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

ON APPEAL FROM:

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

Appellant: CHRISTOPHER COLENSO-DUNNE

Respondent: THE INFORMATION COMMISSIONER

On the papers

Date of decision: 29 November 2013

Before
CHRIS RYAN
(Judge)
and
JEAN NELSON
MALCOLM CLARKE

Subject matter: Personal data s40
Prohibitions on disclosure s44

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

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed in part and the Decision Notice dated 12 January 2012 is substituted by the following notice:

Public Authority: **The Information Commissioner's Office**

Address: **Wycliffe House**
Water Lane
Wilmslow
SK9 5AF

Complainant: **Christopher Colenso-Dunne**

Decision: For the reasons given in the Reasons for Decision below and in the Preliminary Decision and the Ruling (as defined in those Reasons) the Information Commissioner was wrong to have refused to disclose to the Complainant, in response to his information request, the names of the individuals identified in the First Confidential Annex referred to in the Reasons for Decision.

Direction: Within 35 days of the date of this Substituted Decision Notice the Information Commissioner should disclose to the Complainant the information set out in the First Confidential Annex.

REASONS FOR DECISION

Background

1. In this decision capitalised terms have the meaning attributed to them in the Preliminary Decision or the Ruling referred to below.

2. The Preliminary Decision was issued on 6 November 2012 and is available at www.informationtribunal.gov.uk/DBFiles/Decision/i1129/EA-2012-0039_preliminary_decision_06-11-2012.pdf

   In the Preliminary Decision we identified the issues to be determined but explained that we were not able to reach a decision without examining the

Spreadsheets which, it had become apparent, contained information falling within the scope of the Appellant's original information request. The ICO was directed to make the Spreadsheets available to us.

3. The Ruling was issued on 27 March 2013 and is available at www.informationtribunal.gov.uk/DBFiles/Decision/i1130/EA-2012-0039_ruling_27-03-2013.pdf

   We explained in the Ruling the manner in which we had filtered out of the Spreadsheets data that appeared to us to be irrelevant to the issues identified in the Preliminary Decision in order to create the Consolidated Reduced Spreadsheet. The Spreadsheets contained something in the region of 17,000 records, each comprising more than 25 separate data fields. The Consolidated Reduced Spreadsheet approximately 470 records.

4. We included in the Ruling directions designed to enable the parties to make submissions on the basis of the Consolidated Reduced Spreadsheet (or, in the case of the Appellant, so much of it as we considered could properly be disclosed to him). Those directions were amended by a further ruling issued on 15 May 2013.

5. As the parties remained content for the final part of the appeal to be determined without a hearing we have reached our decision on the basis of the documentation (including the Consolidated Reduced Spreadsheets) and the written submissions filed by the parties.

Our Decision

6. With the benefit of the written submissions we have concluded (for the reasons set out below) that many, but not all, of the names of journalists recorded in the Consolidated Reduced Spreadsheet as clients of the investigator at the heart of Operation Motorman should have been disclosed to the Appellant in response to his information request. The First Confidential Annex to this decision is a copy of just those parts of the Consolidated Reduced Spreadsheet that contain those names, together with the names of the media outlet with which the investigator recorded each as having been associated at the time.

7. The First Confidential Annex should remain confidential until the later of:
   a. The time for appealing against this decision shall have expired without an appeal having been filed; or

b. In the event that such an appeal is filed, the date when it shall have been determined or withdrawn.

8. The Second Confidential Annex comprises a more substantial extract of the Consolidated Reduced Spreadsheet in which we have included the content of certain "comment" data fields, which provide an indication of what the original notebooks recorded about the investigator's activities. We have set out, in a new column (in which the print is red) a short note explaining the reasons, on the evidence available in the "comment" and "service requested" fields, for our decision to order disclosure of each element of the information in the First Confidential Annex. Our general reasoning, which is not confidential, is set out in the following section of this decision.

9. The Second Confidential Annex is to remain confidential at all times because it includes information that falls outside the scope of the original information request and may enable some of those who were the targets of the investigator's enquiries to be identified.

Our reasoning

10. In light of the issues identified in the Preliminary Decision we have reached our decision by considering the following questions:
    a. To what extent, if any, does the information recorded in the Consolidated Reduced Spreadsheet constitute "personal data consisting of information as to ... the commission or alleged commission by [the relevant journalist] of any offence", so as to constitute his or her Sensitive Personal Data for the purpose of DPA section 2? In this respect we have already determined that the identity of any individual journalist, in the context of the information requested, constituted his or her personal data (paragraphs 33 - 35 of the Preliminary Decision) and that none of the conditions capable of justifying the disclosure of Sensitive Personal Data would apply to the facts of this appeal (paragraph 18 of the Preliminary Decision). It follows that, if and to the extent that we conclude that, in context, the identity of a journalist constitutes his or her Sensitive Personal Data, we will be bound to conclude that the ICO's refusal to disclose was justified.
    b. If and to the extent that the information recorded in the Consolidated Reduced Spreadsheet does not constitute Sensitive Personal Data would its disclosure by the ICO nevertheless have constituted a breach of any of the Data Protection Principles?

That is to say (as set out in paragraph 38 of the Preliminary Decision):

> *"(i) whether disclosure at the time of the information request would have been necessary for a relevant legitimate purpose; without resulting in*
> *(ii)an unwarranted interference with the rights and freedoms or legitimate interests of each of the [journalists in question]; and, even if those tests are satisfied*
> *(iii) whether disclosure would have been unfair or unlawful for any other reason."*

c. If and to the extent that the conclusions reached under (a) and (b) above would lead to disclosure, should any of the information nevertheless be withheld on the basis that disclosure would be prohibited under DPA section 59, (so as to render it exempt information under FOIA section 44) because it would not be with "*lawful authority*" – see paragraph 45 of the Preliminary Decision.

Sensitive Personal Data?

11. In paragraph 37 of the Preliminary Decision we speculated that an examination of the Spreadsheets might enable us to determine whether or not they disclosed sufficient connection with criminal activity to bring the information within the meaning of "Sensitive Personal Data". Having carefully examined the information in the Consolidated Reduced Spreadsheet we have concluded that it does not constitute information as to the commission or alleged commission of any offence by any of the journalist identified in it. It does contain evidence that the investigator engaged by the journalist committed, or contemplated committing, criminal activity. And, self-evidently, it discloses that the investigator received some form of instruction from the journalist. But there is no suggestion in the Consolidated Reduced Spreadsheet that the journalist had instructed the investigator to use unlawful methods or that he or she had turned a blind eye to their adoption or, indeed, whether he or she had in fact expressly forbidden the investigator from doing anything that was not strictly legal. In those circumstances we are satisfied that the information set out in the Consolidated Reduced Spreadsheet does not say anything that would constitute the sensitive personal data of any of the individual journalists identified in the first confidential annex to this decision.

Disclosure necessary for a relevant legitimate purpose and not an unwarranted intrusion into the journalists' privacy rights?

12. We considered the general principles on this element of the appeal in paragraphs 38 – 41 of the Preliminary Decision and, in paragraph 42,

suggested that the Spreadsheets might contain information that suggested a connection between a named journalist and an investigator which, while not so close as to bring it within the definition of sensitive personal data, nevertheless indicated an indirect connection with the investigator's activities, which the public would have a legitimate interest in knowing. In the Ruling we invited the parties to make written submissions on the extent, if any, to which the conclusions of The Right Honourable Lord Justice Leveson in his November 2012 report on the first part of his "Inquiry into the culture, practices and ethics of the Press" might have an impact on this element of the appeal. Each of them did so, although the Appellant was limited in what he could say due to the limited information made available to him and the Information Commissioner, who had the whole of the Consolidated Reduced Spreadsheet available to him, based his submissions on general principles rather than the detailed information in respect of each of the recorded transactions.

13. Some of the Appellant's submissions were directed at the extent of the redactions made to the materials released to him to enable him to contribute to the debate and are clearly not relevant to the determination of the appeal itself. He also raised an argument as to the impact, on the data protection aspects of our decision, of the possibility that some of the journalists and/or some of those who were investigated might have died before the date of his information request. With respect to the Appellant, we do not think that the invitation to speculate on these issues helps us in striking the required balance.

14. The Commissioner relied upon paragraph 3.9 on page 261 of the Leveson Report, in which it was said that at least some of the information sought could have been obtained lawfully. He argued that it would be unfair, and not in accordance with data protection principles, to disclose the name of a journalist if there was any doubt as to whether he or she had committed an offence. Reliance was also placed on the fact that Lord Leveson had deliberately avoided condemnation of any individual journalist (Paragraph 6.3 on page 296 of the report). In our view, however, disclosure of the information in the First Confidential Annex version of the Consolidated Reduced Spreadsheet does not establish criminal guilt or innocence, for the reasons given in paragraph 11 above. But it may still not be unfair to disclose that a particular journalist had dealings with an investigator, in light of the legitimate public interest in the whole question of media behaviour, as well as the use of investigators by others such as lawyers and insurance companies.

15. The very establishment of the Leveson Enquiry is a strong indication of that public interest, even though the emphasis of the Enquiry was on

telephone hacking rather than the other forms of intrusion suggested by many of the entries in the Spreadsheets. The detailed language of the passage relied on by the Commissioner is also revealing. It reads:

> *"Without condemning any journalist (none of whom were ever even interviewed by the ICO), it is sufficient for me to conclude that, at least in part, what has been revealed by some of the Operation Motorman evidence demonstrates an attitude to compliance with the law relating to data protection which can only be described as cavalier, if not worse: it is certainly revealing of what, at that time at least, were the practices of parts of the press."*

The Appellant drew attention, in addition, to the fact that the Leveson Report included criticism of the use made by the ICO of information obtained from Operation Motorman, including (at paragraphs 5.2 – 5.9 on pages 1059 -1061 of the report) the failure to pursue a possible link between phone hacking and the efforts of the investigators to obtain private phone numbers and lists of "friends and family" numbers. The Commissioner accepted that there was public interest in the ICO's actions but argued that such an interest was not a factor relevant to the issue of fairness or otherwise of the disclosure sought. In our view there is a legitimate interest in the public being made aware of the sort of information the ICO had in its hands at the time when it pursued criminal proceedings against certain investigators but did not take any steps that might have led to the prosecution of those who had engaged the services of those investigators.

16. The Commissioner also commented on Lord Leveson's decision not to extend his inquiry into the activities of individual journalists or the approach taken by their employers after they had become aware of their employees' dealing with the investigators in question. He preferred to leave that form of enquiry to the ICO. The Commissioner provided no indication of whether the ICO had pursued any such enquiry but argued that Lord Leveson was doing no more than to confirm that the appropriate body to consider whether an offence under SPA section 55 had been committed was the ICO. In fact Lord Leveson had gone further. The Appellant drew our attention to the fact that, in paragraph 16 of his Ruling in relation to Operation Motorman evidence, dated 11 June 2012, Lord Leveson wrote:

> *"I ought to deal with two final points. First, it is suggested (entirely correctly) that although a number of journalists were interviewed under caution, none was charged and all are entitled to the presumption of innocence. That is not, however, a total answer to a charge of failure of corporate governance. There are many cases*

in which sufficient evidence cannot be adduced for criminal purposes because of the right to decline to answer questions together with the burden of proving guilt to the very high standard that the law rightly requires. That is not to say that the absence of prosecution (and the fact of the presumption of innocence) means that the issue of compliance with ethical standards does not arise. To be fair, I do not believe that any title has advanced a submission contrary to this proposition but it does serve to underline why the corporate response to any possibility of potentially criminal behaviour...is relevant to any consideration of culture, practices and ethics."

17. The Appellant drew particular attention to Lord Leveson's acknowledgement that, while there could be no certainty that any journalist had committed a criminal act in hiring an investigator both the journalists and their employers may have breached a moral duty owed to the victims of unlawful intrusion. Although the Commissioner argued that it would not be appropriate for us to give weight to this when considering the interests for and against disclosure, we believe that it is a factor in favour of disclosure, to which we should give due weight.

18. We have taken into account the issues of impropriety (which, while very possibly not involving criminality on journalists' part, is nevertheless serious) and corporate governance in the context of the privacy rights of the individuals who appear from the Consolidated Reduced Spreadsheets to have been investigated. We believe that, together, they give rise to a very substantial interest in the public knowing the identities of those who instructed the investigators. The Second Confidential Annexe version of the Consolidated Reduced Spreadsheet contains (in the red print column) further explanation of our reasoning on this point, by reference to each identified transaction. We also give some weight to the public interest in knowing more about the information which was in the possession of the ICO and which the Leveson Report suggested it failed adequately to pursue.

19. We have weighed against those factors the interests of the journalists concerned and the vigorous arguments put forward by the Commissioner to the effect that publication of information indicating that they had engaged the services of the investigators concerned would be so unfair as to outweigh the factors in favour of disclosure. We have taken account of the fact that the journalists would have expected details of their day to day professional activities to remain confidential. But it does not follow that this is a legitimate expectation of privacy that is capable of carrying significant weight to be placed in the scales against the interests in

publicity. The very number of journalists mentioned in "What Price Privacy" suggests that it must have been well known within the profession what types of information could be obtained with the help of investigators, even if the means of obtaining it were not fully understood. The rights of individuals under data protection laws would also have been widely known at the time. In those circumstances those engaging the particular services identified in the Confidential Annexe One version of the Consolidated Reduced Spreadsheet should have known that they ran the risk of becoming involved in behaviour that fell short of acceptable standards. This seriously dilutes the weight to be attributed to their privacy rights and leads us to conclude that the balance tips in favour of disclosure.

Disclosure prohibited or permitted because made with lawful authority?

20. We explained in paragraph 37 of the Preliminary Decision that the parties had relied on the same arguments, in respect of the presence or absence of "lawful authority" for disclosure under DPA section 59(2)(e), as they had deployed in respect of the possible breach of data protection principles. That remains the position today. We have reviewed the evidence and arguments relied on in reaching our conclusion on the data protection aspect of this case (in both the paragraphs above and the Second Confidential Annex). We have concluded that it justifies a finding that the ICO would have had lawful authority to disclose the names of the journalists set out in the First Confidential Annex, that this information was not therefore exempt information under FOIA section 40 and that the ICO should have disclosed it in response to the original information request.

Conclusion

21. In light of our findings and reasons set out above we have decided that the appeal should be allowed to the extent that the information in the First Confidential Annex should have been disclosed and that a Substituted Decision Notice should be issued directing its disclosure.

22. Our decision is unanimous

Chris Ryan
Judge

29 November 2013