First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2016/0167

Heard at Fleetbank House
On 6th. and 7th. April, 2017

Between

THE MINISTRY OF JUSTICE ("THE MOJ")

Appellant

and

THE INFORMATION COMMISSIONER ("THE ICO")

First Respondent

and

JULIAN LE VAY

Second Respondent

Before

JUDGE

DAVID FARRER Q.C.

TRIBUNAL MEMBERS

NARENDRA MAKANJI

AND

MELANIE HOWARD

Colin Thomann and Jennifer Thelen appeared for the MoJ

Peter Lockley appeared for the ICO.

Mr. Le Vay appeared in person.

DECISION AND REASONS

The Tribunal finds that the FOIA s.43(2) exemption claimed for the disputed information, namely the figures in Schedules 4 and 7 of the MoJ's contracts with G4S and Serco, was not engaged.

The Tribunal therefore orders the MoJ to disclose that information to Mr. Le Vay within 35 days of publication of this decision.

The Tribunal further finds that, save for the managing directors of G4S and Serco, disclosure of the names and CVs (where applicable) of persons named in the contracts would be unfair, thus would contravene the First Data Protection Principle. The MoJ was, therefore, right to withhold them. The Tribunal does not require that they be disclosed.

1. Electronic monitoring, ("EM" or "tagging") of persons on bail, offenders subject to Community orders, offenders on licence and suspected terrorists was introduced in the United Kingdom in the early years of the present century. Initially, it operated simply to enforce a curfew, checking that the subject was within a prescribed range of a home monitoring unit. The development of GPS and other changes have increased its tracking potential in recent years.

2. In November, 2004, the Home Office entered into contracts with G4S and Serco for the provision of EM services for defined regions of England and Wales. Those contracts can be regarded as identical in all respects material to this appeal. Upon expiry in 2010 they were extended. From time to time their terms were consensually modified by Change Control Notes ("CCNs"). The MoJ succeeded the Home Office as a party to the contracts.

3. In May, 2013, the MoJ commissioned a forensic audit of the operation of the contracts and the charging practices of Serco and G4S. It was carried out by PricewaterhouseCoopers ("PwC") and the National Audit Office ("the NAO"). It produced a preliminary report in November, 2013 which is publicly available.

4. In July 2013, the Lord Chancellor and Secretary of State for Justice ("the LC") made a statement to the House of Commons, indicating that overpayments of many millions of pounds, dating back to 2005, had been made by the MoJ (and possibly the Home Office), both to Serco and to G4S. Put shortly, the overcharging is said to have arisen from invoicing for maintaining tags in cases where the monitoring had ceased because the subject was no longer on bail or because the requirement for monitoring by virtue of the order of the sentencing court had expired. There may also have been cases where monitoring had been ordered by more than one court and two charges were imposed for one tag. The quite separate question as to whether the contractual terms for payment involved overcharging, in the sense of being unduly generous to the contractor, was raised by Mr. Le Vay in the course of these proceedings.

5. The Serious Fraud Office ("the SFO") opened a criminal investigation into the overcharging allegations in November, 2013. It is still proceeding. At the request of the Tribunal, the SFO most helpfully provided information as to whether MoJ staff members identified in the contracts were involved in its investigation and, if so, in what capacity. That information is referred to in a Closed Annex since it is information not normally made public at this stage of an SFO investigation and which was therefore provided in confidence.

6. An internal staff disciplinary investigation was launched by the MoJ and resulted in extensive confidential interviews of staff members. It was suspended when the SFO investigation was announced. Whether, and, if so, when, it may be resumed cannot be predicted.

7. Following the completion of the audit both Serco and G4S reached settlements with the MoJ for compensation for overcharging, Serco for £70.5m and G4S for £108.9m. On 12th. March, 2014, the LC announced those settlements to the House of Commons and stated that they represented a full recovery for the overcharging.

8. In December, 2013 Capita took over the management of the services from Serco and G4S with effect from February and March, 2014 respectively, pending a fresh competition for the provision of the entire EM system. G4S and for some time, Serco, continued to provide the equipment, namely ankle tags, home monitoring units and consumables, such as ankle straps, during the transitional period.

9. The structure of the new contracts was fundamentally different from those which had operated for the past ten years. Instead of awarding a contract for the complete provision of EM services for a specific region, the MoJ switched to four contracts, each involving the provision of one element of the service for the whole of England and Wales. This structure was termed "horizontal" by contrast with the "vertical" structure of its predecessor.

10. The four elements of the service for which companies were invited to tender were as follows –

    - Lot 1 Field Services, including the monitoring control centres and the provision of tag induction, installation and removal.
    - Lot 2 Smart electronics – the electronic interface, reception of signals (new EM systems to use both GPS and RF technology).
    - Lot 3 The hardware – referred to as equipment in §7.
    - Lot 4 Network provider.

    Invitations to tender were issued in 2014.

11. It emerged during the evidence of Ms. Kate Ellis, now the MoJ's Commercial Director with responsibility for the National Offender Management Service, that contracts had been awarded in 2014 for Lots 1, 2 and 4, as to Lot 1, for six years and as to one or both of the others, three years. These contracts were to run from 2016 and would, therefore, expire from 2019 onwards.

12. Lot 3 had yet to be awarded. The tender document was issued in August, 2016 with bids submitted on 27th September, 2016.

The Request

13. On 26 July 2015, Mr Le Vay made the following request of the Appellant:
"I make the following request under the Freedom of Information Act: for copies of the contracts for electronic monitoring of offenders that were in place with
A) G4S
B) Serco

at the time when the overpayments were made which were revealed by the SoS on 11 July 2013 (HC Deb 11 July 2013 col 573)."

14. The MoJ responded on 1st. September, 2015, acknowledging that it held the requested information but refusing to disclose any part of the contracts in reliance on s.31(1)(c), that is, that disclosure would or could prejudice the prosecution of offenders. This referred to the SFO investigation. It maintained this position after an internal review lasting five months, adding further exemptions within s.31. Mr. Le Vay complained to the ICO.

The Decision Notice and the Appeal.

15. The Decision Notice did not uphold the MoJ's refusal. Since it was directed entirely to the propriety of relying on exemptions which were abandoned on appeal, a summary of its findings would be valueless.

16. The MoJ appealed. It switched reliance to different exemptions on appeal, as FOIA permits, subject to the consent of the Tribunal - see Birkett v DEFRA [2011] EWCA Civ 1606. It was clearly right in this case that it should be able to do so, although it resulted in an appeal entirely divorced from the impugned decision of the ICO.

17. A raft of new exemptions appeared, some relating to different aspects of the disputed information, for example security. Following a detailed case management hearing, the issues were commendably and substantially narrowed and the relevant exemptions reduced to two, namely s.40(2) relating to the personal data of employees of the MoJ, Serco and G4S and s. 43(2) as regards commercial information, that is, service levels and pricing. The contracts were disclosed before the hearing, save as to provisions giving rise to security concerns, the names of employees of the MoJ and the other contracting parties and a substantial number of figures contained in two schedules to which we shall refer.

18. Immediately before the hearing the MoJ submitted a useful summary of the issues which had been resolved and those which remained. Those resolved included those relating to security (ss. 24 and 31), which resulted in the agreed withholding of the disputed information, and the question of the identities of subcontractors (s.41(1)) which were disclosed. CCNs were redacted or disclosed on similar principles.

19. Given the settlement of security issues, the MoJ 's case rested on the evidence of Kate Ellis, who made three witness statements and gave oral evidence. She described the structure of the original contracts and the changes introduced for the current tenders (see §§9 and 10).

20. As to Lot 3, hardware, the relevant technology was evolving. Both RF and GPS tags were involved in the current competition but GPS tags were more numerous than under the GS4 and Serco contracts. The hardware under the original contracts was provided as part

of a service charge[1], invoiced monthly, which was one of five charges provided for in Schedule 7 to those contracts. Hence, the contractors effectively charged a rent for the tags. By contrast, in the current competition, the MoJ was purchasing from the successful bidder the hardware included within Lot 3.

21. The same service charges covered the services now falling within Lots 1, 2 and 4.

22. Schedule 4 of the original contracts contained very detailed provisions as to the level of service required by the MoJ and the consequences of inadequate performance. Failure to achieve the agreed level would result in specified financial remedies. Repeated or serious failures could result in termination of the contract.

23. Ms. Ellis stated that disclosure of the withheld figures in the two schedules would prejudice the commercial interests of G4S and Serco and the MoJ, though, quite reasonably, she emphasised the latter. Both were global players in various countries in which EM had been adopted. Unfavourable publicity in the UK would not necessarily disqualify either company from tendering elsewhere.

24. The MoJ must obtain the best deal that it properly can. Any evidence as to the price that it agreed or the levels of service demanded at that price provided "an anchor" (Ms. Ellis' metaphor) on which a tender could be based. It told the market what the MoJ had been prepared to pay at a given date for what level of service. The tendering party would say: "That's the starting point. Where shall we go?" It substantially reduced the likelihood of a tender at a price below what had been agreed last time. "Any anchor is bad news". The MoJ wants bidders to be blind as to previous prices.

25. Information relating to Lots 1, 2 and 4 may be relevant to a tender for Lot 3. Schedule 7 sets out a very detailed breakdown of pricing of services enabling a tendering company to make refined calculations as to how to pitch its bid.

26. As to Lot 3, an experienced contractor could readily "reverse – engineer" a calculation of an acceptable purchase price for an item of equipment from a calculation of the rental element relating to that item in the agreed service charge in Schedule 7. The structure of the contracts had been fully disclosed to the public and the aggregate losses resulting from overcharging disclosed by the NAO report. Those disclosures did not, however, provide the kind of anchor to which the MoJ objected.

27. As to the other three lots, there would be further competitions in the medium term, which could be affected by disclosure of the figures from these Schedules. Moreover, the MoJ might, in the light of experience, decide to revert to the "vertical" contract structure next time round.

28. A further element of prejudice to the MoJ's commercial interests was the risk that companies, including G4S and Serco, would be deterred from tendering for such large contracts, if they believed that their tenders were liable to be exposed to their competitors.

29. Ms. Ellis put the MoJ case on the balance of public interests vividly and succinctly. Disclosure would mean "just publishing a series of numbers, damaging to the MoJ and the companies and of no value to the public."

[1] The service charge was sub – divided into five volume – related charges. The charge for providing the necessary hardware appears to fall within the "Standing charge" described at clause 7.3.2 of Schedule 7 but the arguments on either side would seem to apply whichever sub – class is involved.

30. These arguments were developed by Mr. Thomann in written and oral submissions. As to the engagement of the exemption under s.43(2), he put the MoJ case on the second footing, namely that disclosure "would be likely to prejudice the commercial interests" of the contractors, the MoJ and the business community as a whole in that any disclosure of sensitive pricing data was likely to undermine public trust in the confidentiality of such information which could affect future tendering.

31. Pricing information was inherently sensitive and the Tribunal was generally astute to protect it. Here, both the charging and the performance schedules contained such information, which could guide a tender and weaken the position of the MoJ. Tendering contractors have the experience and knowledge to exploit such information and convert it into data valuable in the pricing of a quite different contract. Any such information is likely to distort competition and undermine the employer's bargaining stance.

32. As to the public interest, there is an overriding interest in preserving a fair competitive market. More specifically, the public has a powerful interest in ensuring that its government gets value for money. On the other side, the public would gain nothing from the bald figures, which shed no light on how the overcharging occurred. The MoJ had recovered full compensation.

33. Put shortly, this type of information should only be disclosed if a clear case was made out for overriding the normal principle that it should remain protected. No such case had been made out.

34. As to personal data, it was clearly unfair to middle – ranking and junior MoJ staff to disclose their names, when they had no expectation that this would occur and where there was no evidence as to what, if any, part they had played in the overcharging. Some had left the civil service. No condition in Schedule 2 of the DPA 1998 would be satisfied here in relation to any of them.

35. Mr. Le Vay gave evidence. He outlined his extensive high – level experience within the prison service and outsourcing companies working with the prison service. He had retired about six years ago and had no business or other financial interests in the service now.

36. He observed that the G4S – Serco affair represented a major scandal in the field of privately outsourced contracts, which were a matter of considerable public interest on which opinion was sharply divided. He submitted that the figures in Schedule 7 were of great public interest, not simply in relation to the overcharging scandal but as evidence that the MoJ was too generous in the original pricing, specifically in failing to obtain proper volume – related discounts. Both the price gradient (how aggregate cost increases flatten out as volume mounts) and the unit costs would be useful in judging whether the MoJ had negotiated a reasonable deal in terms of price.

37. He asserted that the true profitability to the contractors may have been masked by the use of companies designed as vehicles for cross – charging structures, on to which costs were loaded. This claim was not really developed in evidence or argument.

38. As to prejudice, he questioned whether tenders for the hardware contract could have been affected by the publication of the Schedule 7 figures at or about the date of his request. There was no apparent means of relating the elements of the Schedule 7 standing charge to the purchase price of hardware, for example GPS tags, in 2016. Anyway, time had passed. Government cuts in expenditure were widely apparent. Technology had moved on. No tendering contractor could read across to a current tender the prices contained in Schedule 7 which dated from 2012.

39. As to personal data, the senior figures on the contractors' side were in the public domain. There was little or no value in the provision of names of MoJ staff without a clear picture of the role that each performed.

40. The ICO broadly agreed with Mr. Le Vay's submissions as to the engagement of s.43(2) and the public interest. She argued that the withheld figures were, furthermore, of interest in the context of the plausible claim that the MoJ had agreed too high a price, especially in relation to increasing volumes of business.

41. It appeared to be common ground that disclosure of the withheld information in both Schedule 4 and Schedule 7 was governed by the same considerations as to the engagement of the s.43(2) exemption and the public interest.

The Tribunal's decision

Prejudice to commercial interests

42. We deal first with the issue of prejudice to commercial interests which occupied the greater part of both the written submissions and the hearing.

43. FOIA s.43(2) reads –

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

44. The persons in question in this appeal are the MoJ, G4S and Serco. The wider interest in maintaining confidence in the preservation of the confidentiality of sensitive commercial information is relevant to the balancing of public interests, if that issue requires determination.

45. It is settled law that *"would . .prejudice"* requires a finding that it is more probable than not that disclosure would cause the identified prejudice and that *"would be likely to"* requires "a significant and weighty risk" that prejudice would result (see *R (Lord) v SSHD [2003] EWHC 2073 (Admin.)*. The epithets apply to the risk, not the degree of prejudice.

46. The prejudice to the MoJ's commercial interests is said to be that –

- Disclosure of prices and service levels that it had agreed in 2012 would be likely to undermine its bargaining position in current and future negotiations for the provision of EM services. Any current negotiations would relate to Lot 3 – hardware.
- Knowledge that confidential pricing information might be disclosed to the public, hence competitors would be likely to deter contractors from entering the tendering process for future MoJ contracts. The result would be a weakening of competition for such contracts, thus the likelihood that the MoJ would not get value for money.

The prejudice to the commercial interests of G4S and Serco is said to be that -

- Disclosure of rates to other potential employers in the UK and abroad would weaken their bargaining stance when tendering.

47. Since this is a qualified exemption, a finding that it is engaged, on either basis identified in §45, then requires a balancing of public interests to determine whether the exemption should be maintained.

48. The Tribunal accepts that its decision as to the engagement of the exemption must be the same for both Schedule 4 and Schedule 7 information because both identify the factors which produced the agreed contract prices. The price accepted by the tendering company reflects the discount that it incorporated to cater for the risk and probable quantum of financial penalties for performance failures. This is all, directly or indirectly, financial information.

49. In assessing whether s.43(2) is engaged and, if so, to what extent, there is a fundamental distinction to be drawn between information said to be material to Lots 1, 2 and 4 on the one hand and to Lot 3 on the other.

50. As recorded in §11, Ms. Ellis' oral evidence disclosed that contracts for Lots 1, 2 and 4 were all awarded in 2014, hence well before Mr. Le Vay's request (26th July, 2015). So disclosure in 2015 could not affect the competitions for any of those three lots. The MoJ's case for maintaining the exemption rested, therefore, on the proposition that the prejudice was likely to be sustained in the next round of tenders for contracts replacing those awarded in 2014 or earlier in the event that one or more of the 2014 contracts did not run its full course. This faced the further objection that, whatever the date, the MoJ had abandoned the "vertical" contract structure for the new "horizontal" model (see §9), which made any comparison with the pricing of the 2012 contracts either difficult or impossible. The MoJ met this point by arguing that experience of the "horizontal" model might lead to a reversion to the "vertical".

51. This appears to the Tribunal to be highly speculative. Moreover, the evidence was that these contracts ran from 2016 and were variously for three or six years. Hence, absent early termination, which is a similarly speculative possibility, they would expire from 2019 to 2022. Of course, the tendering process would recommence in advance of such expiry. Nevertheless, it is evident that the G4S/ Serco figures would be at least six years old by the time such procedures were underway.

52. As to Lot 1, the "Field services" contract, it may be that the itemised charges for particular tasks set out in Schedule 7, article 7.3 could somehow be related to the pricing of a fresh "horizontal" contract in about 2020, though there was no detailed evidence as to the content of the services contracted for. There is, however, no obvious relationship between Lots 2 (electronic interface) and 4 (network) and any charges specified in Schedule 7 and the MoJ made no attempt to demonstrate how a bidder for any of the three lots in the next competition could use Schedule 7 figures to price its tender.

53. Even if, contrary to our assessment, such comparisons are theoretically possible, the passage of time makes such exercises of little or no value, in our judgment. The relevant technology has developed and will develop further. Contractors are well aware of government determination to control and, in some areas, reduce public expenditure. The economic environment is certain to be quite different in 2020 from 2012, though in what respects we cannot predict[2]. The field of competitors will probably be quite different.

54. As to these Lots, the Tribunal finds –

    (i) The possibility that the next round of tenders will be, once again, for "vertical" contracts is too remote to justify a finding based on such an assumption;
    (ii) "Reading across" from the Schedules 4 and 7 figures to "horizontal" tenders in a future round is not shown to be a feasible exercise. Furthermore, it would take no

[2] The UK will no longer be a member of the European Union.

account of any economies of scale in contracts providing a single element of service over a much greater area and in respect of many more subjects.

(iii) The passage of time and changes that have taken and will take place make the 2012 figures of minimal relevance to future tenders.

55. So, as to these Lots, any risk of prejudice to the identified commercial interests of the MoJ resulting from future tenders exploiting disclosed figures from the G4S and Serco contracts, as amended, falls well short of the "significant and weighty" threshold.

56. There was no evidence that G4S or Serco had tendered for similar contracts outside the UK since 2013 nor that they were currently tendering. As to the future, the reasoning pertinent to the MoJ' s interests applies equally to theirs.

57. As to Lot 3 ("hardware"), no contract has been awarded to date. Tenders closed on 30th. September, 2016. There were eleven of them. Full disclosure of Schedules 4 and 7 in late 2015 would have enabled tendering companies to modify their prices, if the disclosed figures could be used as a pointer to what the MoJ was likely to pay for the purchase of tags and other items in 2016. We bear well in mind that, in this case, the figures were three to four rather than six to ten years old.

58. We do not doubt the astuteness of tendering contractors in exploiting price information from an earlier contract when fixing the tender prices for a later. However, we greatly doubt that they could derive from the Schedules 4 and 7 figures information which could profitably influence their tenders. Put shortly, the reasons for that conclusion are these –

- The change from a "vertical" to a "horizontal" contract bid.
- The critical difference involved in the replacement of a monthly standing charge by a series of purchases of the equipment covered by the contract. It was apparently assumed by the MoJ that the element of the standing charge representing the use of, say, a tag was based on a notional rental value for the tag for that period. That may not have been the case, however.
- The absence from Schedule 7 of any figures relating to rental or other charges for tags or other items of equipment. The standing charge represented "the availability of the services", that is to say the various forms of monitoring service set out in clause 7.3 of Schedule 7 and the ancillary services also referred to in that sub - clause. The standing charge must have included the provision of the necessary hardware but also a wide range of specific labour – intensive tasks performed by employees of the contractor. The charge for those services was levied each month by reference to the number of subjects monitored, each of whom required the use of equipment and significant human resources. The elements of equipment charge and labour charge were not differentiated in the standing charge.
- There was, therefore, no apparent starting point for inferring any kind of rental element in respect of the items of hardware taken as a whole, let alone by reference to individual items.
- Even if a broadly accurate estimate of such a rental had been possible and appropriate, there was no obvious way of translating that into a purchase price since the tendering contractor had no information as to the period over which the G4S/Serco was writing – off the equipment, hence calculating a notional rental.
- A "vertical" contract may permit the tenderer to adjust his prices by holding down one (say the standing charge) and inflating another (e.g., the induction, installation and removal charges) in order to make the whole more attractive to the employer. Any such process would fatally undermine the drawing of any reliable inferences from individual elements of the contract price.

- It was plain that, whilst firmly asserting that this "reading – across" of figures from the standing charge of 2012 to the purchase price of 2016 could be performed by a tendering company, the MoJ, confronted by Mr. Le Vay's scepticism and the obvious concerns of Tribunal members, was quite unable to demonstrate how and made no attempt to do so. The Tribunal waited in vain for some reference to the provisions of Schedule 7, showing how disclosure of specific figures could lead to a worthwhile estimate of purchase prices in the context of Lot 3.
- With respect to Ms. Ellis' evidence as to "anchors", her evidence suggested simply an instinctive and perhaps understandable MoJ aversion to disclosure of any price – related information, without any detailed consideration of how it might be used in a future tender.

59. We therefore find that the s.43(2) exemption is not engaged in relation to the MoJ's commercial interests in respect of the Lot 3 contract.

60. The second limb of alleged prejudice to the MoJ's commercial interests (see §46) was acknowledged in written submissions to be a less prominent, albeit a genuine concern. The Tribunal is not persuaded that, in the particular circumstances of this case, there is any substantial likelihood that potential contractors would be discouraged from future participation in contract competitions by a disclosure of this specific statistical information.

61. A government department such as the MoJ represents to the private sector an almost irreplaceable source of nationwide contracts running for significant periods for an employer which will not default. The adverse decision of the ICO did not apparently cause any tenderer to withdraw from the Lot 3 competition. All contractors are aware, indeed, are reminded by the MoJ that even sensitive information is not immune from disclosure and that its supposedly sensitive character may be examined by the Tribunal.

62. We find that this form of prejudice is not likely to result from disclosure here.

63. Since we have found against the MoJ as to the engagement of s.43(2) in respect of either form of prejudice to its own interests or the asserted prejudice to those of G4S and Serco, it is not necessary to proceed to weigh the conflicting public interests in disclosure and we see no advantage in setting out hypothetical conclusions that might have been reached, if we had adjudged that s.43(2) was engaged. Such an exercise is rarely valuable, since the degree of risk that the asserted prejudice will result is itself an important factor in balancing those interests. Suffice it to record the Tribunal's appreciation of the care and skill with which the substantial arguments on both sides of this issue were marshalled and deployed.

64. Finally, we wish to emphasise that this decision is based on the particular facts of this appeal. It does not represent a novel approach to the treatment of sensitive commercial information, which, we readily acknowledge, will rarely be disclosed for the reasons rehearsed in numerous Tribunal decisions. Our finding is that this information was not commercially sensitive at the date of the request.

<u>FOIA s.40(2)</u>

65. We turn finally and briefly to the issue of disclosure of personal data. A significant number of employees, both of the MoJ and of the two contractors, are named in the contracts. CVs of many of the named staff of G4S and Serco also feature in a Schedule to the contracts. Two of them are or were managing directors of the contractors. Their names are clearly within the public domain already and their appearance in the disclosed versions of the contract would clearly not violate the First Data Protection Principle ("The

FDPP"). Others were of varying ranks within the contractors and civil service grades. It is not surprising that a significant number have moved into other employment since the contracts were drafted.

66. The exposure of exorbitant overcharging of the MoD caused deep public concern and attracted, unsurprisingly, significant publicity. The results included very large compensation payments, an NAO report on this particular matter, two more on government contract management in general and an SFO investigation. The Tribunal requested information from the SFO as described in §5 and the Closed Annex records the SFO response, which was provided voluntarily and for which we express our appreciation.

67. The context in which names appear in the contracts or CCNs sheds no light on the role, if any, of the named person in the subsequent conduct or management of the contracts, let alone whether that individual might be in any degree responsible for overcharging or permitting overcharging. Neither does the individual's CV, where it is included in the relevant Schedule.

68. It is unnecessary on this appeal to set out in full the statutory provisions in FOIA and Schedules 1 and 2 to the Data Protection Act, 1998 ("the DPA"), which together set out the law governing the processing of non – sensitive personal data. Clearly, all the names in the contracts and the CVs are personal data. That being so, s.40(2) of FOIA provides that they are exempt information if processing (disclosure) would contravene the FDPP, which, so far as material, is set out in Schedule 1 Part 1 §1(a) to the DPA. The FDPP requires that processing must be fair and lawful and the requirement of fairness includes compliance with one or more of the conditions set out in Schedule 2. Condition 6 is the only potentially relevant condition.

69. Publication of the name and/or CV of any civil servant or employee of the companies, save the two managing directors, would plainly be unfair because of the risk that he or she would thereby be stigmatised as party to the misconduct, whether or not it was dishonest, or as failing to detect and stop such misconduct, when there was no evidence of any such involvement or such failure. Such smears would be very hard to rebut. Disclosure of the CVs only would readily permit identification.

70. Furthermore, and having regard to condition 6, the naming of individuals is not necessary or appropriate for the investigation of what went wrong. Without evidence as to the role, if any, of the named person, identification would not advance understanding of what took place or who was responsible in any way.

71. Accordingly, we uphold the decision of the MoJ to disclose no names or CVs, save those of the two managing directors of G4S and Serco which are already public knowledge.

72. We therefore allow in part the appeal of the MoJ, so far as it relates to personal data. It is fair to add that the DN did not uphold reliance on s.40(2) because the exemption had never been raised by the MoJ until it lodged its grounds of appeal. To describe the DN as being "not in accordance with the law" in this respect is therefore a pure technicality dictated by the wording of s.58(1)(a).

73. We dismiss the appeal in so far as it relates to the remaining redactions in Schedules 4 and 7. Again, the arguments addressed and exemptions relied on before the Tribunal are quite different from that on which the ICO adjudicated. This is regrettable because it is clearly preferable that the ICO should rule on a similar case to that presented to the Tribunal. Given the time taken in responding to this request, the MoJ should have been able to identify the appropriate exemptions when responding to the ICO.

74. This decision is unanimous.

75. We record finally that Mr. Le Vay was indisposed on the first day of the hearing and informed the Tribunal that he could not attend. He stated that he was content for the hearing to proceed. Given that he had made a statement which was to be treated as his evidence and the fact that the ICO opposed this appeal, the Tribunal decided that it was in the interests of justice and of the overriding objective that the appeal proceed, whilst expressing the hope that he would recover sufficiently to allow him to attend on the second day. Happily, he did so, was briefed as to the evidence on the first day, gave evidence and addressed the Tribunal, all at the appropriate stages of the hearing.

Signed

David Farrer Q.C.

Judge of the First-tier Tribunal

Date: 12th. June, 2017