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IN THE FIRST-TIER TRIBUNAL **EA/2011/0041**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's Decision Notice: FS50318415
Dated: 17 January 2011

Appellant: ALAN RITCHIE

Respondent: THE INFORMATION COMMISSIONER

Date of hearing: 27 June 2011

Date of Decision: 26 July 2011

Before

Annabel Pilling (Judge)
Paul Taylor
Ivan Wilson

Subject matter:

FOIA – Absolute exemptions – Prohibitions on disclosure s.44
FOIA – Absolute exemptions – Personal data s.40

Cases:
Lamb v The Information Commissioner (EA/2009/0108)
Leander v Sweden ((1987) 9 EHRR 433)
R (Howard) v Secretary of State for Health ([2002] EWHC 396 (Admin))
Friends of the Earth v The Information Commissioner and The Department for Trade and Industry (EA/2006/0039)
Corporate Officer of the House of Commons v The Information Commissions and Brooke ([2008] EWHC 1084)
Guardian and Brooke v The Information Commissioner and BBC (EA/2006/0011 and 0013)

Representation:
For the Appellant: John Samson
For the Respondent: Robin Hopkins, Richard Bailey

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Decision

For the reasons given below, the Tribunal upholds the Decision Notice of 17 January 2011 and dismisses this Appeal.

Reasons for Decision

Introduction

1. This is an Appeal by Mr Alan Ritchie, General Secretary of the Union of Construction, Allied Trades and Technicians (UCATT) against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 17 January 2011.

2. The Decision Notice relates to a request made by Mr Ritchie under the Freedom of Information Act 2000 (the 'FOIA') to the Information Commissioner; the term "ICO" is used to denote the public authority dealing with the request while the term "Commissioner" denotes the regulator dealing with the complaint about how the request was handled and conducting this appeal.

Background

3. The subject of the Appellant's request for information arose from the ICO's seizure of information from an organisation called the Consulting Association. This organisation had, over a number of years, compiled and maintained a "blacklist" of the names and personal details of workers in the construction industry who had engaged in trade union or other activities in furtherance of employment rights. A substantial number of major companies in the construction industry paid annual subscriptions and, as potential employers, were able to access individual records for a fee.

4. The ICO investigated the lawfulness of the Consulting Association's activities. In March 2009 the ICO executed a warrant, granted under

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Schedule 9 of the Data Protection Act 1998 (the 'DPA') at the Consulting Association's premises. A search of the premises revealed the following information:

(i) A ring binder containing 3213 entries in relation to individuals, The entries contained information such as names, dates of birth, national insurance numbers, locations and trades alphabetically listed on pages which had been processed on electronic media.

(ii) A comprehensive card index system constituting an intelligence database. Some of the information is over 30 years old and the database contained, amongst other things, personal data relating to the union activity of an individual, his employment conduct together with any information that the individual may pose a threat to industrial relations between an employer and its employees. This database was linked to the information contained in the ring binder referred to in (i) above.

(iii) The identity of organisations ("subscribers") within the construction industry that had access to the information contained in the database following contact with the Consulting Association (as the data controller).

(iv) Copies of invoices from the data controller to the subscribers for services provided, for example, employment checks on individuals.

(v) Miscellaneous papers for sifting, a computer and other electronic storage media.

5. The investigation culminated in a successful prosecution of the owner of the Consulting Association for breach of the DPA.

6. From 16 March 2009 the ICO operated a dedicated enquiry system for people who believed personal information about them may be held on the "blacklist" database. This involved a two stage process. Stage one

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was a call to the ICO helpline to check whether there was a match on the database; if there was no match that would be disclosed straight away. If the details of the name were similar to or seemed likely to match those of someone on the database, the individual making the enquiry would be asked to provide further identification in writing, essentially making a subject access request ('SAR') under the DPA. Once identity had been verified, any information held about that individual on the database would be provided.

7. The helpline was active until mid-February 2010. Over the period it operated there were 2,068 SARs. The total number of people who have had copies of their personal data from the database sent to them is 172.

The request for information

8. The Appellant, the General Secretary of UCATT, made a request under the FOIA on 23 December 2009 to Christopher Graham, the Information Commissioner, as follows:

> *"Please could you supply me with a copy of all files held by the Information Commissioner's Office, and which were formally held by the Consulting Association that contain references to the following organisations:*
> *UCATT (Union of Construction Allied Trades and Technicians)*
> *ASW (Amalgamated Society of Woodworkers)*
> *The Amalgamated Society of Painters and Decorators*
> *The Association of Building Technicians*
> *The Amalgamated Union of Building Trades Workers."*

9. The ICO responded on 20 January 2010 and explained that certain information about the Consulting Association and its clients had already been published. In relation to specific items relating to UCATT, while the ICO confirmed that information is held on files, this information was being withheld under the provisions of section 44(1)(a)

FOIA as disclosure was prohibited by section 59 DPA, which placed a prohibition on disclosure by the ICO in the absence of any lawful authority. In relation to the files containing references to The Amalgamated Society of Woodworkers ("ASW"), The Amalgamated Society of Painters and Decorators ("ASPD"), The Association of Building Technicians ("ABT") and The Amalgamated Union of Building Trades Workers ("AUBTW"), the ICO explained that it was not able to provide the information requested, and relied on section 12 FOIA as the estimated cost of complying with the request would exceed the appropriate limit.

10. Through solicitors, the Appellant asked for an internal review of this decision on 23 February 2010. In particular, he offered to cover the estimated cost of complying with the request for copies of the files containing references to ASW, ASPD, ABT and AUBTW.

11. The ICO conducted an internal review and upheld the original decision to refuse disclosure under section 44(1)(a) FOIA on the basis that there was no lawful authority to allow disclosure of the UCATT information. He also upheld the decision that in respect of the other information section 12 FOIA is engaged, but concluded that the information would still be exempt under section 44(1)(a) FOIA for the same reasons as the UCATT information. He apologised for this not being made clearer in the original refusal.

The complaint to the Information Commissioner

12. On 18 June 2010 the Appellant complained to the Commissioner about the way his request had been handled. He specifically asked the Commissioner to consider his view that section 59(2)(e) DPA gave the ICO "lawful authority" to disclose the information requested.

13. The Commissioner commenced an investigation and a Decision Notice was issued on 17 January 2011. During the investigation the Commissioner viewed a sample of the files held by the ICO in order to

consider the applicability of the exemption raised. In summary, the Commissioner concluded that section 59 DPA was applied correctly to the information requested and that, as lawful authority to release the information could not be demonstrated, there was a statutory prohibition on disclosure and section 44(1)(a) FOIA applied. The Commissioner did not consider section 12 FOIA.

The Appeal to the Tribunal

14. By Notice of Appeal dated 11 February 2011 the Appellant appeals against the Commissioner's decision, on two Grounds of Appeal:

> Ground 1 - The Commissioner erred in concluding that the exemption under section 44(1)(a) FOIA was engaged by virtue of section 59(1) DPA by concluding that the requested information was not, at the time of the request for disclosure available to the public from other sources pursuant to section 59(1)(c) DPA;
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> Ground 2 - The Commissioner erred in concluding that pursuant to section 59(2)(e) DPA disclosure of the requested information would not be necessary in the public interest.

15. In a skeleton argument served shortly before the hearing, the Appellant raised additional grounds of appeal:

> Ground 3 – The Commissioner erred in identifying the scope of the request for information;
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> Ground 4 – The Commissioner erred in concluding that the exemption under section 44(1)(a) FOIA was engaged by virtue of section 59(1) DPA; section 59(1) DPA applies to individuals and not the ICO as a public authority;

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Ground 5 – The Commissioner erred in concluding that the exemption under section 44(1)(a) FOIA was engaged by virtue of section 59(1) DPA; there was lawful authority for disclosure as there was consent to that disclosure under section 59(2)(a);

Ground 6 – The Commissioner erred in concluding that the exemption under section 44(1)(a) FOIA was engaged by virtue of section 59(1) DPA; there was lawful authority for disclosure as it was necessary for the discharge of a community obligation under section 59(2)(c)(ii).

16. The Commissioner raised concern at the late addition to the grounds of appeal but did not formally object to their being raised. He opposes the appeal on the basis that his decision in the Decision Notice of 17 January 2010 was correct, but he also submits that the information is exempt from disclosure under section 40(2) FOIA in the alternative because the requested information is personal data and disclosure would breach the first data protection principle.

17. The Appeal was determined at a hearing on 27 June 2011, with further deliberations on 28 June 2011.

18. The Tribunal was provided in advance with an agreed Bundle of material, written submissions from the parties and an agreed bundle of authorities relied upon by the parties.

19. The Tribunal was also provided with a Closed Bundle of material which contained all of the disputed information, that is, a copy of files from the card index system (item (ii) referred to in paragraph 4 above) that contain references to UCATT, ASW or AUBTW. Having reviewed all of the disputed information when preparing for this hearing, the Commissioner confirmed to the Appellant that the ICO holds no information within the scope of his request that contain references to either the Amalgamated Society of Painters and Decorators or the Association of Building Technicians.

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20. At the start of the hearing the Tribunal held a closed session[1] with the Commissioner as a result of which it was disclosed to the Appellant that the disputed information amounted to records of 86 individuals that contain references to UCATT, ASW and AUBTW. It was also disclosed that there had been 18 successful SAR in respect of those records. (This is a figure reached by the help of the solicitor for the Commissioner during the hearing and is not a confirmed final figure.)

21. This disclosure was important in our opinion. It appeared to us that many of the written submissions in this case were concerned with the importance of disclosure of the names on the "blacklist" database of persons who may be members of UCATT or the unions which subsequently merged with UCATT, and referred to by the Appellant as its "predecessor unions". As the Appellant has not seen the disputed information (to do so would be making the disclosure at issue in this Appeal), he has advanced arguments based on a mistaken assumption as to what was contained in it. Despite this disclosure and the Appellant's repeated assertion before us that this was not a request for personal data, much of the submissions did, in our opinion, suggest that the Appellant still believes that a request has been made for the "blacklist" at item (i) in paragraph 4 above.

22. Although we do not refer to every document, we have had regard to all the material before us.

The Powers of the Tribunal

23. The Tribunal's powers in relation to appeals are set out in section 58 of FOIA, as follows:

> *(1) If on an appeal under section 57 the Tribunal considers-*
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> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*

[1] Counsel for the Appellant made an application to be present during this closed session. This application was refused. Written reasons for this refusal are attached to this Decision as Appendix 1.

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(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

24. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether the applicable statutory framework has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, it will find that the Decision Notice was not in accordance with the law.

The Legal Framework

25. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.

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26. The section 1(1)(b) duty of the public authority to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions. Where the information is subject to a qualified exemption, it will only be exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b)). Sections 40(2)(a) and 44 of FOIA are absolute exemptions. Information that falls within one of these sections is therefore exempt from disclosure and not subject to the balancing of public interest considerations under section 2(2)(b).

27. The relevant part of section 44(1) of FOIA provides as follows:

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

28. The relevant legislative prohibition in this case is section 59(1) DPA which provides that:

> *"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 –*
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> *(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,*
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> *unless the disclosure is made with lawful authority.*

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(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 of 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.

29. Section 59(3) DPA makes it an offence for any person knowingly or recklessly to disclose information in contravention of that subsection.

Submissions and Analysis

Did the Commissioner err in identifying the scope of the request of 23 December 2009?

30. The Appellant criticised the ICO and the Commissioner for having proceeded on the basis that the only manner in which to interpret the request and/or in which disclosure could be made was by the disclosure of information which revealed personal data of individuals.

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He submitted that the ICO should have sought clarification and failure to do so amounts to a breach of section 16 FOIA, the duty to advise and assist.

31. The Commissioner submitted that there was no need to seek clarification of the request. The principles that apply to any analysis of request require that it be construed objectively and be treated as "motive blind". He submitted that the duty under section 16 FOIA is only triggered when there is any ambiguity.

32. The request of 23 December 2009 was not a request for item (i), the "blacklist" of 3213 names.

33. We consider that the request of 23 December was clear and unambiguous; what was asked for was a copy of all files that had been seized from the Consulting Association that contain references to the named Unions.

34. The Commissioner had publicised the five categories of information that had been seized, listed in paragraph 4 above. From the outset, the description of (ii) made it clear that it contained personal data relating to union activity of an individual and was linked to the information in item (i).

35. The Appellant has not seen the disputed information, and therefore has made an assumption that there are files or record cards from the card index that somehow relate to a Union rather than an individual. That is not the case; the card index system which amounted to an intelligence database relates to individuals.

36. We do not consider that the Commissioner erred in identifying the scope of the request and, having seen the disputed information, are satisfied that it amounts to the information sought - a copy of all files that had been seized from the Consulting Association that contain references to the named Unions.

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Does section 59(1) DPA apply to the ICO as a public authority?

37. The Appellant submitted that the Commissioner relies on a misreading of section 59(1) DPA. He submitted that by its heading "Confidentiality of information" and the fact that it addresses individuals and not the ICO body corporate, this provision is to be construed as placing only a *personal* obligation on the Commissioner and his staff not to disclose information received under the FOIA or the DPA during the course of their employment.

38. The Commissioner disagreed with this narrow interpretation of section 59(1). He reminded us that the ICO is a public authority listed in Schedule 1 of FOIA and drew our attention to the decision of a differently constituted Panel of this Tribunal in *Lamb v The Information Commissioner* (EA/2009/0108) which involved a consideration of the lawful authority for disclosure in section 59(2)(e). The Tribunal concluded that the Commissioner would not have lawful authority to make the disclosure sought and that to comply with the request in that case would have been prohibited under section 59(1); accordingly the absolute exemption in section 44 FOIA was engaged.

39. We accept the submissions of the Commissioner and are satisfied that section 59(1) DPA applies to the ICO, whether to Christopher Graham, the Information Commissioner, to whom the original request was addressed, any member of staff who might answer the request or to the ICO, the public authority, as the body corporate. The Appellant conceded that if we were so satisfied, the prohibition on disclosure applies and section 44 FOIA is engaged unless disclosure can be justified through one of the "gateway" exceptions in section 59 DPA.

40. There is no dispute that the requirements in section 59(1)(a) and (b) are met. The information was obtained by the Commissioner as a result of a warrant under Schedule 9 of the DPA and relates to an individual or identifiable individual or business.

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Has the disputed information been available to the public from other sources?

41. The Appellant has asserted that the information sought has *"in fact and/or law"* been disclosed to the public. He submitted that therefore there is no prohibition to disclosure under section 59(1) as the requirement in subsection (c) is not made out.

42. Before us, the Appellant agreed that the information was clearly not known to the world at large and conceded that if the test was whether there had been wide scale publication of the information, by national newspaper, television or radio, this information is unlikely to be regarded as having entered the public domain. He argued that the definition of "public domain" should be narrowly applied in this case. In particular, he submitted that the information from the database *"remains live within the construction industry. It feeds into the underground working of the construction industry. A number of individuals and companies continue to have the benefit of the information."*

43. The ways in which the Appellant claims the information to be within the public domain are as follows:

    i. The information was available publicly via the Consulting Association's "blacklist";
    ii. The information in question has been widely dispersed within the construction industry;
    iii. Political and trade union activists by their outspoken nature have not hidden their opinions from public view;
    iv. Construction site foremen who have been given this information in the past may now hold influential positions and put it to use to the detriment of UCATT members, hence it is still "live";

44. The Appellant accepted that it was impossible to know if any such disclosure had been made since the seizing of the information by the

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ICO in February 2009. He submitted that UCATT would be in the best position to assess that; for example, it would be less likely if most of the 3213 names on the "blacklist" were not members of UCATT but of its associated unions, if the information dated back 15/20 years or if it involved activists who engaged publicly.

45. We had to remind the Appellant that the information sought under the request of 23 December 2009 was for a copy of files that contained references to UCATT and its predecessor unions and not for a copy of the "blacklist" at item (i) in paragraph 4 above, seized from the premises of the Consulting Association in February 2009, and that the disputed information amounted to 86 copies of files that contained references to UCATT, ASW and AUBTW.

46. The Commissioner submitted that whilst there has been publicity concerning the Consulting Association and its records, including the public naming of companies which used its services, the disputed information in this case has not been available to the public. The information was previously available to subscribers of the Consulting Association but not the public. Unusual action had been taken by the Commissioner to remove this information from circulation.

47. The Commissioner argued that if the disputed information were in the public domain, the Appellant's request would have been otiose. We take this to mean either that there would have been no need to make the application or that the request would have been refused on the basis of the exemption in section 21 of FOIA, that the information was reasonably accessible by other means.

48. We are not persuaded to adopt the Appellant's novel definition of public domain, that is, to assess in any given case what matters to the data subject and in this case to include the putative thoughts of hypothetical construction site foremen.

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49. We are satisfied that the disputed information in this case is not, and has not previously been, available to the public from other sources and therefore the requirement in section 59(1)(c) is made out and disclosure prohibited.

Disclosure would have "lawful authority"

50. In the alternative, the Appellant submits that even if the requirements of section 59(1) are made out, disclosure of the disputed information would have "lawful authority" under section 59(2) in the following ways:

    (i) there is consent to the disclosure;

    (ii) disclosure is necessary to discharge Community obligations;

    (iii) disclosure is necessary in the public interest.

(*i) Consent*

51. Section 59(2)(a) DPA provides that:

> *"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.*

52. The Appellant submitted that if UCATT gives consent to information about itself being disclosed that would amount to lawful authority to justify disclosure.

53. The Appellant has not seen the disputed information, and therefore has made an assumption that there are files or record cards from the card index that relate to the Union rather than an individual. This is an

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incorrect assumption in light of the content of the disputed information. The disputed information is a copy of records from the card index system which amounted to an intelligence database and which relate to individuals. The Appellant's submissions concerning the consent of UCATT for the disclosure of information referring to UCATT may carry some force if the content of the disputed information was as he has assumed. However, there is no information of this nature within the closed bundle or anywhere within the seized materials. The only references to the relevant Unions are in the context of individuals who happen to be union members. If the personal data was redacted to leave reference to the Unions concerned then the information would be meaningless and of no value because of its lack of context (i.e. the union member).

54. In the Appellant's skeleton argument it was suggested that, as a matter of principle, FOIA can be construed as permitting disclosure of personal information to a representative organisation already having its members' consent to act on their behalf and hold their personal data. This point was not specifically pursued before us, as the Appellant stressed the request was not a request for personal data, but it does illustrate the confusion that the Appellant appears to continue to be operating under in respect of what information had been requested. This confusion is added to by submissions concerning UCATT's role in respect of individual members' rights, as data controller and the co-ordination of SARs from UCATT's 120,000 members; the request of 23 December 2009 was not for the names of individuals appearing on the "blacklist", item (i), or in the intelligence database, item (ii).

55. However, even if hypothetically this information falls within the scope of the request, it cannot be said that the individual union members have properly consented in the manner required under the DPA. This is because by its very nature, the personal data is sensitive given that it relates to trade union membership. In some instances the disputed

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information also contains references to offences (alleged or otherwise) and to political opinion.

56. Where sensitive personal data are concerned, a condition from both Schedules 2 & 3 DPA need to be satisfied in order for the processing to be regarded as fair. Whilst arguably it might be said that union membership meets the first condition of schedule 2 DPA (relating to consent), the same cannot be said of the first condition of schedule 3, also relating to consent. This is because consent for the processing of sensitive personal data must be explicit as well as fully informed. In other words, a positive expression of consent, for example in the form of a signature given in the full understanding of what personal data is to be processed and for what reason (in this instance, the processing in question being disclosure).

57. We are not satisfied that there has been consent of any or all of the individuals identified in the disputed information and therefore the "gateway" to disclosure in section 59(2)(a) is not available.

58. For completeness we should refer to evidence from the ICO in the open bundle that lawful access to the information could be obtained by way of a court order, whereby a court could make a decision in respect of what information should be provided to an applicant. At the hearing, the Commissioner confirmed that a number of court orders in respect of this information had been obtained and actioned by the ICO. These orders were thought to have been solely in the context of Employment Tribunal hearings.

(ii)Disclosure is necessary for the discharge a Community obligation

59. Section 59(2)(c)(ii) DPA provides that:

> *"For the purposes of subsection (1) a disclosure of information is made with lawful authority only if, and to the extent that-*
>
> *…*

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the disclosure is made for the purposes of, and is necessary for, the discharge of-

…

(ii) any Community obligation.

60. The Appellant submitted the refusal to disclose the information interferes with rights protected by the ECHR, given effect in domestic law by the Human Rights Act. In particular:

> Article 9 – freedom of thought, conscience and religion: including the right to change their belief(s) or, either alone or in community with others and in public and private, to manifest those beliefs.
>
> Article 10 – freedom of expression: including the right to hold opinions and receive and impart information and ideas.
>
> Article 11 – freedom of assembly and association: including the right to form and join trade unions for the protection of their interests.

61. The Appellant submitted that the legitimate functions of a trade union in a democratic society are hindered by the ICO's refusal to disclose the information requested and by the Commissioner's decision in his Decision Notice to uphold that refusal: *"The Blacklist represents a very significant breach of the HRA in relation to UCATT and its officials and individual members in that the information collated, recorded and distributed by Ian Kerr, the Consulting Association and its subscribers and contributors places illegitimate sanctions on legitimate rights, freedoms and interests including individual and collective rights embodied in Articles 9,10 and 11. UCATT has a responsibility to ameliorate the adverse effects of the Blacklist."*

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62. Before us, the Appellant illustrated an example of a possible breach of Article 9, of an individual who had been active within a Union in the 1970s but had now changed his beliefs. This is fallacious. There is no interference with the right to change beliefs in that scenario. The *existence* of the Blacklist itself might interfere with protected rights, but it is not part of our jurisdiction to say whether it did.

63. The Appellant went so far as to argue that disclosure of the disputed information is necessary to discharge UCATT's obligations in respect of its trade union functions, to protect the rights of its individual members. Once again, we consider that these arguments relate to the compilation and dissemination of the "blacklist" itself and not the information that had been requested on 23 December 2009 which forms the disputed information in this case.

64. We agree with the response of the Commissioner, that it was the act of blacklisting which interfered with these rights, not the refusal to disclose under FOIA. He submitted that the rights protected by Articles 9, 10 and 11 were very far from being interfered with. By way of assistance, he drew our attention to a decision from the European Court of Human Rights, *Leander v Sweden* ((1987) 9 EHRR 433)[2] in which the Court observed:

> *"74. ..that the right to freedom to receive information basically prohibits a Government form restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such of those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.*

[2] The Applicant had been refused permanent employment at the Naval Museum on account of certain secret information which allegedly made him a security risk. He contended that he should have had an opportunity to challenge this vetting.

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75. There has thus been no interference with Mr. Leander's freedom to receive information, as protected by Article 10."

65. This has been followed in domestic case law; *R (Howard) v Secretary of State for Health* ([2002] EWHC 396 (Admin))[3]:

"The European Court of Human Rights has consistently rejected attempts by applicants to assert a right of access to information under article 10, holding that article 10 does not confer a right on individuals to receive information that others are not willing to impart."

66. The Commissioner submits that even if the Appellant's submissions were correct, disclosure of the information pursuant to this request is not "necessary" as there is a simple mechanism available to achieve that same result, that is, by individuals making a SAR under the DPA.

67. We consider that this ground of appeal is misconceived. The refusal to disclose the requested information does not interfere with any right protected by the ECHR. It follows that we do not consider that disclosure of the disputed information is necessary in the discharge of any Community obligation and therefore the "gateway" to disclosure in section 59(2)(c)(ii) is not available.

(iii) Disclosure is necessary in the public interest

68. Section 59(2)(e) DPA provides that:

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

…

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

[3] Application for Judicial Review of the decision of the Secretary of State for Health not to hold a public inquiry into the conduct of doctor.

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69. The Appellant relied on the decision of a differently constituted panel of this Tribunal in *Friends of the Earth v The Information Commissioner and The Department for Trade and Industry* (EA/2006/0039) as support for his submission that the Commissioner erred in concluding that disclosure was not necessary in the public interest. In paragraph 44 of that decision, the Tribunal identified *"at least four elements"* to be considered when assessing whether disclosure was necessary in the public interest and the Appellant submitted that these were the matters that we should take into account:
    (1) the extent of the legitimate interests of UCATT;
    (2) the extent of the ICO's interests;
    (3) the public interest in ensuring that there is a transparent public understanding as to the manner in which the Commissioner discharges his functions, and
    (4) the "perhaps countervailing" public interest in protecting the ability of the Commissioner to carry out its statutory functions under section 50 FOIA.

70. The extent of the legitimate interests of UCATT was said to be very wide and important in a democratic society, that it should have all information available to assist its members.

71. Within the Grounds of Appeal, the Appellant set out a number of factors to support the submission that disclosure is necessary in the public interest:
    i) There is a public interest in the issue of Blacklisting, the threats it imposes to employment rights and the need to inform the debate on penalties for those involved in Blacklisting;
    ii) This public interest has been enshrined in law and acknowledged by the Commissioner in his responses to public consultations by the House of Lords Select Committee on the Constitution;

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iii) This public interest has been further confirmed by the Commissioner setting up a helpline;

iv) It is in the public interest that employment rights not only exist but are actively pursued and enforced;

v) It is in the public interest that workers are informed of their employment rights by the most effective means possible;

vi) The information sought is likely to inform the relevant data subjects of beaches of their employment rights for which but for disclosure they would otherwise have no remedy;

vii) The proactive promulgation of the information sought to the members affected subject always to the data protection principles would serve that end;

viii) The employers who purchased information from the Blacklist constitute a large proportion of the construction industry and are frequently involved in public projects using public funds;

ix) It is in the public interest that any use of information by the employers is brought to light. Disclosure would further that end;

x) The current provisions provided by the ICO are inadequate and ineffective. The Appellant is better placed to provide the service faster, more efficiently and more comprehensively.

72. Before us, the Appellant argued that the thrust of these objectives was not to suggest that UCATT was really seeking the personal data of individuals, but that there was a *"curious divide"* between individual and corporate rights and that in this case these were very closely aligned.

73. The Commissioner accepted that a number of these objectives by the Appellant are public interest arguments in favour of disclosure and reflected this in his Decision Notice. However, the Commissioner

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submits that section 59(2)(e) DPA sets a relatively high threshold for disclosure being "necessary" in the public interest.

74. Our attention was drawn to the decision of a differently constituted panel of the Tribunal in *Lamb v Information Commissioner and The Cabinet Office* (EA/2010/0108)[4]. At paragraph 18, the Tribunal said:

> *"Although a determination under section 59(2)(e) is based on a public interest test it is a very different test from the one commonly applied by the Information Commissioner and this Tribunal under section 2(2)(b), when deciding whether information should be disclosed by a public authority even though it is covered by a qualified exemption. The test there is that disclosure will be ordered unless the public interest in maintaining the exemption outweighs the public interest in disclosure. Under section 59 the information is required to be kept secret (on pain of criminal sanctions) unless the disclosure is necessary in the public interest. There is therefore an assumption in favour of non-disclosure and we are required to be satisfied that a relatively high threshold has been achieved before ordering disclosure."*

75. In the Grounds of Appeal, the Appellant set out the following arguments in support of the suggestion that the necessary disclosure under section 59(2)(e) DPA need not be disclosure to the world at large. It was suggested that the Commissioner should have considered the merits of disclosure, with undertakings, to the Appellant having regard to the following factors:

    (i) The Appellant is the largest construction trade union with over 120,000 members;

[4] This was another case involving reliance on section 44(1)(a) of FOIA in conjunction with section 59 DPA in refusing a different request for information from the ICO.

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(ii) The Appellant's membership is exclusively from the construction industry, to which the Blacklist related;

(iii) Names were added to the Blacklist because of union membership and activity and thus union members will be disproportionately represented within it;

(iv) It is therefore likely that the vast majority of the names within the Blacklist will be, or have been, members of the Appellant or its predecessor unions;

(v) The Appellant is already a data controller for workers within the construction industry with an excellent record in observing its data protection duties and the data protection principles;

(vi) The Appellant would remain bound by its ordinary obligations as a data controller were the information sought to come under its control;

(vii) The Appellant has direct lines of communication to its membership, not only by general means such as publications, email and the website, but personally by telephone or post to individuals;

(viii) The means of general communication referred to above will also come to the attention of non-members working within the construction industry;

(ix) The Appellant has a duty to actively pursue its members' interests and would therefore be likely proactively to inform any members whose names appeared on the Blacklist, rather than waiting for members to enquire;

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(x) The proactive steps referred to above would incur no cost to the public purse.

76. The Appellant relies upon the decision in *Corporate Officer of the House of Commons v The Information Commissions and Brooke* ([2008] EWHC 1084) in which it was held that "necessary" within paragraph 6 of schedule 2 of the DPA (conditions relevant for the purposes of the first data protection principle that personal data shall be processed fairly and lawfully) reflected the meaning attributed to it by the ECHR when justifying an interference with a recognised right, namely, that there should be a pressing social need, and that the interference was both proportionate as to means and fairly balanced as to ends, and argued that the same considerations apply by analogy with section 59(2)(e) DPA.

77. He submitted that there is a *"pressing social need to right the injustices of the Blacklist and UCATT is the most obvious organisation."*

78. We were asked to consider that *"since the individuals on the Blacklist are likely to be political or trade union activists and members of UCATT or its predecessor unions and are almost certain to have faced detriment within the particular vicissitudes of the construction industry employment marketplace, the prospect of unwarranted harm to those individuals by disclosure is low in any event and far outweighed by the legitimate interest in disclosure."*

79. Putting to one side the emotive language used in advancing this proposition, it is clear, from the Grounds of Appeal, the written skeleton argument and the submissions during the hearing, that the Appellant, contrary to submissions before us, is envisaging the disclosure of either the "Blacklist" in item (i) or of personal data of individuals. Criticism was placed on the Commissioner for taking into account the interests of individuals and not of UCATT.

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80. The Appellant has not seen the disputed information, and therefore has made an assumption that there are files or record cards from the card index that relate to the Union rather than an individual. The disputed information is a copy of records from the card index system which amounted to an intelligence database and which relate to individuals.

81. In respect of the interests of the ICO, the Appellant submits that the Commissioner should not have taken into account the effect on the ICO's discharging of its regulatory duties when assessing the public interest in disclosure.

82. The Commissioner rejected the suggestion that there could be disclosure to UCATT only, with or without undertakings. The "gateway" in section 59(2)(e) DPA requires the weighing of public interest considerations in all the circumstances; an inescapable aspect of those circumstances is that disclosure in response to this particular request would be disclosure under FOIA and that must be treated as disclosure to the world at large (*Guardian and Brooke v The Information Commissioner and BBC* (EA/2006/0011 and 0013 at paragraph 52).

83. He agreed that there was public interest in individuals being informed that their personal data was held by the Consulting Association on its blacklist database. However, he rejected the arguments that disclosure to UCATT of the disputed information would be necessary to that end, on the high standard articulated in *Lamb*. This is because the ICO has already provided an alternative means to that end by inviting potentially affected individuals to make SARs to find out for themselves if they appear on the "blacklist".

84. While the Commissioner concedes, and we accept, that UCATT has more immediate contact with its union members than the ICO, this does not mean that disclosure is necessary in this case. At the start of the hearing we were provided with a copy of the UCATT Autumn 2009 newsletter which bore the headline "Are you one of the 3,200 on the

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blacklist?" Inside, a column on page 10 and page 11 covered the news story itself. There was also a "poster" insert that could be detached and displayed at places of work alerting members to the issue and providing details of the ICO helpline. This appears to have been the extent of the efforts of UCATT to draw the attention of its members to the helpline or to provide further advice and assistance to them.

85. We are satisfied that there was and remains an available and suitable alternative means to the same objective, that is, on request individuals should be informed whether their personal data was held by the Consulting Association on its blacklist database. However, we note again that the information sought in the request was not for the personal data of individuals.

86. In the course of the hearing, the Commissioner indicated that the information remained available and that the ICO was willing to co-operate with UCATT in processing individual SARs using the two stage process referred to in paragraph 6 above. This could be either via individual union members giving informed and explicit consent to UCATT or by the union assisting individual members to make direct SARs to the ICO.

87. Although not a matter strictly within our jurisdiction, we consider it appropriate to make the following observation. As both parties appeared to agree that the information seized from the Consulting Association should be placed in the hands of those it affected, it is of some concern that there had been no dialogue between them save for the request for information under FOIA. UCATT criticised the ICO for the mechanism it deployed for the dissemination of the information, however we are surprised, in light of the arguments advanced throughout this appeal, that UCATT did not make a more concerted effort to assist its members in obtaining information about the "blacklist". We are also surprised that such a small number of successful applications have been made by people on the "blacklist".

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88. We agree with the Commissioner that the arguments advanced concerning how companies accessed the blacklist or the use to which the information on the blacklist was put are not relevant in this case. The names of the companies which subscribed to the Consulting Association have been made public. The disputed information does not assist with this public interest objective.

89. In respect of weight to be given to the interests of the ICO, the Commissioner submitted that the effects on the ICO's discharging of its regulatory duties was not only relevant but should be given substantial weight in the circumstances of this case. Firstly, this was a criminal investigation by the ICO and there is a strong public interest in criminal investigations being conducted away from the public gaze and secondly, one of the objectives of seizing the disputed information was to prevent further dissemination. In relation to the first, we would have accepted the Commissioner's point in respect of conducting criminal investigations away from the public gaze had there been anything within the disputed information which referred to any aspect of the investigation other than that which has already been covered in the press releases from the ICO. We agree that there is a substantial public interest in the disputed information not being disseminated further and agree with the Commissioner that under FOIA it is not possible to disclose to UCATT, with or without undertakings.

90. While there is public interest in ensuring the ability of the ICO to carry out its statutory functions under section 50 FOIA, we do not, however, consider that this factor has any bearing in the circumstances of this case. This is because there is nothing relating to the ICO's actions contained within the disputed information and details of the action taken have been publicised in a number of related press releases from the ICO.

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91. In light of our findings above, it follows that we do not consider that disclosure of the disputed information is necessary in the public interest and therefore the "gateway" to disclosure in section 59(2)(e) is not available.

92. As the prohibition on section 59(1) DPA applies to the disputed information and there is no "gateway" to disclosure being with lawful authority, we are satisfied that the absolute exemption in section 44 of FOIA is engaged and the ICO entitled to refuse the request.

93. We consider it worthy of note that during the course of the hearing, counsel for the Commissioner was asked how the disclosure of the names of companies which had subscribed to the blacklist could have been published via press notices, given that this information had itself been derived from that seized by the Commissioner in the exercise of his duties. In other words, why would disclosure of the list of companies not constitute a breach of s.59(1) DPA.

94. In response, the Commissioner asserted that disclosure was necessary having regard to the rights and freedoms or legitimate interests of affected persons because it was in the public interest to know which companies were subscribing to the blacklist, thus justified under section 59(2)(e) DPA. Furthermore, that publication of the list of companies would assist affected data subjects in bringing action against former or prospective employers where their employment rights had been infringed through reference to the blacklist. Consequently this was further justified under section 59(2)(d) DPA.

<u>Section 40(2) FOIA – personal data</u>

95. The Commissioner submitted that further, or alternatively, the disputed information is exempt from disclosure under section 40(2) FOIA.

96. The relevant part of section 40(2) FOIA provides:

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(2) Any information to which a request for information relates is also exempt information if-

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or second condition below is satisfied.

(3) The first condition is –

(a) In a case where the information falls within any of the paragraphs (a) to (d) of the definition of 'data' in section 1 (1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene –

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress)…..

97. The first data protection principle states that personal data shall be processed (which includes disclosure of the information) fairly and lawfully and, in particular, in the case of sensitive personal data, at least one of the conditions in Schedule 3 of the Data Protection Act 1998 (the "DPA") is also met.

98. In light of our findings above in relation to the exemption under section 44 FOIA being engaged, we do not need to reach a decision on this point.

99. We do however consider it appropriate to record our concern that section 40(2) FOIA was not raised at any stage by the ICO when the dealing with the request nor by the Commissioner during his investigation of the way in which the request had been dealt with.

100. Additionally, the request in respect of the files containing references to ASW, The Amalgamated Society of Painters and Decorators, The Association of Building Technicians and The Amalgamated Union of Building Trades Workers (AUBTW) was initially refused on the basis of section 12 FOIA as the estimated cost of

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complying with the request would exceed the appropriate limit. At the internal review, the ICO upheld the decision that section 12 FOIA was engaged, but concluded that the information would *in any event* be exempt under section 44(1)(a) FOIA for the same reasons as the UCATT information. He apologised for this not being made clearer in the original refusal.

101. We are aware that the Commissioner's decisions are read by other public authorities to inform them as to their obligations under FOIA. It is incumbent on the Commissioner in many cases to stress the importance of identifying and considering any applicable exemptions to disclosure as early as possible and to notify a requestor of those exemptions in any refusal notice. Failure to do so is in breach of section 17(1)(b) of FOIA. The failure of the ICO, as the public authority dealing with a request for information, to do so is inexcusable.

Conclusion and remedy

102. For the reasons set out in detail above, we have concluded that the Commissioner's decision was correct and accordingly, we dismiss this appeal.

103. Our decision is unanimous.

Other Matters

104. Some of the information contained on the records of the 86 individuals which makes up the disputed information in this case is very old. Some records had effectively been closed by 1980.

105. The Appellant addressed us in respect of the "duality" of the role of the Information Commissioner in this case, as both the public authority which refused the request for information and the regulator

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which upheld that refusal. While not affecting our decision in this case, we consider that the Commissioner's investigation into the refusal was lacking in real challenge. It seems to us that in a situation such as this, the Commissioner's investigation should be as thorough and transparent as possible.

Judge Annabel Pilling
Tribunal Judge
Dated: 26 July 2011