with a subset of the data contained in the Spreadsheet showing information related to their particular organisation together, in at least one instance, with copies of the documentation supporting particular entries.

27. Mr Thomas was subjected to lengthy cross examination on the way in which information acquired during Operation Motorman had been used as the basis for:
    a. prosecutions against certain investigators (but not journalists);
    b. communications with the Press Complaints Commission; and
    c. the two reports presented to Parliament.

28. Against that background we do not understand how the Appellant could have been given such a misleading response to the First Information Request. If the true position had been revealed to the Appellant it is quite conceivable that, even if extracting all the requested information from the Spreadsheet would have caused the cost limit to have been exceeded, the scope of the request might have been adjusted to bring the exercise within that limit. FOIA section 16 requires public authorities to advise and assist those requesting information. Such advice and assistance is particularly important in cases where it may be possible to adjust the terms of an information request in order to avoid a refusal under FOIA section 12.

29. It may be, of course, that there would still have been a justification for refusing the First Information Request under one or more of the exemptions provided for under FOIA, including under section 40 or section 44. However, that does not alter the fact that, as a result of the misleading information given to the Appellant, he was not able to pursue his request, even to the stage of being able to debate the application of any such exemption with the public authority or, during the course of its investigation, the ICO.

30. We only became aware of the ICO's error after the Appellant drew our attention to the evidence presented to the Leveson Inquiry regarding the Spreadsheets. We assume (and certainly hope) that those in the Commissioner's office handling this appeal had not become aware sooner. In inviting the Commissioner to comment on our discovery we did so on a confidential basis because the Hard Copy List had been provided to us in the closed bundle. However, the essence of the Commissioner's response should be treated as an open submission as it did not disclose anything about the names contained in either the Hard Copy List or the Spreadsheets. In short, the Commissioner apologised for the error and accepted that the Hard Copy List included in the closed bundle was nothing more than an address book or contact list of one of the

investigators involved and that it did not represent the entirety of the information held.

31. We record, later in this decision, the impact the ICO's error had on the handling of the Second Information Request.

The issues arising on this Appeal in respect of the Second Information Request

32. The Appellant raised the following arguments in his Grounds of Appeal and subsequent written submissions in respect of FOIA section 40:
    a. The information requested did not fall within the scope of the DPA because it was not data; or, in the alternative, if this was not accepted
    b. It was not necessary to invoke the additional control on disclosure imposed by DPA Schedule 3 because the information was not sensitive personal data; and in any event
    c. The public interest in disclosure was so great that it outweighed the factors in favour of protecting the requested information from disclosure.

    The Appellant also argued:

    d. That the prohibition under DPA section 59 did not apply (so that the requested information was not exempt under FOIA section 40) because disclosure would be with lawful authority.

    We will deal with each of these issues in turn.

Did the requested information fall within the scope of the DPA?

33. The Appellant argued, first, that the information falling within the Second Information Request did not constitute "data" for the purposes of DPA section 1(1). By the time that he filed his Grounds of Appeal it had become apparent, from the evidence submitted to the Leveson Inquiry, that the ICO held both paper files and database records (in the form of the Spreadsheets) summarising information obtained from them. The Appellant nevertheless argued that the journalists' names were not held in a "relevant [manual] filing system" for the purpose of sub paragraph (c) of the definition. He relied on an extract from *Durrant v Financial Services Authority* [2003] EWCA Civ 1746 which did not, in our view, support his contention. More significantly the argument became irrelevant once the existence of the Spreadsheets had become apparent. The Appellant nevertheless argued that this did not fall within the definition either because sub-paragraphs (a) and (b) of the statutory definition did not apply to information stored in an Spreadsheets due to the very limited database functions incorporated in the Excel software with which they had been created. The point, however, is unarguable. The level of

sophistication of processing that may be undertaken is irrelevant for these purposes; a computer operating in accordance with instructions generated by software in order to store data and enable it to be searched or sorted clearly falls within the definition.

34. It is not strictly necessary, therefore, to consider the Appellant's argument that the data fell within sub paragraph (e) of the definition. However, even if it did (and did not fall within any of the previous sub-paragraphs) this does not help the Appellant's case because, in any event, the effect of DPA section 33A is to substantially exempt such information from the first data protection principles (as well as others that do not have impact on the facts of this case).

35. The Appellant argued, in the alternative, that if the requested information was "data" it was not "personal data" or "sensitive personal data". As to the former, the Appellant again relied on a passage from Durant, which, far from supporting his argument undermined it both by the terms of the judgment itself and the case law quoted in it.

Information in any event not sensitive personal data

36. In respect of sensitive personal data the Appellant suggested that the information did not relate to the commission or alleged commission of any offence by any of the individuals in question because none of them had ever been charged with a crime or interviewed under caution. The Commissioner, on the other hand, argued that it was clear that there was sufficient connection with criminal activity to bring the names within the meaning of "sensitive personal data". However, neither the Hard Copy List nor (so far as we are aware) the Spreadsheets contain any allegation of crime – they simply record the names of individuals and, in the case of the Spreadsheets, certain facts regarding transactions they undertook with Mr Whittamore. On its own, therefore, this does not disclose any conviction, failed conviction, charge or public allegation of criminal conduct.

37. It is conceivable that the whole body of information held by the ICO may demonstrate that some or all of the named journalists were implicated in possible breaches of DPA section 55 and that there is sufficient connection with criminal activity to bring the information within the meaning of the expression "sensitive personal data". Without studying the information in the Spreadsheets and receiving submissions on the significance of particular entries, it is not possible to determine what information, if any, may fall within the definition.

Disclosure would breach data protection principles

38. It follows from what we have said that, once a name has been correctly categorised as either personal data or sensitive personal data, different criteria must be applied in order to determine whether disclosure may be

made without breaching any of the data protection principles. The questions we have to determine are:

i. whether disclosure at the time of the information request would have been necessary for a relevant legitimate purpose; without resulting in
ii. an unwarranted interference with the rights and freedoms or legitimate interests of each of the individuals concerned; and, even if those tests are satisfied

And if we are satisfied on those points we have also to consider:

iii. whether disclosure would have been unfair or unlawful for any other reason.

In the case of those that are found to constitute sensitive personal data, disclosure will only be appropriate if, in addition:

iv. one of the previously identified provisions of DPA Schedule 3 is satisfied.

39. The Appellant did not expressly refer to the tests set out above but argued that the public interest in disclosure was so great that it justified disclosure. He equated the facts of this case to those involving information about expense claims submitted by Members of Parliament as considered in *House of Commons v Information Commissioner & Leapman, Brooke, Thomas (EA/2007/0060)* and suggested that the behaviour of journalists had been equally unethical and deserving of public exposure. As further justification for complete transparency in this area, the Appellant also relied on the ICO's failure, in his view, to prosecute any journalist and, as a consequence, to protect individual's right to privacy under Article 8 of the European Convention on Human Rights and the public's right to receive information under Article 10.

40. The Commissioner argued that there were significant differences between the journalists involved in this case and the MPs considered in the *House of Commons* case. The MPs, he argued, were in positions of responsibility where they were spending public funds and scrutiny of how the money was spent was inadequate. In this case, he said, the information would be ambiguous sensitive personal data and there was no expenditure of public funds. He also asserted that there had been some scrutiny of journalists' actions. He stressed the harm that would be caused to journalists by the disclosure of information that might imply that they had committed criminal acts, without adequate evidence and without any right of reply.

41. If the issue we were considering was the possible disclosure of the Hard Copy List, which is all that the Decision Notice considered, then there would be considerable force in the Commissioner's argument. The mere fact that an individual's name and contact details appeared in what may be characterised as the address book of an investigator does not establish that the individual instructed that investigator to obtain information, whether by legal or illegal means. It would be an unwarranted interference in privacy rights for the names to be disclosed in those circumstances. But, as is now apparent, there is a great deal of information in the

Spreadsheets that may disclose a greater connection between a named journalist and criminal behaviour and we are not able to determine whether or not disclosure should be made without reviewing the database.

The significance of the conclusions reached on the first three issues

42. The submission from the Commissioner referred to in paragraph 30 above sought to persuade us that we should not pursue any investigation along these lines. It suggested that, while there might be other evidence suggesting that those named in the Hard Copy List may have instructed Mr Whittamore to obtain information by unlawful means, the Hard Copy List did not provide evidence by itself that those named on the list had received information in this way. The submission continued as follows:

"2.5 The Commissioner can, if requested provide to the Tribunal un-redacted copies of the spreadsheets though the only additional information that this would provide to the Tribunal would be a list of names. The Commissioner would contend that the spreadsheets by themselves do not necessarily amount to evidence of supply of information to the journalists. In reaching the conclusions contained within the 'What Price Privacy?' report, the spreadsheets were merely one of the many pieces of evidence considered by the Commissioner. In addition, the Commissioner also considered other evidence such as invoices, interviews carried out and information relating to the four successful prosecutions carried out referred to in paragraph 11 of the Appellant's clarification dated 19 August 2012.

"2.6 The Commissioner would submit that it would be disproportionate and not in accordance with the overriding objective under rule 2 of the 2009 Tribunal rules for the Commissioner to extract from the many thousands of pages within the Motorman files evidence that each individual journalist had been supplied with information from the investigator. In the event that the Commissioner is asked to carry out this task, the Commissioner would then have to consider making an application to the Tribunal to seek to rely upon section 12 of the Act.

"2.7 The Commissioner further submits would it be disproportionate (sic) and not in accordance with the overriding objective for the Tribunal to look through all of the paper files as well as the electronic files held by the Commissioner as suggested by the Appellant in paragraphs 68-70 of his clarification of 19 August.

"2.8 The Commissioner would submit that, in the circumstances, this particular appeal can be properly decided without sight of the disputed information. The central question for the Tribunal in this case is whether it would be fair and in compliance with the first data protection principle for the names of the journalists held by the Commissioner to be disclosed to a member of the public."

43. We do not think that it would be appropriate for us simply to abandon further enquiry on the basis suggested, and certainly not before receiving further submissions from both parties. If it transpires that an individual's name appeared only in the Hard Copy List, with no data in the Spreadsheets linking him or her to a particular transaction, we think that, although not sensitive personal data, the public interest in disclosure might be sufficiently light that disclosure would constitute an unwarranted intrusion into the individual's privacy and disclosure should not be ordered. At the other end of the spectrum it is at least conceivable that the information summarised in the Spreadsheets may, on their own, be sufficient to establish that a named journalist had engaged the services of Mr Whittamore to obtain information, which was unlikely to have been obtainable by legal means because, for example, it disclosed a request for the telephone number of a person's close friends or members of his or her immediate family, with no indication that the person making the request was unaware of the criminal implications of such a request or that a public interest defence was likely to be available. In that case there may be sufficient connection with a crime to support an argument that the public interest in disclosure should outweigh the journalist's right to privacy (although it may also have the effect of converting the information into Sensitive Personal Data). Between those two extremes there may be names where the information linked to it in the Spreadsheets may or may not be sufficient to support a sustainable allegation of criminal involvement in wrongdoing. In those circumstances a search of the documentation retained by the Commissioner may be necessary and, depending on how well it has been organised and indexed, an issue of costs under FOIA section 12 may arise. It will then be for the Commissioner to decide whether or not to rely on that provision and, if so, to make his case under it.

44. In light of these provisional conclusions we believe that the correct way forward is for directions to be made that will enable these issues to be explored and for the parties to make representations as to what those directions should be. That will be unnecessary, however, if the information requested is exempt information under FOIA section 44 and we accordingly turn now to consider that aspect of the matter.

Disclosure of the requested information prohibited by statute.

45. There was no disagreement between the parties that the prohibition in section 59 would apply unless subsection (2)(e) permitted disclosure i.e. that the disclosure would have been with "*lawful authority*" because "*having regards to the rights and freedoms or legitimate interests of any person, the disclosure was necessary in the public interest*." The parties relied on the same arguments, in respect of this provision, as they deployed in respect of the balance to be drawn when considering whether disclosure would breach the data protection principles. The language of the statutory provisions is almost identical and requires us to balance the public interest in receiving the information with the legitimate interest of an

individual to protect his or her privacy. We are therefore faced with the same dilemma, in that we do not have sufficient information about the information that we now know the ICO held at the time of the request (comprising both the Spreadsheets and the Hard Copy List) to form a view as to the public interest in its disclosure.

Conclusion

46. We find ourselves unable, on the basis of evidence and submissions presented to us to date, to determine:
    a. Whether any of the information held by the ICO constitutes sensitive personal data; *or, to the extent that it does not*
    b. Whether it would be fair, and not an unwarranted intrusion into the privacy of individual journalists, for any of the information to be disclosed; *and, in the event that we decide that some information should be disclosed as a result of our conclusions on a. and b.*
    c. Whether disclosure could not be regarded as being with lawful authority, so that it was prohibited under DPA section 59.

47. In these circumstances we wish to see an unredacted version of the Spreadsheets, in Excel format, which may be made available to us on a closed basis. Although permitting closed evidence will create difficulties for the Appellant it is an unfortunate necessity if the central issue in this Appeal is not, effectively, to be pre-judged. Thereafter, we will accept further submissions from the parties on the application of the principles we have outlined above to the information in the Spreadsheets, with the Information Commissioner filing submissions first, followed by the Appellant and then the Information Commissioner in reply. The parties are invited to seek to agree a timetable for these actions and are directed to file with the Tribunal, within 21 days from the date of this decision, either agreed further directions for our approval or, in the event that they may not have been able to reach agreement, a joint note indicating the areas of agreement and dispute.

48. Given the complexity of the information recorded in the Spreadsheets we wish the parties to consider, also, whether it might be possible to arrange a hearing, limited to the issues on which submissions are invited, at which both sides could appear or be represented. We are conscious that this may create particular difficulties for the Appellant, unless a video conference may be arranged or legal representation obtained, on either a fee paying or pro bono basis. We invite the parties to file their submissions on the possibility of a hearing, also within 21 days of the date of this decision.

Judge Ryan
6th November 2012