



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER**

Case No. EA/2012/0039

Appellant: Christopher Colenso-Dunne

Respondent: The Information Commissioner

RULING OF THE FIRST-TIER TRIBUNAL

1. We gave a preliminary decision in this appeal on 6 November 2012 (the "Preliminary Decision").
2. Capitalised terms in this ruling have the same meaning as we gave them in the Preliminary Decision. The factual background is set out in full in Preliminary Decision.
3. Two matters have arisen from the Preliminary Decision. First, the Commissioner has complained about part of the decision which he believes includes unfair criticism of his office and has asked us to correct the impression given. Although not an issue that may be the subject of a review of the Preliminary Decision under rule 44 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chambers) Rules 2009 we would be disturbed if a published decision included an unfair criticism of a public authority. We have therefore reconsidered the point. We deal with this in paragraphs 4 to 7 below. Secondly, we sought further information from the Commissioner. We have now considered that information and are in a position to give further directions for the final determination of the Appeal. We explain the background, and set out the further directions, with reasons, in paragraphs [8 to 21] below.

Review of part of the Preliminary Decision

4. The Preliminary Decision drew attention to the information given in evidence to the Leveson Inquiry in December 2011 about the electronic

storage of data derived from documents seized by the ICO during the Operation Motorman investigation into the illegal market in personal information. We contrasted the evidence with a letter written to the Appellant by the ICO a few weeks earlier, (on 26 September 2011), in which the Appellant had been given certain information on the same broad topic.

5. The Commissioner has suggested that the ICO's letter was not misleading, as we had suggested, given the specific question which the Appellant had asked in the course of requesting an internal review of the earlier rejection of his information request. We have set out the entirety of the correspondence in the annex to this Ruling, including the letter written to the Tribunal by the Commissioner after the Preliminary Decision had been promulgated.
6. We continue to believe that our criticism was justified. The Appellant was told that he was wrong to assume that any database of information existed that could be interrogated, for the purposes of his request, at a cost that would not exceed the financial limit imposed by FOIA section 12. However, it is now known that the ICO held the Spreadsheets at the time. It is also apparent that they can very easily be sorted, by reference to one of the columns ("journalist surname") to demonstrate the number of times a particular name appeared in the enquiry agent's records. That may not have provided the Appellant with precisely the information he requested, but it would have come close. Against that background we believe that the ICO was open to criticism for asserting, without further qualification, that it would be necessary to search through the 17,000 documents in order to respond to the request. We remain of the view that we were therefore justified in saying, in paragraph 28 of the Preliminary Decision that:

"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."

7. In the event the Appeal proceeded towards a determination without either the Tribunal or the Appellant being aware of the Spreadsheets until very late in the process. Their significance will be apparent from what we say below in respect of the second matter that arises from the Preliminary Decision.

Further Directions

8. We explained in the Preliminary Decision that we had not been able to decide, on the information available to us at that time, whether the Appellant had been entitled to the information he had requested. The information concerned journalists who may have engaged the services of a particular enquiry agent, who had subsequently been prosecuted for his illegal information-gathering activities.
9. During the course of the appeal it had become apparent, in the circumstances described in the Preliminary Decision and alluded to above, that the information sought had been summarised in the Spreadsheets as an aid to managing the large quantity of documentary material gathered. The Commissioner submitted that we did not need to inspect the spreadsheets before determining the appeal. We took the view that we should do so because it was conceivable that the information summarised might be sufficient to establish that a named journalist had engaged the services of the enquiry agent to obtain information, which was unlikely to have been obtainable by legal means. In those circumstances although, as we had concluded, the information requested constituted the personal data of the journalists, there might be sufficient public interest in its disclosure to outweigh the journalist's right to privacy. If that were the case then, provided the information was not so specific as to amount to information about the commission or alleged commission of a criminal offence (so as to bring it within the definition of Sensitive Personal Data) we thought that it might be appropriate to order its disclosure.
10. Our conclusion was set out in the following paragraphs of the Preliminary Decision:

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...”

11. The Spreadsheets were duly provided to us and the parties filed written submissions. We carried out our own analysis of the Spreadsheets and established that the only ones containing any information relevant to the Appellant's information request were those summarising the information held by the enquiry agent in four coloured notebooks (Yellow, Red, Blue and Green). We checked to see if the other spreadsheets might cross refer to the information held in the notebooks, so as to expand or clarify their content, but satisfied ourselves that they did not.

12. It became evident that the coloured notebook spreadsheets included a categorisation of many of the recorded entries by reference to the "service requested". We assumed that a key to the abbreviation list would have been devised at the time the Spreadsheets were created and asked the Commissioner to provide it. In reply we were told by the Commissioner's office that no particular key appears to have been created at the time when the data was assembled and recorded in spreadsheet format. This was surprising given the importance of the data and the fact that an independent computer forensic organisation had apparently been retained by the ICO to carry out the task. However, the Commissioner provided us with his own "educated guess" as to the meaning of the abbreviations based on the evidence seized. It was as follows:-

- “1. Airline Check – An inquiry with the airlines*
- 2. Area – The area in which the target was living.*
- 3. CCC – Credit card check*

4. *CCJ – County court judgments*
5. *Company Search – A search at Companies House*
6. *Conv – Conversion between name and information(i.e. link between number and name)*
7. *CRO – Criminal records office*
8. *DIR – Company directorships*
9. *DSS and DSS Enquires: - Benefits enquiries*
10. *Endorsements – DVLA enquiry of endorsements on driving licences*
11. *Enquire – Confidential enquiries*
12. *F&F – Friends and Family*
13. *Hotel Costs – Hotel enquiries*
14. *HPI – Hire purchase inquiry*
15. *Misc - Miscellaneous*
16. *Mob – Mobile phone number*
17. *Mob Conv – Mobile telephone account conversion*
18. *Occ – Occupant search*
19. *T/P Checks – Telephone checks*
20. *T/P Conv – Telephone conversion between phone numbers and names*
21. *T/P Enquiries – Telephone enquiries*
22. *T/P Billing enquiries – Telephone billing enquiries*
23. *VehReg – Vehicle Registration enquiry*
24. *XD – X-Directory phone number enquiry”*

13. On the basis of this information we sorted each of the coloured notebook spreadsheets by reference to the service requested and then filtered the data in order to remove substantially all entries in which the required service description pointed to a legitimate enquiry (for example a County Court Judgment or an “Area” enquiry). The only exceptions were those in respect of which a comment was included suggesting that illegal means

might have been used (typically, because of a reference to a “blag”). We also filtered out entries that did not include a name for either or both of the journalist or the target for the enquiries. The resulting data was then assembled into a single spreadsheet comprising a separate worksheet in respect of each notebook (the “Consolidated Reduced Spreadsheet”). A copy accompanies the copy of this Ruling which is being delivered to the Commissioner.

14. It seems to us that the Consolidated Reduced Spreadsheet should be made available to the parties (appropriately redacted in the Appellant’s case) to enable them to make further written submissions based, this time, on the specific information disclosed, with a view to establishing whether any of it does fall within the category of Personal Data that should properly be disclosed.
15. The Tribunal believes that the Consolidated Reduced Spreadsheet should be disclosed to the Appellant redacted as follows:
 - a. any names in columns C (“Journalist First Name”) and D (“Journalist Surname”) should be replaced with a letter, which may be linked, through a confidential key, to the journalist named in the original;
 - b. any names in columns L (“Subject First Name”), M (“Subject Middle Name”), N (“Subject Surname”), AA (“Comment One”), AB (“Comment Two”), AC (“Comment Three”), or AD (“Comment Four”), should be replaced with the word “redacted”.

The Commissioner is directed, within 14 days, to provide the Tribunal with a copy of the Consolidated Reduced Spreadsheet redacted in the manner indicated, together with any comments the Commissioner may have as to whether the proposed redactions are adequate or appropriate.

16. The Tribunal will then send a copy of the redacted Consolidated Reduced Spreadsheet to the Appellant, who will have 21 days from the date of receipt to file and serve written submissions directed to the specific context of the Consolidated Reduced Spreadsheet (as opposed to the general principles articulated in previous submissions). The submissions may, if the Appellant prefers, take the form of a copy of the Consolidated Reduced Spreadsheet with a new column, AK, setting out comments in respect of each row.
17. The Commissioner will then have 21 days from the date of receipt of the Appellant’s submissions to file and serve his own submissions, following the same guidance as to their form and content.

18. The Appellant will have a final 7 days in which to submit submissions in reply, after which the Tribunal panel will re-convene with a view to finalising its determination.
19. The preparation of the Consolidated Reduced Spreadsheet has taken considerable time and effort and the Tribunal appreciates that the task of preparing detailed submissions addressing its content will involve a certain amount of work for the parties. However, the Tribunal believes that the subject matter of the Appellant's enquiry, including the circumstances in which this final stage of the decision-making process has arisen, justifies the degree of forensic rigour the Tribunal is imposing on itself and the parties.
20. The Tribunal invites the parties to include in their submissions one element that goes beyond the specific content of the Consolidated Reduced Spreadsheet. This arises from the report published at the conclusion of the first stage of the Leveson Enquiry available at <http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp> as well as the Ruling in relation to Operation Motorman Evidence issued by Lord Leveson on 11 June 2012 (<http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Ruling-In-Relation-to-Operation-Motorman-Evidence-11-June-20123.pdf> .) The Tribunal has noted, in particular, that:
 - a. In Chapter 3 of Part D of his report Lord Leveson described Operation Motorman. He speculated, at paragraph 3.9 on page 261, that some, but not necessarily all, of the transactions with the enquiry agent in question might have involved criminality and commented on the necessary mental element before a journalist might be successfully prosecuted under DPA section 55(1)(b) (paragraph 3.21).
 - b. In paragraph 6.3 on page 269 Lord Leveson drew some preliminary conclusions about the attitude of the press to compliance with the DPA, while deliberately avoiding condemnation of any individual journalist.
 - c. Later, in Part H, Lord Leveson addressed Data Protection issues including, at Chapter 6, the Commissioner's approach to the press (see especially paragraph 1.12 – 1.29 on pages 1099 to 1104).
 - d. At paragraphs 14 and 15 of his Ruling Lord Leveson decided not to extend his inquiry into the activities of individual journalists and the approach taken by their employers to any appearance of an involvement in potentially unlawful activity, preferring to leave that form of enquiry to the Information Commissioner.

21. The Tribunal invites submissions from the parties on whether it is legitimate for the Tribunal to consider any element of the Leveson Inquiry and, if so, what influence the parties consider the passages referred to above, (or any other parts of the Report, Rulings or evidence), should have on its determination.

Chris Ryan

Tribunal Judge

Dated 27 March 2013