Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0098
Information Commissioner's Ref: FS50178913

Heard at Procession House, London, EC4
On 14 July 2009

Decision Promulgated
21 August 2009

BEFORE

CHAIRMAN

Andrew Bartlett QC

and

LAY MEMBERS

Marion Saunders
John Randall

Between

ALASTAIR BRETT

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

FOREIGN AND COMMONWEALTH OFFICE

Additional Party

Subject matter:
Exemption under FOIA s40(2)(3) – whether first data protection principle would be contravened by disclosure
DPA s1 personal data – DPA s2 sensitive personal data – DPA Schedule 1 paragraph 1, first data protection principle
Whether conditions for processing met - DPA Schedule 2 conditions 5(a) and 6, DPA Schedule 3 conditions 6(c) and 10
Data Protection (Processing of Sensitive Personal Data) Order 2000 Schedule paragraphs 3 and 9 – "substantial public interest".

Cases:
Durant v Financial Services Authority [2003] EWCA Civ 1746
Corporate Officer of the House of Commons v Information Commissioner EA/2007/0060
Common Services Agency v Scottish Information Commissioner [2008] UKHL 47

Representation:

For the Appellant: Ms Estelle Dehon
For the Respondent: Mr Timothy Pitt-Payne
For the Additional Party: Mr Clive Sheldon

Decision

The Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice dated 24 November 2008.

Information Tribunal **Appeal Number: EA/2008/0098**

SUBSTITUTED DECISION NOTICE

Dated 21 August 2009

Public authority: **Foreign and Commonwealth Office**

Address of Public authority: **King Charles Street**
London SW1A 2AH

Name of Complainant: **Alastair Brett**

The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is that the public authority was correct to withhold the information falling within the scope of the request on the basis that it was exempt by virtue of section 40(2), read with section 40(3), of the Freedom of Information Act, except for the following information, which ought to have been disclosed under s1(1) of the Act, namely the relevant information in the document identified as TMH4 and the second element of TMH5.

Action Required

The public authority shall disclose the information within the exception mentioned above, as further defined in the confidential annex to the Tribunal's decision, within 28 days from the date of publication of this decision.

Dated 21 day of August 2009

Signed

Andrew Bartlett QC

Deputy Chairman, Information Tribunal

Reasons for Decision

Introduction

1. This case is concerned with the inter-relationship of the Freedom of Information Act 2000 ("FOIA") and the Data Protection Act 1998 ("DPA"), where information requested under FOIA is or may be protected from disclosure by DPA.

2. On Sunday 6 March 1988 three members of the IRA were shot dead by British Special Forces in Gibraltar.

3. The shooting was the subject of a Thames Television programme 'Death on the Rock', which was screened in the UK on 28 April 1988 and seen by some six million viewers. Mrs Carmen Proetta, who claimed to have witnessed part of the incident, took part in the programme. She also gave evidence at the subsequent inquest in Gibraltar on 22 September 1988.

4. The programme gave rise to intense public controversy. It was described by the then Foreign Secretary, Sir Geoffrey Howe, as "trial by television". Mrs Proetta claimed in it that she saw two of the IRA members shot without warning while trying to surrender. The inquest jury decided, by nine to two, that the killings were lawful, being reasonably justified in the circumstances.

5. Much later, in September 1995, the European Court of Human Rights decided by ten votes to nine that the killings were contrary to the European Convention on Human Rights. This was on the basis that it was not demonstrated to the satisfaction of the majority that the killing of the three terrorists constituted a use of force which was no more than was "absolutely necessary". This was not a criticism of the actions of the soldiers, but of the standard of care exercised in the control and organisation of the arrest operation.

6. In the wake of the television programme, there was considerable criticism of Mrs Proetta in the media. She successfully sued for libel the Sun, the Daily Mail, the Daily Express and the Daily Mirror, and her suits against the Sunday Times and RTÉ were settled.

7. Mr Brett is a solicitor and the legal manager of Times Newspapers. He wishes to write a book investigating the allegation that the British Army operated a 'shoot to kill' policy in relation to the IRA.

The request for information

8. Mr Brett made an information request to the Foreign and Commonwealth Office ("FCO") on 16 May 2007. After explaining that his researches related to the Thames Television programme "Death on the Rock", he wrote:

> "I would like copies of all letters, memos, or other documents received by Sir Geoffrey Howe, then Foreign Secretary from all or anyone who cast doubt on the evidence given by Carmen Proetta, a witness on the Death on the Rock programme about the shooting of Danny McCann and Sean Savage outside the Shell petrol station in Gibraltar. (Mrs Proetta said the terrorists were trying to surrender when they were shot but her account was hopelessly wrong.) I believe that Sir Geoffrey Howe may have received letters and other communications shortly after the screening of Death on the Rock in April 1988 suggesting that Mrs Proetta was never in Gibraltar on Sunday 6th March when the shootings took place. In particular I am told that Jackie Wilkins or Jackie Finch ... wrote to the Foreign Secretary saying that Carmen Proetta was not in Gibraltar on the day of the shootings. There may have been other letters or communications from residents of Gibraltar or residents in San Pedro de Alcantara in Spain, where Mrs Proetta had another flat, or others with direct knowledge of events in Gibraltar on 6th March 1988 who wrote in or supplied information to the Foreign Secretary saying that Mrs Proetta was not in Gibraltar that Sunday *or* that she could not possibly have seen what she said she had seen."

9. In the request "Sean Savage" was a mistake for "Mairéad Farrell", but nothing turns on this. We think in context the natural understanding of the expression "received

by Sir Geoffrey Howe, then Foreign Secretary" is such as to include items received on his behalf by the FCO, irrespective of whether he personally saw them, and we note that the FCO interpreted the request in that sense.

10. In a follow up email of 15 June 2007 Mr Brett wrote that he hoped to be able to demonstrate that Mrs Proetta's "account in Death on the Rock was not only wrong but one of the greatest ever con tricks on the British media and Government of the last 25 years".

11. The FCO replied on 12 July 2007 that it held information falling within his request, but that it was personal data relating to third parties, the disclosure of which would be unfair and so contravene the first data protection principle. It was therefore exempt from disclosure by FOIA s40(2) and 40(3). This position was confirmed by the FCO's letter of 10 August 2007 after an internal review.

The complaint to the Information Commissioner

12. On 1 October 2007 Mr Brett complained to the Commissioner, who commenced his investigation on 27 May 2008. He obtained in confidence the information that the FCO held ("the disputed information").

13. In addition, on 30 October 2007 Lord Howe confirmed by email (in answer to an inquiry from another journalist, Barrie Penrose, and after consulting the FCO) that Mrs Jackie Finch (ie Mrs Wilkins) had indeed written to him during his time as Foreign Secretary.

14. The Commissioner's decision notice was issued on 24 November 2008. It stated that the Commissioner was satisfied, after review of the disputed information, that all of it constituted sensitive personal data relating to Mrs Proetta. In addition, the Commissioner was satisfied that the disputed information also contained personal data (and in some cases sensitive personal data) relating to individuals who had contacted the British Government and to other third parties.

15. The Commissioner was further satisfied that no condition in DPA Schedule 3 was met. He concluded that disclosure of the disputed information would contravene

the first data protection principle and was therefore exempt under FOIA s40(2) (paragraph 30 of the Decision Notice).

16. The Commissioner also considered that disclosure of those parts of the disputed information which amounted to personal data about other individuals would amount to unfair processing, because in his view neither the individuals who wrote to the Foreign Secretary nor the other individuals mentioned would have expected the information to be placed in the public domain.

17. He therefore agreed with the FCO that the disputed information was exempt from disclosure under FOIA.

The appeal to the Tribunal

18. On 18 December 2008 Mr Brett appealed to the Tribunal. While accepting that the disputed information was "data" within DPA s1(1)(e), he challenged that it was "personal data" or "sensitive personal data". He also contended that, in so far as it was personal data or sensitive personal data, it could be disclosed without contravening the first data protection principle.

19. Since he had not been able to see the disputed information, his arguments were necessarily in rather general terms. He asked the Tribunal to examine the material itself and consider the issues afresh. The Tribunal joined the FCO as an additional party.

The questions for the Tribunal

20. The overall issue in this appeal is whether disclosure of the disputed information to a member of the public otherwise than under FOIA would contravene any of the data protection principles. If so, it is exempt from disclosure under FOIA, by virtue of FOIA s40(2). If it is not exempt, then it must be disclosed pursuant to the general right of access to information held by public authorities: FOIA s1(1).

21. It is common ground between the parties that the only relevant data protection principle, which might be contravened by disclosure of the information, is the first. The first data protection principle is therefore central to this appeal. It states:

> "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 met."
>
> DPA Schedule 1, Part I, paragraph 1.

22. The Schedule 2 conditions relied on by Mr Brett as being met were condition 5(a) (disclosure necessary for the administration of justice) and condition 6 (disclosure necessary for the purposes of legitimate interests pursued by him, except where unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject).

23. The Schedule 3 conditions relied on by Mr Brett were condition 6(c) (disclosure necessary for the purposes of establishing, exercising or defending legal rights) and condition 10 (disclosure in circumstances specified in an order made by the Secretary of State). The order relied on under condition 10 was the Data Protection (Processing of Sensitive Personal Data) Order 2000, and the circumstances which he said applied were those in paragraph 3 and paragraph 9 of the Schedule to the Order. Paragraph 3 is concerned with disclosure, in connection with improper conduct, for journalistic or literary purposes. Paragraph 9 is concerned with disclosure that is necessary for research purposes.

24. The questions for the Tribunal are therefore, in relation to each part of the disputed information:

    a. whether it is personal data;

    b. whether disclosure would be fair processing;

    c. whether condition 5(a) or condition 6 of Schedule 2 is met;

    d. whether it is sensitive personal data;

e. if so, whether condition 6(c) or condition 10 of Schedule 3 is met (where condition 10 requires consideration of paragraphs 3 and 9 of the 2000 Order).

Evidence

25. The central evidence was the disputed information itself.

26. At an early stage in the appeal proceedings the FCO found some additional material which arguably fell within the terms of the request and which had not previously been located or shown to the Commissioner.

27. The additional material was shown to us, along with the material previously identified, and the arguments and oral evidence which we heard in closed session dealt with the whole of the disputed information.

28. The disputed information consisted of five items, which for convenience were labelled as TMH1 to 5. Each mentioned Mrs Proetta. They were as follows:

TMH1 was a communication from the British Consulate in Madrid dated 20 September 1988.

TMH2 was the letter referred to by Lord Howe.

TMH3 was an official communication from Gibraltar dated 3 June 1988.

TMH4 was a letter dated 29 April 1988 from two academics in London.

TMH5 was an official communication from Gibraltar dated 4 May 1988.

29. We were also shown ancillary confidential items such as an acknowledgment and a covering letter, which did not themselves contain any additional information.

30. Two of the items in the form shown to us contained redactions. We decided to accept an express assurance from Mr Sheldon of counsel that he had personally seen the redacted material and had checked that it was not relevant to Mr Brett's information request.

31. We received very full written and oral evidence from Mr Brett concerning the general background to his request and his intention to write a book. It was accompanied by a large file of exhibits, which included a transcript of the Thames Television programme and of Mrs Proetta's evidence at the inquest. We also received written and oral evidence (partly in open and partly in closed session) from Mr Timothy Hitchens of the FCO, who sought to justify the non-disclosure of the disputed information. In addition there was an agreed bundle of documents covering the making of the information request and how it was dealt with.

32. Mr Brett was cross-examined at some length by counsel for the FCO and for the Commissioner. We found his answers to be credible and reliable, if sometimes unnecessarily discursive. The main points we derived from his evidence were:

    a. He had a genuine intention of writing a book about the allegations that there had been a 'shoot to kill' policy. It was his view that there was no such policy.

    b. He considered that the Sunday Times (for which he had been the solicitor on record) should not have settled, through George Carman QC, Mrs Proetta's libel action by making a very large contribution to her costs and agreeing a statement in open court in which she conceded that her account of the shooting "might have been mistaken".

    c. He believed that Mrs Proetta had given deliberately false evidence to Thames Television and at the inquest, but he was not confident of the strength of the evidence which he held to support his belief. He wanted further evidence so that he could proceed with his book without being subject to a successful libel action. He was researching both whether she had been present in Gibraltar on the day of the shootings and whether she had been paid by the IRA to give the evidence which she did.

    d. He could not think of any way of obtaining the supporting evidence which he needed, short of paying the substantial sum of £25,000 demanded by two informants in about 1991, who had told him they could prove where Mrs Proetta had had lunch in Spain on the day of the shootings. He had made many other inquiries, which had proved fruitless. Three potentially important witnesses, Joseph Wilkins, Aida Cooper and Kerry Aston, were now dead.

e. He had been told that the letter from Jackie Wilkins to the Foreign Secretary cast very serious doubt on whether Mrs Proetta was in Gibraltar on the day of the shootings. No one had suggested to him that there was anything in the correspondence with the FCO about her connection with the IRA.

f. If the evidence showed that Mrs Proetta had made a mistake in her evidence, rather than perjuring herself, then that was what his book would say.

g. He considered that Mrs Proetta's personal data in connection with the incident were not deserving of protection, since she had chosen publicity, by voluntarily going on television to say what she claimed to have seen.

h. If he could not obtain the FCO papers, he hoped he would still write a book, but it would not be the same book as it would have been if he had had the full story.

33. Mr Hitchens had been the Director, European Political Affairs, at the FCO since 2008. It was not clear to us why Mr Hitchens had been put up by the FCO in order to give evidence, except that he was a responsible official of the data controller. It was apparent that he had no direct knowledge of the circumstances in which the disputed information came into existence, or of the controversies about Mrs Proetta or 'shoot to kill' at the time of 'Death on the Rock' or subsequently, nor had he dealt with Mr Brett's information request either initially or at internal review, nor had he been involved with any of the searches for relevant material. His written evidence omitted any mention of one of the items of additional material which had been located. In the result, Mr Hitchens' 'evidence' was mostly legal argument.

34. Under cross-examination by Ms Dehon he candidly accepted both that he was not legally trained and that he had fairly limited experience and knowledge of DPA. It seemed to us that this was illustrated by his evidence that he had considered, by reviewing newspapers and talking to friends and colleagues, whether the issue of the truthfulness of Mrs Proetta's account was something in which people in England had a particular interest at the present time. His evidence confused 'public interest' in the popular sense of 'public curiosity' with 'public interest' in the statutory sense of 'public good' or 'public benefit'.

35. He described the process of thought that he went through in deciding, for the purpose of the appeal, whether the disputed information should be disclosed. He saw himself to be balancing the degree of public interest on the one hand with the DPA rights (of the people whose personal data was in the disputed information) on the other. Because of his lack of a clear understanding of the relevant legal framework, we were unable to regard that part of his evidence as giving us significant assistance.

36. In closed session we found his evidence helpful in interpreting for us various abbreviations and markings on the disputed information including, where relevant, the meanings of the security classifications then in force. Since the Commissioner was adopting the same position as the FCO, the cross-examination of Mr Hitchens by Mr Pitt-Payne in closed session was not testing. The Tribunal therefore asked its own questions of Mr Hitchens on points of concern.

37. Taking open and closed sessions together, we derived the following potentially relevant matters from Mr Hitchens' evidence-

    a. He accepted that Mrs Proetta appeared to have made a deliberate decision to give an interview for the 'Death on the Rock' programme, and "told the world where she lived and where she was on that weekend".

    b. An important element in the FCO's judgment on whether the disputed information should be disclosed was that generally the information questioning Mrs Proetta's account was unsubstantiated and of doubtful quality. He did not accept that any of the disputed information showed Mrs Proetta to be guilty of perjury.

    c. In 1988 it would have been very rare for third party letters providing information to the FCO to find their way into the public domain. The basic assumption of the FCO would have been that such a letter would not be made public unless there was a definite decision to do so.

    d. The FCO had considered whether the documents could be disclosed after redaction of the personal data contained in them, but had concluded that

after such redaction the documents would no longer contain the substance of the information that Mr Brett was requesting.

e. The individuals whose personal data was in the disputed information had not been contacted to ask them whether they consented to disclosure. The FCO had initiated an investigation to see if the individuals were still alive, but had had no returns from that investigation. No one had entered any of their names into an internet search engine to see whether they could easily be contacted. As far as he was aware, the individuals referred to in the documents were still alive.

f. As regards one particular document, TMH4, Mr Hitchens conceded it was probably right to infer that the authors were motivated partly by being public-spirited and partly by a desire to raise their own profile. If so, that was inconsistent with a reasonable expectation that their letter would be treated as confidential. In addition, since the document merely challenged Mrs Proetta's interpretation of what she observed and did not impugn her honesty, the impact on her if it were disclosed would be modest.

g. Mr Hitchens did not regard TMH5 as falling within the scope of Mr Brett's request.

Legal analysis

Nature of the data

38. Mr Brett submitted that the disputed information was "data" only by virtue of the definition in DPA s1(1)(e), ie, recorded information held by a public authority. The Commissioner submitted that it might instead fall within DPA s1(1)(c), if recorded as part of a relevant filing system, but the Commissioner accepted that this possibility had no practical relevance here: if the data were within s1(1)(c), the test for exemption was FOIA s40(3)(a)(i); if the data were within s1(1)(e), the test for exemption was FOIA s40(3)(b). In the particular circumstances of this case there is no difference between the two tests.

39. "Personal data" is defined as-

"data which relate to a living individual who can be identified ... and includes any expression of opinion about the individual ..." DPA s1(1).

40. We have been assisted by the discussion of this definition in Durant v Financial Services Authority [2003] EWCA Civ 1746, paragraphs 22-29, and in particular by the reminder that to constitute personal data the information should have the data subject as its focus and affect the subject's personal privacy.

41. We have also reminded ourselves of the definition of 'sensitive personal data' in DPA s2. This includes information as to the commission or alleged commission by the data subject of any offence.

42. TMH5 contains some comments casting doubt on the accuracy of Mrs Proetta's account. Contrary to the view expressed by Mr Hitchens in his evidence, in our judgment it falls within the scope of the request for "all letters, memos, or other documents received by Sir Geoffrey Howe, then Foreign Secretary from all or anyone who cast doubt on the evidence given by Carmen Proetta".

43. Having considered the applicable law, the disputed information and the parties' submissions we have reached the following conclusions about the nature of the information in each of the five items:

    a. TMH1 consists principally of information about Mrs Proetta, falling within the category of sensitive personal data. TMH1 also contains some details concerning the informant, who gave information to the consulate: those details are personal data, and partly sensitive personal data, of the informant.

    b. Mrs Proetta is the principal focus of the letter from Mrs Jackie Wilkins to Lord Howe, TMH2. The letter largely consists of sensitive personal data of Mrs Proetta. It also contains some personal data of Mrs Wilkins and some sensitive personal data concerning another individual.

    c. The unredacted part of TMH3 consists of sensitive personal data of Mrs Proetta.

d. The letter from two academics, TMH4, does not in our view constitute personal data of Mrs Proetta. It does not contain any information about her but is a discussion of the account which she gave to the public in "Death on the Rock". It contains arguments, based on the time it would have taken for the sound of firing to reach Mrs Proetta, for reinterpretation of what she claimed to have seen. It does not contain or imply any particular opinion about Mrs Proetta herself or involve any breach of her personal privacy. We are also unpersuaded that the letter constitutes personal data of the two academics. They are not the focus of the information, nor in our view does it affect their privacy. The letter was written on University notepaper. It is unremarkable for academics to offer their findings or opinions for public review or critique by their peers. There is nothing in TMH4 which indicates to us that the two authors requested, desired or expected their letter to be regarded as confidential.

e. The unredacted part of TMH5 contains two elements. The first element (numbered 2 in the document) is personal data of Mrs Proetta. The second element (numbered 3 in the document) suggests three reasons, by reference to other evidence, for regarding the account which she gave to the public as mistaken. Like TMH4, the second element does not appear to us to constitute personal data, since it does not contain any information about Mrs Proetta herself and does not contain or imply any particular opinion about her or affect her privacy.

Conclusion on TMH4 and the 2nd element of TMH5

44. It follows from the above analysis that the Commissioner's decision notice was not wholly in accordance with the applicable law and that, subject to further redaction of words which do not relate to the subject matter of the request, TMH4 and the second element of TMH5 must be disclosed to Mr Brett pursuant to FOIA s1(1). We give guidance on the further redactions in the confidential annex to our decision.

45. If, contrary to our view, the proper evaluation of TMH4 and the 2nd element of TMH5 were that they constituted personal data, then, while we cannot see that there would be unfairness in the making of the disclosure, we would not be able to

conclude that either condition 5(a) or condition 6 of Schedule 2 was met. The information would then be exempt under FOIA s40(2).

Sensitive personal data within TMH1, 2 and 3

46. One of the requirements for the disclosure of sensitive personal data in this case is that Schedule 3 condition 6(c) or condition 10 is met.

47. Condition 6(c) of Schedule 3 is that the processing is necessary for the purposes of establishing, exercising or defending legal rights.

48. The 'rights' relied on by Mr Brett were (a) "the rights of those associated with the events that took place outside the Shell petrol station in Gibraltar in March 1988", and (b) Mr Brett's "right to publish an accurate and fair account of events" (ie one which will not subject him to a libel action) and his right "not to be impeded in that by the refusal of a public authority to share information that it holds and which does not otherwise conflict with a protected interest".

49. It is not necessary for us to reach a conclusion on whether these are 'legal rights' within the meaning of condition 6(c). Even if we were to accept without question Mr Brett's description of the supposed rights, we would not be able to conclude that disclosure was necessary for the purposes of establishing, exercising or defending those rights, because of the doubtful quality of the information. It would be of minimal assistance in relation to any such rights. The test of necessity under condition 6(c) is not met.

50. Condition 10 of Schedule 3 is that the personal data are processed in circumstances specified in an order made by the Secretary of State. As noted above, the relevant order is the Data Protection (Processing of Sensitive Personal Data) Order 2000. Article 2 of that Order provides that the circumstances specified in any of the paragraphs in the Schedule to the Order are circumstances in which sensitive personal data may be processed.

51. Mr Brett relied first on paragraph 3 of the Schedule to the Order. Most of the paragraphs refer to 'processing', which covers both disclosure and other forms of

processing. Paragraph 3 differs, in referring only to 'disclosure'. The relevant elements of the paragraph are that the disclosure-

a. is in the substantial public interest;

b. is in connection with the commission by any person of any unlawful act, whether alleged or established;

c. is for the special purposes defined in DPA s3, ie, the purposes of journalism or artistic or literary purposes; and

d. is made with a view to the publication of those data by any person and the data controller reasonably believes that such publication would be in the public interest.

52. We are satisfied from the nature of the request and from Mr Brett's evidence that elements (b) and (c) and the first part of element (d) would be met in this case.

53. The second part of (d) requires that the data controller reasonably believes that publication would be in the public interest. In a single set of circumstances, the reasonable belief of one data controller may differ from the reasonable belief of another data controller. The question arises whether it is the actual belief of the FCO, as represented by Mr Hitchens, that matters in the present context and, if so, whether that belief must be both objectively reasonable and reasonably arrived at. A further question might then be, if (as in the present case) his belief was vitiated by a misunderstanding of the meaning of the expression "public interest", whether it is our function to substitute our own belief for his.

54. It is not necessary for us to explore fully how paragraph 3 is intended to function in a case where the data controller is considering on his own initiative whether he will allow publication. This is not such a case. The present context is an information request and a Commissioner's decision notice under FOIA, which the Tribunal is required to consider pursuant to FOIA ss57-58. In that context FOIA s40(3) requires us to consider a hypothetical question, namely, whether "the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles". We can answer this question by

considering, in relation to element (d), whether a hypothetical data controller in the position of Mr Hitchens and his department could reasonably believe that publication would be in the public interest. If we answer that question in the affirmative, then it is not established that disclosure "would contravene" a data protection principle by reason of non-compliance with element (d).

55. It seems to us at least arguable that a hypothetical data controller could reasonably believe that publication of some parts of the sensitive personal data within TMH1, 2 and 3 would be in the public interest. However, it is not necessary for us to consider this question more closely, because of the more substantial obstacle provided by element (a), as explained below.

56. Element (a) of paragraph 3 of the Schedule to the Order requires the disclosure to be "in the substantial public interest". This phrase is used in four of the paragraphs of the Schedule. It derives from article 8 of the Data Protection Directive (Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data). Article 8.4 provides that Member States may, "for reasons of substantial public interest", lay down additional exemptions to the prohibition on processing sensitive personal data.

57. The word "substantial" involves us in making a judgment which is a matter of degree. A public interest which is so minor or marginal as not to be substantial is not sufficient.

58. Ms Dehon deployed a forceful argument on the question of substantial public interest. She pointed out that the exposure of iniquity is a matter of public interest, as is the correction of any public misapprehension. The greater the iniquity and/or the wider the misapprehension, the more significant the public interest. Disabuse of a theory that those in authority deliberately shot unarmed civilians, a theory that continues to enjoy currency in some quarters, would be a matter of substantial public interest. This was particularly the case, given that the incident was widely proffered as probative of the existence of a 'shoot to kill' policy.

59. She realistically accepted that the quality of the information was relevant to whether its publication would be in the substantial public interest, but she submitted that the

public interest in knowing the truth about whether people were murdered by agents of the state was acute, so much so that even information of dubious value should be released.

60. We accept the principle of her argument, but only up to a point. It depends on what is meant by 'information of dubious value'. We accept that information does not need to be copper-bottomed before its publication would be in the substantial public interest on the ground that it would materially contribute to finding out the truth. But we cannot regard it as in the substantial public interest to publish information that amounts to little more than additional speculation concerning the probity of Mrs Proetta's evidence. This is particularly the case, given that there have been two judicial inquiries into the circumstances of the shootings, the inquest (which sat for 19 days and heard evidence from 79 witnesses), and the case taken to the European Court of Human Rights, which culminated in a long and detailed decision by the Grand Chamber on 5 September 1995.

61. Our view of the disputed information in TMH1, 2 and 3 is that it amounts to little more than additional speculation concerning the probity of Mrs Proetta's evidence. It is secondhand, and not adequately or appropriately substantiated. We therefore conclude that the condition set out in paragraph 3 of the Schedule to the Order is not met.

62. Mr Brett relied secondly on paragraph 9 of the Schedule to the Order. The elements of the paragraph are that the disclosure-

    a. is in the substantial public interest;

    b. is necessary for research purposes (including statistical or historical purposes as in DPA s33);

    c. does not support measures or decisions with respect to any particular data subject otherwise than with the explicit consent of that data subject; and

    d. does not cause, nor is likely to cause, substantial damage or substantial distress to the data subject or any other person.

63. Our reasoning on the issue of substantial public interest under paragraph 3 applies equally under paragraph 9. It is therefore unnecessary for us to reach conclusions on elements (b), (c) and (d) of paragraph 9.

Personal data within TMH1, 2 and 5

64. Mr Brett contended that condition 5(a) of Schedule 2 was met ("The processing is necessary ... for the administration of justice"). We do not agree. It appears to us to be improbable that disclosure of the personal data within TMH1, 2 or 5 would be of material assistance in the administration of justice, let alone necessary for that purpose.

65. Mr Brett also relied on condition 6:

> "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."

66. In addition to the forceful argument concerning public interest which we have noted above, Ms Dehon argued that Mr Brett needed the most cogent evidence available. The evidence showed that Mrs Proetta was not slow to react when she thought she was being libelled. The risk of further proceedings was a serious one.

67. The meaning and application of condition 6 were examined at length in Corporate Officer of the House of Commons v Information Commissioner EA/2007/0060, 26 February 2008, paragraphs 52-62.[1] It is not necessary for us to repeat that discussion. For completeness, we note that FOIA does not create any presumption in favour of the release of personal data: cf Common Services Agency v Scottish Information Commissioner [2008] UKHL 47, paragraphs 2 and 7. In the present case we need only say that we are unpersuaded that the condition is met. In our judgment disclosure would be unwarranted, given the invasion of privacy which it would involve and the poor quality and limited usefulness of the information.

[1] For the avoidance of doubt, the expression "or anyone else" in paragraph 60(B) of that decision was a reference to other data subjects, not to other persons in general.

68. It follows that disclosure of the personal data within TMH1, 2 and 5 would contravene the first data protection principle, since no Schedule 2 condition would be met.

69. The non-applicability of any Schedule 2 condition also provides an additional reason why disclosure of the sensitive personal data within TMH1, 2 and 3 would contravene the first data protection principle.

70. Given that no Schedule 2 condition is met, it is not necessary for us to consider separately whether disclosure would amount to fair processing.

Conclusion and remedy

71. The Commissioner ought to have ruled that the FCO should have disclosed the relevant information in TMH4 and the second element of TMH5, because that information was not personal data protected by DPA and accordingly was not exempt pursuant to FOIA s40(2). We allow the appeal to that limited extent. Otherwise we uphold the Commissioner's decision.

72. The FCO must disclose the above-mentioned information within 28 days from the date of publication of this decision. We give guidance on the precise extent of the disclosure required in the confidential annex to our decision.

73. Our decision is unanimous.

Signed

Andrew Bartlett QC

Deputy Chairman

Date 21 August 2009