THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Upper Tribunal Case Nos. GIA/702/2014

PARTIES

The Information Commissioner (Appellant)

and

Christopher Colenso-Dunne (Respondent)

APPEAL AGAINST A DECISION OF A TRIBUNAL

DECISION OF THE UPPER TRIBUNAL

JUDGE WIKELEY

DECISION BY THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to dismiss the Information Commissioner's appeal under reference GIA/702/2014.

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) dated 29 November 2013, under file reference EA/2012/0039, in relation to Mr Colenso-Dunne's appeal against Decision Notice FS50422884 issued by the Information Commissioner on 12 January 2012, does not involve any error on a point of law. The First-tier Tribunal's decision accordingly stands.

However, the First Confidential Annex to the First-tier Tribunal's decision is to remain confidential until the later of (i) the time for appealing against this decision of the Upper Tribunal shall have expired without an application for permission to appeal having been lodged; or (ii) in the event that such an application is filed, the date when it shall be determined or withdrawn.

The Upper Tribunal consents to the withdrawal of Mr Colenso-Dunne's cross-appeal under reference GIA/1270/2014.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007 and rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

REASONS

The role of the Information Commissioner: *Quis custodiet ipsos custodies?*

1. Mr Christopher Graham, the Information Commissioner (IC), is a man who wears two hats. He is the statutory regulator in the arena of information rights, holding the ring between requesters under the Freedom of Information Act 2000 (FOIA) and public authorities. So if requesters are unhappy with the response of public authorities to their FOIA requests, they may complain to the IC. But the IC is also himself a public authority (see Part VI of Schedule 1 to FOIA). So it may come to pass – as in this case – that the *public authority* IC is investigated by the *regulator* IC. In this decision, and in that rather peculiar context, the public authority is called the Information Commissioner's Office (the ICO) and the regulator is the IC.

2. This dual role may only serve to fuel some of the more outlandish conspiracy theories that abound on the internet. Certainly, as the First-tier Tribunal noted in its preliminary decision on this appeal, this conundrum is "an unusual, and unsatisfactory, feature of this area of the law" (at paragraph [1]). So, as the Honourable Member of Parliament for Uxbridge and South Ruislip would doubtless ask, "*Quis custodiet ipsos custodies*?" Who will watch the watchmen? The answer is that the First-tier Tribunal (General Regulatory Chamber) – or "the Tribunal", previously the Information Tribunal – does (and, on any further appeal, the Upper Tribunal), at least within the limited confines of their respective appellate jurisdictions.

The disputed information in this appeal

3. The disputed information in this appeal is the list of 305 journalists' names seized by the ICO during a raid in 2003 on the home of Mr Steve Whittamore, a

private investigator, as part of "Operation Motorman". That investigation by the ICO forms part of the background to the various civil and criminal proceedings generated by the phone-hacking scandal and to the establishment of the Leveson Inquiry. The ICO (as public authority) refused to release the list of journalists' names in response to Mr Colenso-Dunne's request under FOIA. The IC (as regulator) dismissed Mr Colenso-Dunne's complaint. The Tribunal, however, allowed Mr Colenso-Dunne's appeal (under case reference EA/2012/0039). The IC now appeals to the Upper Tribunal against the Tribunal's decision.

The Upper Tribunal appeal

4. An application by Mr Colenso-Dunne for a three-judge panel of the Upper Tribunal to determine this appeal having been dismissed by the Charles J., I held an oral hearing at Field House in London on 13 July 2015. The IC was represented by Mr Robin Hopkins of Counsel, instructed by the Solicitor to the Information Commissioner. Mr Colenso-Dunne (who lives abroad, and was unable to attend) was represented by Mr Hugh Tomlinson QC, instructed by Bindmans, both acting on a pro bono basis. I am indebted to both counsel for their careful and well-focussed oral and written arguments.

5. There were technically two appeals before the Upper Tribunal. The IC's appeal is under reference GIA/702/2014. Mr Colenso-Dunne had a cross-appeal, in effect supporting the Tribunal's decision, under reference GIA/1270/2014. At the outset of the hearing Mr Tomlinson helpfully announced that the cross-appeal was not being pursued. Technically a withdrawal by a party of their case, or part of it, needs my consent, which I give (Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), rule 17). Indeed, I am grateful to both counsel for narrowing down the field of enquiry for the purposes of this second appeal. I note that the Tribunal's open bundle ran to over 500 pages of evidence and submissions. There was also a (much slimmer) closed bundle. For the purposes of deciding this appeal I did not need to hear submissions on that closed material and there was no Upper Tribunal closed session at the hearing; nor is there a closed decision nor a closed annex to this decision.

The First-tier Tribunal's decision in summary

6. As noted above, the essential issue for the Tribunal was whether the ICO should disclose the names of the journalists who had commissioned Mr Whittamore's services. The Tribunal held that the information in issue was not "sensitive personal data" and that its disclosure was for a legitimate purpose, rather than an unwarranted intrusion into the journalists' privacy rights. Thus, in partly allowing Mr Colenso-Dunne's appeal against the IC's decision notice, the Tribunal relied on three principal reasons:

(1) none of the requested names, in their context, comprised "sensitive personal data" for the purposes of the Data Protection Act 1998 ("the DPA");

(2) disclosure of some of the names would not breach any of the data protection principles set out at Schedule 1 of the DPA; and

(3) the statutory prohibition under section 59(1) of the DPA did not apply because, by virtue of section 59(2)(e), disclosure of the requested names would have been made "with lawful authority" (and so the bar under section 44 of FOIA was not relevant).

The parties' cases in outline

7. In the original grounds of appeal, the IC argued that the Tribunal erred in law on all three counts. As to (1), it was said that the disputed information was information as to the alleged commission of criminal offences by at least some of the journalists

concerned, and so necessarily "sensitive personal data" within section 2(g) of the DPA. As regards (2), the IC submitted that the Tribunal's analysis of the balancing exercise under condition 6(1) of Schedule 2 to the DPA was fundamentally flawed. So far as (3) was concerned, the IC relied on the same matters in connection with condition 6(1) to argue that the section 59(2)(e) exception did not apply. The IC also (originally at least) contended that the Tribunal had made a fourth and further error of law in failing properly to consider its discretion as to the steps to be taken by the ICO (given the terms of section 50(4) of FOIA).

8. In the course of oral argument, Mr Hopkins for the IC acknowledged that the grounds of appeal really came down to two points. The first was what he described as his 'knock-out blow' on ground (1) – the disputed information was, he submitted, "sensitive personal data" within the terms of the legislation, meaning the Tribunal's decision had to be set aside and the decision re-made so as to preclude disclosure. The second point, in the alternative, and rolling together grounds (2) and (3), was that the Tribunal had erred in law in relation to the public interest balancing exercise, such that the Tribunal's decision should be set aside and remitted to a new First-tier Tribunal. In that event Ground (4) was a matter of consequential directions for the new Tribunal.

9. Mr Colenso-Dunne's case, equally stripped down to its essentials, was that the information in question is not information about either the commission or the alleged commission of criminal offences; rather, it shows that journalists displayed a cavalier attitude towards the privacy of those individuals who were the subjects of the inquiries to Mr Whittamore. Moreover, it demonstrated that the media, individually and collectively, had wholly failed to put in place proper systems for dealing with personal data. Mr Tomlinson further argued that the public interest in disclosure was overwhelming and so the IC's appeal should be dismissed. If his arguments in opposition to the IC's first ground were not successful, I understood Mr Tomlinson to concede that was the end of the matter, as it was common ground that none of the special conditions for processing *sensitive* personal data applied. If, however, he was right on the sensitive personal data point, but wrong on the Tribunal's approach to the balancing exercise, then Mr Tomlinson urged me to re-make the decision in the same manner, correcting any deficiencies in the Tribunal's approach.

Section 55 of the Data Protection Act 1998

10. Before turning to the background to this particular appeal, it is relevant to consider the terms of the offence under section 55 of the DPA. Section 55(1)-(3) of the DPA provides as follows:

> '*Unlawful obtaining etc. of personal data*
>
> (1) A person must not knowingly or recklessly, without the consent of the data controller—
>
> (a) obtain or disclose personal data or the information contained in personal data, or
>
> (b) procure the disclosure to another person of the information contained in personal data.
>
> (2) Subsection (1) does not apply to a person who shows—
>
> (a) that the obtaining, disclosing or procuring—
>
> (i) was necessary for the purpose of preventing or detecting crime, or
>
> (ii) was required or authorised by or under any enactment, by any rule of law or by the order of a court,

(b) that he acted in the reasonable belief that he had in law the right to obtain or disclose the data or information or, as the case may be, to procure the disclosure of the information to the other person,
(c) that he acted in the reasonable belief that he would have had the consent of the data controller if the data controller had known of the obtaining, disclosing or procuring and the circumstances of it, or
(d) that in the particular circumstances the obtaining, disclosing or procuring was justified as being in the public interest.

(3) A person who contravenes subsection (1) is guilty of an offence.'

The background to Mr Colenso-Dunne's FOIA request

11. In 2003 the ICO conducted the Operation Motorman investigation into the unlawful trade in confidential personal information. Pursuant to a search warrant, materials including certain invoices and notebooks were seized from Mr Whittamore's premises. Mr Whittamore himself was prosecuted under section 55 of the DPA and received a conditional discharge in 2004. Three of his associates were also prosecuted. Those journalists whose names were in his notebooks were not prosecuted (or indeed interviewed). Instead, in May 2006 the ICO presented a report to Parliament on the unlawful trade in personal information entitled *What Price Privacy?*, noting that "among the buyers are many journalists looking for a story. In one major case investigated by the ICO, the evidence included records of information supplied to 305 named journalists working for a range of newspapers" (at paragraph 1.8). That report was followed in December 2006 by a supplementary report to Parliament entitled *What Price Privacy Now?*

12. Subsequent developments are a matter of public record. Moving swiftly forward, the terms of reference for Lord Justice Leveson's *Inquiry into the Culture, Practice and Ethics of the Press* were announced in July 2011. Mr Colenso-Dunne made his FOIA request a few days later. Although the primary focus of the Leveson Inquiry was on phone-hacking, Operation Motorman was also considered. The resulting Report (published in November 2012) concluded, unsurprisingly, that Mr Whittamore's activities had been unlawful (Part E, Ch 3, paragraphs 3.14 and 3.17, p.262). The Report also discussed the culpability of those journalists who were amongst Mr Whittamore's customers (at paragraphs 3.21-3.22, p.263). Furthermore, at paragraph 5.16 (p.268) the Report noted as follows, referring to the evidence of Mr Graham's predecessor, Mr Richard Thomas:

> "It is worth underlining the view of the Information Commissioner, as set not in the text of *What Price Privacy Now?*, that the figures in the table do not purport to set out the total number of offences committed by journalists, but rather the number of requests made by journalists for information. In his evidence to the Inquiry, Mr Thomas emphasised that it was not being said that every single transaction identified was an offence committed by a journalist, but rather that journalists were significant customers of information which appeared to have been obtained illegally. However, Mr Thomas also expressed the view that it was likely that journalists were committing an offence."

13. The reference to a table was to the grid that originally appeared in *What Price Privacy Now?* (at p.189), setting out (i) various named publications; (ii) the number of transactions positively identified for that title; and (iii) the aggregate numbers of journalists or other employees from that title using Mr Whittamore's services. The Leveson Report likewise named the journalists' employers, but not the individual journalists themselves (Part E, Ch.3, para.3.22, pp.263-264):

> "There is certainly enough here to indicate *prima facie* (if not at a higher level) that many journalists either knew precisely how the information was being obtained or turned a Nelsonian eye to the obvious, or the close to obvious (with the result that there were, at least, reasonable prospects of proving recklessness). In that regard, I do no more than accept the concession that the press Core Participants made to that effect. It is not possible to go further than that, and (notwithstanding that the names of the journalists have not entered the public domain) it would be unfair to do so."

Mr Colenso-Dunne's FOIA request

14. On 26 July 2011 Mr Colenso-Dunne made a FOIA request by email to the ICO for (i) a further table to supplement that in *What Price Privacy?*, so as to provide a detailed breakdown of the number of transactions per journalist; and (ii) a key identifying each of the 305 journalists in question by first, middle and last name.

15. On 22 August 2011, the ICO responded to these two requests as follows: limb (i) of the request was refused under section 12 of FOIA, on the basis that the cost of compliance would exceed the appropriate limit of £450; and limb (ii) was refused on the basis that the information concerned was exempt under section 40(2) of FOIA as personal data. Mr Colenso-Dunne subsequently complained, perhaps more in hope than expectation, to the IC about the ICO's decision on the latter issue.

16. On 12 January 2012, the IC issued a Decision Notice (FS50422884) in which the ICO's decision not to provide the names of the journalists was upheld. The IC found that the information was "sensitive personal data" which had been correctly withheld by the ICO under section 40(2) of FOIA, and that the information in question was also correctly withheld under section 44(1).

The First-tier Tribunal's decision in more detail

17. The Tribunal allowed Mr Colenso-Dunne's subsequent appeal in part, deciding that some but not all of the journalists' names should be released. The Tribunal dealt with the matter in the course of three separate rulings.

The Tribunal's preliminary decision

18. On 12 November 2012 the Tribunal handed down its preliminary decision, noting that the ICO had the Hard Copy List of journalists' names that had been seized during the raid on Mr Whittamore's premises and that the seized information had been tabulated in spreadsheets under more than 30 columns (each column containing information relevant to the inquiry, e.g. journalist's name, employer's name, target's name, type of data sought, price charged etc). The Tribunal held, in summary, (i) that the information was "personal data" (preliminary decision at [33]-[35]); (ii) but it could not determine whether the information was "*sensitive* personal data" without studying the spreadsheets (preliminary decision at [36]-[37]); and (iii) it also could not determine whether the disclosure of the information would be an unwarranted intrusion into the privacy of individual journalists or prohibited under section 59 of the DPA without examining the spreadsheets (preliminary decision at [43] and [45]).

The Tribunal's interim ruling

19. The Tribunal then handed down an interim ruling on 13 March 2013, in which it indicated it had analysed the spreadsheets and determined that the only ones relevant to the request were those summarising the information in four coloured notebooks maintained by Mr Whittamore (interim ruling at [11]). These categorised

the entries by reference to 24 different types of "service requested" (e.g. credit card check, company search, mobile phone number, DVLA enquiry etc; see interim ruling at [12]). The Tribunal was able to sort the spreadsheets and then filter them to remove various irrelevant entries (interim ruling at [12] to [13]) to produce a document which it referred to as the "Consolidated Reduced Spreadsheet". The Tribunal then invited further submissions on these documents and on certain matters arising from the Leveson Report. After a closed directions hearing on 15 May 2013, a redacted version of the Consolidated Reduced Spreadsheet was disclosed to Mr Colenso-Dunne. Both parties then made further submissions to the Tribunal.

The Tribunal's final decision

20. After further deliberations, on 29 November 2013 the Tribunal handed down its final decision. In summary, the Tribunal decided that: (1) the information in the Consolidated Reduced Spreadsheet did not constitute "sensitive personal data", in that it did not contain evidence that the journalist concerned had instructed Mr Whittamore to use unlawful methods or had turned a blind eye to their adoption (final decision at [11]); (2) disclosure was for a legitimate purpose and was not an unwarranted intrusion into the journalists' privacy rights, in that the issues of impropriety and corporate governance gave rise to a very substantial public interest in knowing the identity of the journalists who had instructed Mr Whittamore (final decision at [18]). The balance therefore tipped in favour of disclosure (final decision at [19]); (3) it followed that there was lawful authority for disclosure under section 59(2)(e) of the DPA and so section 44 of FOIA did not bite (final decision at [20]). The Tribunal accordingly allowed Mr Colenso-Dunne's appeal and directed that the information in the First Confidential Annex should be released (that is, the parts of the Consolidated Reduced Spreadsheet containing the relevant journalists' names along with names of the associated media outlets).

21. The Tribunal summarised its decision in the following terms:

> "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."

Ground 1: the disputed information is "sensitive personal data" under the DPA

The legislation

22. Section 40 of FOIA provides for an exemption in relation to personal information. In particular, section 40(1)-(4) provide as follows:

> '(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
> (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 the second condition below is satisfied.
> (3) The first condition is—
> (a) in a case where the information falls within any of 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), and
> (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
> (4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).'

23. Section 1(1) of the DPA in turn defines "data" as follows:

> '"data" means information which—
> (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
> (b) is recorded with the intention that it should be processed by means of such equipment,
> (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system,
> (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68; or
> (e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d);'.

24. The same interpretation section defines "personal data" as follows:

> '"personal data" means data which relate to a living individual who can be identified—
>
> (a) from those data, or
>
> (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
>
> and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;'.

25. Section 2 of the DPA then defines "sensitive personal data" in these terms:

> 'In this Act "sensitive personal data" means personal data consisting of information as to—
>
> (a) the racial or ethnic origin of the data subject,
>
> (b) his political opinions,
>
> (c) his religious beliefs or other beliefs of a similar nature,
>
> (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
>
> (e) his physical or mental health or condition,
>
> (f) his sexual life,
>
> (g) the commission or alleged commission by him of any offence, or
>
> (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.'

26. As part of his oral submissions, Mr Hopkins took me on a fascinating and very informative Grand Tour of the genesis of the phone-hacking saga in the Operation Motorman investigation in 2003 and the IC's subsequent reports to Parliament in 2006 through to the public shaming (but not the naming) of journalists in the Leveson Report in 2012. This excursus was designed to persuade me that the Tribunal had erred in law in its approach to the question of what amounts to "sensitive personal data". With respect, I prefer to start with what the Tribunal actually decided on the point. Although both counsel understandably focussed on the Tribunal's final decision, this final decision cannot fairly be read without looking at its earlier rulings.

The First-tier Tribunal's decision

27. In its preliminary decision, the Tribunal had this to say, dealing with Mr Colenso-Dunne's own grounds of appeal:

> <u>"Information in any event not sensitive personal data</u>
>
> 36. In respect of sensitive personal data the Appellant suggested that the information did not relate to the commission or alleged commission of any offence by any of the individuals in question because none of them had ever been charged with a crime or interviewed under caution. The Commissioner, on the other hand, argued that it was clear that there was sufficient connection with criminal activity to bring the names within the meaning of 'sensitive personal data'. However, neither the Hard Copy List nor (so far as we are aware) the Spreadsheets contain any allegation of crime – they simply record the names of individuals and, in the case of the Spreadsheets, certain facts regarding transactions they undertook with Mr Whittamore. On its own, therefore, this does not disclose any conviction, failed conviction, charge or public allegation of criminal conduct.

> 37. It is conceivable that the whole body of information held by the ICO may demonstrate that some or all of the named journalists were implicated in possible breaches of DPA section 55 and that there is sufficient connection with criminal activity to bring the information within the meaning of the expression 'sensitive personal data'. Without studying the information in the Spreadsheets and receiving submissions on the significance of particular entries, it is not possible to determine what information, if any, may fall within the definition."

28. The Tribunal then proceeded to undertake its own detailed forensic analysis, resulting in the production of the Consolidated Reduced Spreadsheet. In its final decision, the Tribunal posed the question before it as follows (and no issue is taken with this passage of its analysis, at paragraph [10a]):

> "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."

29. The Tribunal then addressed that issue head-on in paragraph [11] of its final 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."

The Commissioner's submissions

30. It was common ground that "sensitive personal data" is a special category of "personal data" under the DPA that is subject to stricter processing criteria. Mr Hopkins started by noting that section 2 of the DPA did not require the disputed information to state, in terms, either that a crime had been committed or was alleged to have been committed. Rather, section 2(g) provided that "'sensitive personal data' means personal data consisting of information *as to* ... (g) the commission or alleged commission by him of any offence" (emphasis added). "As to" was an ordinary expression in the English language, meaning "about" or "related to", which should be construed in line with the statutory objective of protecting the interests of data subjects. The Tribunal, Mr Hopkins submitted, had erred in law in its approach to, and application of, this statutory test.

31. In particular, Mr Hopkins argued, the Tribunal had erred in law in four respects. First, it had erred in its finding that there was an insufficient connection between the disputed information and allegations of criminality on the part of the data subjects. Second, it had failed to apply the principles set out by the House of Lords in *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47. Third, it had erred by focussing exclusively on the disputed information in isolation, without considering that information in its wider context of the public debates on the conduct of journalists. Fourth, it had set too high a threshold; section 2(g) refers to "the commission or alleged commission by him of any offence", whereas the Tribunal, at paragraph [14] of its final decision, had noted that "disclosure of the information in the First Confidential Annex version of the Consolidated Reduced Spreadsheet does not establish criminal guilt or innocence" – with no reference to mere allegations of criminality.

The Upper Tribunal's analysis

32. This is, undeniably, the crucial ground of appeal. If Mr Hopkins is right, it is truly a knock-out blow. This is because, on that scenario, the ICO's refusal to disclose the journalists' names would inevitably be correct, given the Tribunal's uncontested finding that none of the specified conditions potentially capable of justifying the disclosure of *sensitive* (as opposed to 'ordinary') personal data (see Schedule 3 to the DPA) could apply in the particular circumstances of this case.

33. The rationale for the stricter conditions for processing sensitive personal data was also common ground. As the ICO's own helpful guidance states (at https://ico.org.uk/for-organisations/guide-to-data-protection/key-definitions/):

> "The presumption is that, because information about these matters could be used in a discriminatory way, and is likely to be of a private nature, it needs to be treated with greater care than other personal data."

34. Mr Tomlinson made two preliminary points about section 2(g) of the DPA. The first was that section 2(g) does not concern "core private information", unlike many of the other sensitive personal data categories, not least as information about the actual or alleged commission of any offence is usually in the public domain. The second was that there is no corresponding provision to section 2(g) in Directive 95/46/EC; rather sub-paragraph (g) is an additional home-grown category added by the DPA, and not an EU-wide provision that had to be transposed into domestic law. On that basis, Mr Tomlinson submitted, the Directive supports a narrow reading of section 2(g), as Article 8 of the Directive does not require this type of personal data to be subject to especially strict processing criteria.

35. The combined effect of Mr Tomlinson's preliminary submission may be summarised thus: all categories of sensitive personal data are equal, but some are more equal than others. If that is the submission, I reject it. The DPA distinguishes between "personal data" and the sub-species of "sensitive personal data"; it does not distinguish (in terms of potential outcomes or consequences) as between different sub-categories of sensitive personal data. As Mr Hopkins put it, a long since spent conviction may be just as much a part of a person's life-story, and attract enhanced privacy rights, as the state of their physical health. Furthermore, the enactment of section 2(g) is evidence in itself that Parliament considered that "the commission or alleged commission" of any offence should attract the heightened level of protection under Schedule 3 of the DPA. Thus far I am with Mr Hopkins.

36. In practice, obviously, "sensitive personal data" may in fact be more or less sensitive, depending on the circumstances. So the fact that Mr X has a common cold falls within section 2(e), as also does the fact that he has a sexually transmitted disease, but the latter is obviously far more sensitive (in a non-technical sense) than the former. However, this does not affect the general principle referred to in the previous paragraph.

37. Beyond that, as Mr Hopkins fairly acknowledged, the case law on section 2(g) does not take us very far. Information about a caution (as opposed to a prosecution or charge) falls within section 2(g) (see *MM v UK* (App. No. 24029/07) [2012] ECHR 24029/07, *The Times,* January 16, 2013). Likewise a warning letter from the police (a step short of a caution) similarly falls within the scope of sub-paragraph (g) (see *R (T) v Commissioner of Police for the Metropolis* [2012] EWHC 1115 (Admin) at [70], a finding not questioned in the appellate judgments arising out of that decision). A false allegation as to the commission of a crime likewise falls within section 2(g) (see *The Law Society and Others v Kordowski* [2011] EWHC 3185 (QB) at [83]). If this case law shows anything, it demonstrates that whether particular information falls within section 2(g) of the DPA must be a question of fact in the circumstances of any given case. The Tribunal itself recognised the fact-sensitive nature of this inquiry in its preliminary decision (at paragraph [37]), where it observed as follows:

> "It is conceivable that the whole body of information held by the ICO may demonstrate that some or all of the named journalists were implicated in possible breaches of DPA section 55 and that there is sufficient connection with criminal activity to bring the information within the meaning of the expression 'sensitive personal data'. Without studying the information in the Spreadsheets and receiving submissions on the significance of particular entries, it is not possible to determine what information, if any, may fall within the definition."

38. As to the arguments advanced by Mr Hopkins to support his submission that the Tribunal had erred in law, the first was his contention that the Tribunal had erred in finding an insufficient connection between the disputed information and allegations of criminality on the part of the data subjects. The question for the Tribunal in this case was whether the personal data in question relating to any of the journalists was data "consisting of information *as to* – ... (g) the commission or alleged commission by him of any offence." The Tribunal's answer to that was in the negative. The key passage in its final decision (at paragraph [11] – see also paragraph 29 above) read as follows:

> "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."

39. In essence, the Tribunal made a finding of fact that the information demonstrated that particular journalists had commissioned Mr Whittamore to obtain information but, so far as the journalists were concerned, no more than that. The information did not carry with it any assertion as to the actual or alleged commission of any crime by those journalists. The line may be a fine one, but a sustainable line it is, and it is clear from the sequence of its rulings and its inquisitorial approach that the Tribunal interrogated the evidence rigorously in making its findings of fact.

40. Mr Hopkins's second argument was that the Tribunal had failed properly to apply the principles laid down by *Common Services Agency v Scottish Information Commissioner*, referring in particular to the judgment of Lord Hope (at [7] and [40]). *Common Services Agency* is certainly authority for the proposition that (by analogy with the parallel Scottish legislation) the FOIA exemption for personal data is not to be read more narrowly than under the DPA. In other words, stringent data protection principles are not to be watered down so as to give effect to some broad FOIA presumption in favour of the release of information. On the contrary, section 40 of FOIA must be read in the light of the purpose of the DPA, namely to "regulate and control the processing of data and to protect the interests of those who may be affected by its release" (Lord Hope at [40]).

41. However, I agree with Mr Tomlinson that *Common Services Agency* does not actually assist Mr Hopkins in the present case. The principle expounded by Lord Hope is not in dispute. But at no time did the Tribunal seek to justify its approach to section 2(g) of the DPA (and so section 40 of FOIA) on the general basis of a broad or liberal reading of the legislation in furtherance of the interests of openness and transparency that underpin FOIA. Indeed, on the contrary, the Tribunal had correctly reminded itself in its preliminary decision that "a broad concept of protecting, from unfair or unjustified disclosure, the individuals whose personal data has been requested is a thread that runs through the data protection principles" (at [19]). This shows the Tribunal was well aware of, and properly applied, the principle from *Common Services Agency*.

42. Thirdly, Mr Hopkins submitted that the Tribunal had erred by focussing exclusively on the disputed information in isolation rather than in its proper context. As a matter of law, Mr Hopkins argued, the application of the definition of "sensitive personal data" is context-dependent, as is the definition of "personal data" (see *Farrand v Information Commissioner and LFEPA* [2014] UKUT 0310 (AAC)). Read in its proper context, i.e. against the backdrop of everything that had been said about the Operation Motorman investigation in the *What Price Privacy?* and *What Price Privacy Now?* reports, the clear implication was that at least some of the journalists involved had committed criminal offences. This was all the more so in the light of Mr Thomas's evidence to the Leveson Inquiry (although, as Mr Tomlinson correctly pointed out, that evidence post-dated the time at which the request was dealt with). If the disputed information was released into the public domain under FOIA, ordinary

members of the public would, so Mr Hopkins argued, reasonably interpret the information as conveying at the very least an allegation of the commission of criminal offences by those journalists.

43. I have to say that I do not think *Farrand* can bear the weight which Mr Hopkins seeks to place on it. The disputed information in *Farrand* comprised data about individuals (principally one particular tenant) contained in, but redacted from, a fire investigation report following a fire in a mansion block. Judge Jacobs held that "when taken together with the remainder of the information in the report, it would be possible to identify the individuals to whom the redacted material related. To ignore context would render the legislation ineffective in numerous circumstances to which it is clearly intended to apply, thereby reducing its effectiveness" (at paragraph 18).

44. The issue for Judge Jacobs in *Farrand* was whether the particular information was *personal* data, not whether it was *sensitive* personal data. Thus the focus of his ruling was the definition of "personal data" in section 1 of the DPA, not the definition of "sensitive personal data" in section 2. Furthermore, Judge Jacobs's reasoning makes it plain that he was referring to the "context" in terms of the particular report, not in some much wider and more general sense. In the present case there was no dispute but that the disputed information – the identity of any individual journalist – was that person's "personal data" within section 1 (see preliminary decision at [33]-[35] and final decision at [10a]). The question as to whether it was "sensitive personal data" was then governed by section 2, on which *Farrand* sheds no light.

45. Mr Tomlinson made a further and powerful policy argument. The DPA imposes particular obligations on data controllers in processing personal data, and especially onerous obligations when it comes to processing sensitive personal data. Data controllers cannot reasonably be expected to conduct a search of the entire public domain to check that there is nothing else "out there" which, when combined with the personal data being processed, changes its nature into sensitive personal data. The data must essentially speak for itself in its immediate context. Information which on the face of it is 'ordinary' personal data cannot suddenly transmute into sensitive personal data because of other information which is out in the public domain.

46. For all those reasons I agree with Mr Tomlinson that whether the disputed information is sensitive personal data has to be answered in the light of the immediate context of the information in question. The Tribunal was entitled to arrive at the conclusion that the information in the Consolidated Reduced Spreadsheet was not sensitive personal data. The fact that some people might misconstrue the fact that a journalist's name was in the material seized from Mr Whittamore as an allegation that he or she had committed an offence did not convert personal data into sensitive personal data.

47. Mr Hopkins's fourth point was that the Tribunal had applied too high a threshold in the passage cited from paragraph [14] of its final decision (see paragraph 31 above). There is nothing in this argument. In that part of its decision the Tribunal was dealing with the Commissioner's argument, based on the Leveson report, that it would be unfair to disclose the name of any individual journalist if there was any doubt as to whether he or she had *committed* an offence. This was in the context of its discussion of the balancing exercise. However, the key passage in terms of the Tribunal's approach to the issue of "sensitive personal data" is in paragraph [11] (see paragraph 29 above), and it is clear that the Tribunal approached that definition in terms of the commission or *alleged* commission of criminal offences (as it did in its preliminary decision at [38]). As Mr Tomlinson put it, the Tribunal, having directed

itself properly at paragraph [11], did not suddenly forget the plain terms of section 2(g) by the time it reached paragraph [14] of its reasoning.

48. It follows that I dismiss the IC's first and primary ground of appeal. The Tribunal directed itself properly on the relevant law and was entitled to conclude on the facts that the requested information was not "sensitive personal data".

Ground 2: the balancing of interests under the DPA favours non-disclosure

The legislation

49. Section 4 of the DPA, which is headed "data protection principles", makes the following provision:

> '(1) References in this Act to the data protection principles are to the principles set out in Part I of Schedule 1.
> (2) Those principles are to be interpreted in accordance with Part II of Schedule 1.
> (3) Schedule 2 (which applies to all personal data) and Schedule 3 (which applies only to sensitive personal data) set out conditions applying for the purposes of the first principle; and Schedule 4 sets out cases in which the eighth principle does not apply.
> (4) Subject to section 27(1), it shall be the duty of a data controller to comply with the data protection principles in relation to all personal data with respect to which he is the data controller.'

50. The first data protection principle, as set out in paragraph 1 of Schedule 1 to the DPA, is that:

> '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 also met.'

51. Schedule 2 to the DPA sets out a number of conditions for the processing of personal data, but it was accepted on all sides that only one is relevant to the facts of this case. This is paragraph 6(1) which reads as follows:

> '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.'

The First-tier Tribunal's decision

52. In its preliminary decision the Tribunal set out the parties' submissions on whether disclosure would breach the data protection principles (at [38]-[44]). In its interim ruling the Tribunal also drew the parties' attention to particular passages in the Leveson report, inviting submissions on their relevance to the Tribunal's own inquiry (at [20]). The Tribunal then devoted over three pages of its final decision to considering whether disclosure was necessary for a relevant legitimate purpose and whether it was an unwarranted intrusion into the journalists' own privacy rights (at [12]-[19]). The Tribunal summed up its reasoning in its final decision as follows:

> "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."

The Commissioner's submissions

53. The IC's argument was that even if the disputed information was not sensitive personal data, the Tribunal still erred in its application of the balancing of interests under condition 6(1) of Schedule 2 to the DPA (see paragraph 51 above). Mr Hopkins argued that the Tribunal should have concluded that the balance favoured non-disclosure, and so it would be unfair to release the names in question. In doing so Mr Hopkins emphasised that many of his arguments as to why the relevant information constituted sensitive personal data were equally relevant to his second ground of appeal. Mr Hopkins argued that the Tribunal had erred with respect to eight particular matters in applying condition 6(1). He laid most stress on point (vi), namely the Tribunal's alleged failure to consider the very serious reputational consequences which disclosure would have for the journalists in question. All the Tribunal did was to refer to the journalists' reasonable expectations that the details of their professional activities would remain confidential. The omission to have regard to reputational rights, he argued, fatally underlined the Tribunal's conclusion on the application of condition 6(1).

The Upper Tribunal's analysis

54. I shall deal first with Mr Hopkins's principal point about the Tribunal's treatment of the journalists' reputational rights. Mr Tomlinson acknowledged that the Tribunal did not in terms expressly refer to the journalists' reputational rights. His argument,

however, was that the Tribunal acknowledged that journalists would be subject to legitimate criticisms for using Mr Whittamore's services, so justifying any reputational damage. In many other appeals before the Upper Tribunal, when the Commissioner is resisting an appeal and seeking to uphold a tribunal's decision, I am regularly (and rightly) reminded by his counsel of the importance of reading its decision as a whole and "that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined" (*Jones v First Tier Tribunal & CICA* [2013] UKSC 19 *per* Lord Hope at [25]). Mr Tomlinson likewise cautioned me against unpicking the first instance Tribunal's balancing exercise. I must accordingly focus on the substance of the Tribunal's decision and reasoning, rather than its form. In that context the Tribunal's conclusion at the end of paragraph [19] of its final decision is telling, namely that the journalists:

> "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."

55. Reading paragraph [19] as a whole, it is plain to me that the Tribunal concluded that any damage to the journalists' reputational rights was justified, in the sense that they would be subject to legitimate criticism for using Mr Whittamore's services. It necessarily followed that insofar as the journalists had a legitimate interest in protecting their reputational rights, that interest did not carry significant weight. As Mr Tomlinson put it, what matters ultimately are a person's *deserved* reputational rights.

56. Mr Hopkins made a number of further submissions in seeking to buttress his argument that the Tribunal had erred in its approach to the balancing of interests as required by paragraph 6(1) of Schedule 2 to the DPA. I have to say that the more the arguments unfolded, the more I became satisfied that this was really at heart an attempt to re-argue the balancing test on the factual merits. In that context I remind myself again that I "should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it" (*Jones v First Tier Tribunal & CICA* [2013] UKSC 19 *per* Lord Hope at [25]).

57. Mr Hopkins argued that the Tribunal had no basis for finding that the particular named journalists were guilty of any impropriety, and that such a finding was essential to count decisively in favour of disclosure. However, as Mr Tomlinson argued, the Tribunal relied on the public interest in knowing that the journalists were engaged in an activity which at the very least raised questions about their conduct. As Mr Tomlinson also notes, the Commissioner is seeking to have his cake and eat it. On the one hand he argues that the very fact of inclusion on the list gives rise to an allegation of criminality for the purposes of section 2(g). Yet in this regard he also seeks to argue that inclusion gives rise to no clear inference of impropriety. That inherent contradiction means I find this argument unpersuasive.

58. The Commissioner also relied on the fact that the Leveson Inquiry had specifically declined to name the individual journalists in question (see paragraph 13 above). The Tribunal was obviously aware of this matter, as it invited submissions on this very point (see Interim Ruling, at paragraph [20(b)]) and considered the issue in its final decision (at paragraph [14]). In the event, the Tribunal declined to place any weight on this factor. That was clearly a sustainable approach to take, not least as the Leveson Inquiry's terms of reference were focussed on the press as a whole, not on the conduct of individual journalists. Furthermore, Leveson LJ's ruling (*Ruling in relation to Operation Motorman evidence*, 11 June 2012) acknowledged that the

relevant information was "within the purview of the Information Commissioner whose decision as to appropriate disclosure deserved respect" (at paragraph [2]) – subject, of course, to the appellate process under FOIA.

59. It was also argued that the Tribunal erred by having regard to the public interest in holding the ICO to account over the use to which the Operation Motorman evidence was put. This, it was said, was irrelevant to the particular information in dispute. This is a classic question of fact in the balancing exercise. The Tribunal adequately addressed the point at paragraph [15] of its final decision:

> "… 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."

60. Mr Hopkins further contended that the Tribunal erred in law by failing to give adequate weight to the privacy rights of data subjects in terms of the principles expounded in *Common Services Agency v Scottish Information Commissioner*. This point was considered in the context of ground (1) at paragraphs [40] and [41] above. It has no more purchase in the present context. The Tribunal was well aware of the principles involved and appropriately weighed the data protection and privacy rights in the balance.

61. The Commissioner also argued that the Tribunal had not properly considered whether there was a "pressing social need" for disclosure and whether interference was "proportionate as to means and fairly balanced as to end" (*Corporate Officer of the House of Commons v Information Commissioner and Others* [2008] EWHC 1084 (Admin) at [43]). This again comes down to a question of substance, not form. On any sensible reading of the Tribunal's final decision, especially when taken against the backdrop of its earlier rulings, this is precisely the exercise that the Tribunal undertook. The fact that it did not follow the precise sequence in the detailed taxonomy as set out in the later decision in *Goldsmith International Business School v Information Commissioner and Home Office* [2014] UKUT 0563 (AAC) (at [35] onwards) matters not. In substance it addressed those considerations as part of the balancing exercise.

62. The Commissioner's penultimate submission on this ground of appeal was that the Tribunal's failure to have regard to the fact that the journalists in question had not had the opportunity to comment meant that the process was unfair and liable to cause prejudice. In some ways this is another way of putting the point considered at paragraph 58 above. Insofar as it is a freestanding argument, the short answer is that inclusion on the list is not an allegation of criminality; rather, it at the least raises issues as to professional conduct, which the journalists in question may or may not choose to address in the course of any further public debate. As the Tribunal found, "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" (final decision at paragraph [14]).

63. Finally, with regard to this ground of appeal, Mr Hopkins sought to argue that the Tribunal erred in finding that the journalists in question had no reasonable expectation that their privacy rights would be respected. In sum, they could reasonably have expected that their names would not be publicly linked to Mr

Whittamore. This is unconvincing – the fact of the matter is the Tribunal weighed this factor in the balance, as it was bound to do, and found it wanting.

64. It follows that I dismiss the IC's second ground of appeal. I stress that in doing so I have also taken into account Mr Hopkins's arguments on ground (1) which carry forward to ground (2). I have also had regard to the Tribunal's preliminary decision and its interim ruling, which further demonstrate the exemplary care with which it approached the balancing exercise. Again, I emphasise that this is a very fact-sensitive process. At paragraph [43] of its preliminary decision the Tribunal helpfully set out its provisional thinking on the parameters of its enquiry, and in doing so revealed no error of law:

> "… If it transpires that an individual's name appeared only in the Hard Copy List, with no data in the Spreadsheets linking him or her to a particular transaction, we think that, although not sensitive personal data, the public interest in disclosure might be sufficiently light that disclosure would constitute an unwarranted intrusion into the individual's privacy and disclosure should not be ordered. At the other end of the spectrum it is at least conceivable that the information summarised in the Spreadsheets may, on their own, be sufficient to establish that a named journalist had engaged the services of Mr Whittamore to obtain information, which was unlikely to have been obtainable by legal means because, for example, it disclosed a request for the telephone number of a person's close friends or members of his or her immediate family, with no indication that the person making the request was unaware of the criminal implications of such a request or that a public interest defence was likely to be available. In that case there may be sufficient connection with a crime to support an argument that the public interest in disclosure should outweigh the journalist's right to privacy (although it may also have the effect of converting the information into Sensitive Personal Data). Between those two extremes there may be names where the information linked to it in the Spreadsheets may or may not be sufficient to support a sustainable allegation of criminal involvement in wrongdoing."

65. In its interim ruling (at paragraph [9]) the Tribunal explained its methodology, again in such a way as to show that it had directed itself correctly as to the law:

> "… The Commissioner submitted that we did not need to inspect the spreadsheets before determining the appeal. We took the view that we should do so because it was conceivable that the information summarised might be sufficient to establish that a named journalist had engaged the services of the enquiry agent to obtain information, which was unlikely to have been obtainable by legal means. In those circumstances although, as we had concluded, the information requested constituted the personal data of the journalists, there might be sufficient public interest in its disclosure to outweigh the journalist's right to privacy. If that were the case then, provided the information was not so specific as to amount to information about the commission or alleged commission of a criminal offence (so as to bring it within the definition of Sensitive Personal Data) we thought that it might be appropriate to order its disclosure."

66. It is also important to note that the Tribunal did not actually order the disclosure of <u>all</u> of the 305 names that formed the subject matter of the FOIA request. The Tribunal's decision was 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" (final decision at [6], see paragraph 21 above). In its interim ruling, having referred to the evidence generated by Operation Motorman, the Tribunal had explained the process by which it had arrived at the Consolidated Reduced Spreadsheet:

> "13. On the basis of this information we sorted each of the coloured notebook spreadsheets by reference to the service requested and then filtered the data in order to remove substantially all entries in which the required service description pointed to a legitimate enquiry (for example a County Court Judgment or an 'Area' enquiry). The only exceptions were those in respect of which a comment was included suggesting that illegal means might have been used (typically, because of a reference to a 'blag'). We also filtered out entries that did not include a name for either or both of the journalist or the target for the enquiries. The resulting data was then assembled into a single spreadsheet comprising a separate worksheet in respect of each notebook (the 'Consolidated Reduced Spreadsheet')."

67. This further exemplifies the care devoted by the Tribunal to its investigation of the evidence. In effect, the Tribunal sifted out those journalists' names where the enquiry was plainly legitimate or the information was incomplete. The Consolidated Reduced Spreadsheet was thus a sub-set of the original list, limited to those instances where there was at least a question mark over the legality of the transaction (but not an allegation of criminality as such). In so doing the Tribunal had appropriate regard to the privacy rights of those journalists who, on the face of the record, had no questions to answer. These earlier rulings accordingly provide further support for my conclusion that the Tribunal did not err in law in its approach to the balancing test.

Ground 3: disclosure is barred by DPA s.59 and so within FOIA s.44 exemption

The legislation

68. Section 44 of FOIA provides as follows:

> '*Prohibitions on disclosure*
> (1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—
> (a) is prohibited by or under any enactment,
> (b) is incompatible with any EU obligation, or
> (c) would constitute or be punishable as a contempt of court.
> (2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).'

69. Section 59 of the DPA provides as follows:

> **'***Confidentiality of information*
> (1) 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 -
> (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,
> (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 under the information Acts, or
> (ii) any EU 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.
> (3) Any person who knowingly or recklessly discloses information in contravention of subsection (1) is guilty of an offence.
> (4) In this section "the information Acts" means this Act and the Freedom of Information Act 2000.'

The parties' submissions

70. As well as the section 40(2) personal information exemption, the IC had concluded that section 44(1) of FOIA (statutory prohibition on disclosure) applied. This was because section 59(1) of the DPA prohibits disclosure of information such as that in dispute here unless the disclosure is made "with lawful authority". Section 59(1) of the DPA provides an exhaustive definition of what is meant by "with lawful authority". It was acknowledged that the only category that could apply in the circumstances of the present case was that "having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest" (section 59(2)(e)). The IC, in his original grounds of appeal to the Upper Tribunal, submitted that the Tribunal had erred in the threshold it adopted when applying section 59(2)(e) of the DPA, arguing that section 59(2)(e) imposed a higher threshold than condition 6(1), in other words that a stronger public interest in disclosure is required than under condition 6(1). At the hearing Mr Hopkins advised me that, on reflection, that particular submission was not being pursued; the IC now accepted that section 59(2)(e) does not impose a higher standard than condition 6(1) of Schedule 2 to the DPA. Rather, the IC's argument was that just as condition 6(1) was not met, nor was section 59(2)(e).

71. In the light of the IC's decision to resile from the way in which this ground of appeal had originally been put, Mr Tomlinson's arguments were essentially the same as those that he advanced in relation to the second ground of appeal.

The Upper Tribunal's analysis

72. In my view the IC has quite properly abandoned the argument originally used to underpin this ground of appeal. With that prop removed, the present ground necessarily stands or falls with the second ground of appeal. For the reasons set out above, it falls and so I need say no more.

Ground 4: the "steps discretion" ground

The legislation

73. Section 50(4) of FOIA declares that:

> 'Where the Commissioner decides that a public authority—
>
> (a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or
>
> (b) has failed to comply with any of the requirements of sections 11 and 17,
>
> the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.'

The parties' submissions

74. Mr Hopkins submitted in his skeleton argument (and I accept) that there are some very exceptional cases where, even if a public authority has contravened FOIA by failing to disclose information in response to a request, the IC has a discretion to order that the information should *not* be disclosed in any event. This is known as the "steps discretion", based on section 50(4) of FOIA. Mr Hopkins had further argued that the IC's determination as to compliance is to be assessed at, or shortly after, the time of the request, whereas the decision on the steps to be adopted, if any, may take into account subsequent developments (see *Information Commissioner v HMRC and Gaskell* [2011] UKUT 296 (AAC); [2011] 2 Info LR 11 and see also *Home Office v Information Commissioner & Cobain* [2015] UKUT 27 (AAC)).

75. Mr Hopkins had very fairly acknowledged in his skeleton argument that in the proceedings below the IC had not invited the Tribunal to consider the exercise of the steps discretion so as to preclude disclosure. However, since Mr Colenso-Dunne made his FOIA request, the Metropolitan Police had been investigating whether journalists should be prosecuted for phone-hacking and/or other unlawful activities aimed at the obtaining of confidential personal information. The IC had accordingly provided information, including the disputed information in this appeal, to the Metropolitan Police. In those circumstances, the IC's original grounds of appeal argued that disclosure of the disputed information to the world at large would be unfair and cause unwarranted prejudice, certainly to these individuals, and probably also to the police investigation.

76. Mr Tomlinson submitted in his skeleton argument that the very fact that the Commissioner had not invited the Tribunal to adopt the course of exercising the steps discretion was tantamount to an implied concession that, if there had not been compliance with FOIA, then the Tribunal should order disclosure. Further, no evidence had been put before the Tribunal on this point and neither had the IC sought permission to adduce fresh evidence before the Upper Tribunal; and without evidence, Mr Tomlinson submitted, the point was hopeless. Although the fact of such a police investigation was very much in the public domain, what was not known is its precise extent and whether it concerns any of the journalists who obtained information from Mr Whittamore. In any event, he argued, a police investigation into phone hacking and the unlawful obtaining of information was irrelevant. The mere fact that individual journalists were named as having obtained information from Mr Whittamore could not conceivably be said to be prejudicial. The issue for any criminal proceedings would not be not whether they obtained information but what their state of mind was when they did it. The disputed information sought under the FOIA request had no bearing on this issue.

77. As noted above, Mr Hopkins conceded in the course of oral argument that if the steps discretion point had any relevance it was not as a freestanding ground of

appeal against the Tribunal's decision, but rather as a submission as to the terms of consequential directions to be given to the First-tier Tribunal on any remittal under ground (2).

The Upper Tribunal's analysis

78. I agree that the Tribunal cannot be faulted as having erred in law for failing to have regard to a matter (the potential exercise of the steps discretion) that it had not considered precisely because it had not been raised before it. I note Mr Hopkins's graceful and well-advised abandonment of this point as a separate ground of appeal. Given I have dismissed the first three grounds of appeal, this fourth ground goes nowhere.

Some final matters

79. There are several miscellaneous matters I should mention.

80. First, I simply record that the IC's original appeal also included one closed ground of appeal. I expressed some concern about this feature of the appeal in a telephone directions hearing at an early stage. The IC very helpfully subsequently withdrew that document, acknowledging that it really amounted to a justification of the open fourth ground of appeal.

81. Second, and given the complexities of this case, I think it is only right to pay tribute to the following:

- The Tribunal itself, for the rigour of its analysis in its various rulings, its active and proportionate case management, and above all the incisive drafting of its decision;
- The Commissioner (and his counsel), who has found himself in the doubtless rather uncomfortable position of defending the privacy rights of journalists, some of whom at least may have been less scrupulous as regards the privacy rights of others – albeit the Tribunal has correctly and adequately explained why it reached a different conclusion;
- Mr Colenso-Dunne's legal team, acting pro bono, and the good offices of Mr Maurice Frankel of the Campaign for Freedom of Information;
- And, last but not least, Mr Colenso-Dunne for the tenacious but always measured way in which he has conducted these proceedings from afar.

Conclusion

82. For all the reasons above, I dismiss the Information Commissioner's appeal. The First-tier Tribunal's decision dated 29 November 2013 stands. As a result the Tribunal's order for disclosure takes effect. However, the First Confidential Annex to the Tribunal's decision should remain confidential until the later of (i) the time for appealing against this decision of the Upper Tribunal shall have expired without an application for permission to appeal having been lodged; or (ii) in the event that such an application is filed, the date when it shall be determined or withdrawn.

Signed on the original
on 26 August 2015

Nicholas Wikeley
Judge of the Upper Tribunal