



Tribunals Service

Information Rights

**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]**

Case No. EA/2009/0035

ON APPEAL FROM:

**Information Commissioner's
Decision Notice No: FS50078514
Dated: 31 March 2009**

Appellant: ALASDAIR ROBERTS

Respondent: THE INFORMATION COMMISSIONER

**Additional Party: THE DEPARTMENT FOR BUSINESS,
INNOVATION AND SKILLS**

On the papers

Date of decision: 26th May 2010

Before

**Chris Ryan
and
Roger Creedon
John Randall**

Subject matter: - Personal data s.40

**Cases: *Common Services Agency v Scottish Information
Commissioner* [2008] UKHL 47
*Corporate Office of the House of Commons v Information
Commissioner* [2008] EWHC (Admin) 1084**

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DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed and the Decision Notice dated 31 March 2009 is upheld, although on different grounds.

REASONS FOR DECISION

Introduction

1. On 20 November 2009 we issued a decision on certain aspects of this Appeal (“the First Decision”). At the time of the First Decision we were constituted as the Information Tribunal. However, by virtue of the Transfer of Tribunal Functions Order 2010, the Tribunal which has decided the section 40 issue is now constituted as a First-tier Tribunal.
2. Capitalised words in this decision bear the same meaning as they were given in the First Decision.
3. The background facts to the Appeal were set out in the First Decision. It is only necessary to repeat at this stage that:
 - (a) the Request was made on 22 April 2005;
 - (b) the requested information was a list of the record numbers for documents and folders created on the Department’s “Matrix” system between 1 and 8 December 2004, together with the names of those recorded as the creator of each of those documents and records; and
 - (c) the focus of the request was the names of the document creators and its purpose was to seek a decision on what the Appellant described as a “policy question”, which was whether or not the personal data exemption in FOIA section

40 should prevent information about the creator of the documents being disclosed for the purpose of research into the use and value of metadata within public bodies.

4. The First Decision recorded the circumstances in which the Department had, first, relied on the exemption provided by FOIA section 40, then abandoned that ground, before reviving it during the course of the investigation by the Information Commissioner, from which this Appeal derives. In the event the Information Commissioner decided that the names of the document creators did not need to be disclosed because they constituted information covered by the exemption set out in FOIA section 36. He did not therefore consider the possible impact of section 40. However, in the First Decision we decided that the section 36 exemption did not apply, with the result that the information would have to be disclosed by the Department unless the section 40 exemption applied. This decision addresses that issue.
5. A pre-hearing review was convened after the First Decision and directions were given for the determination of the outstanding issue without a hearing, on the basis of the parties' written submissions and evidence. We subsequently received sequential submissions as follows:
 - (1) From the Department dated 25 January 2010 accompanied by evidence;
 - (2) From the Information Commissioner dated 8 February 2010;
 - (3) From the Appellant dated 26 February 2010 accompanied by evidence;
 - (4) From the Department in reply dated 30 March 2010; and
 - (5) A letter from the Appellant dated 9 April 2010.

Preliminary Issue

6. A new argument was introduced in the Appellant's submission, which we should deal with at the outset. The Appellant argued, on the authority of *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47, that the Department should have considered alternative forms of data release that would have avoided any invasion of privacy. He suggested two possible techniques for anonymising the data and adduced expert evidence to demonstrate that both were feasible. That evidence was not challenged

and in its subsequent Reply Submission the Department made an open offer to provide the data in anonymised form. It said that the offer was made “as a matter of discretion”; a phrase that seems to have been intended to emphasise that it did not accept that it had been obliged to do so at the time of the Request. Its reason was that the *Common Services* case had not then been decided and there was therefore no obligation to anonymise personal data at that time. Whatever the degree of acceptance these days of the concept of judicial law-making it does not justify the Department’s claim that the law on this issue, created by statute, was different before the House of Lords gave its interpretation in the *Commons Service* case. The obligation was the same. But it seems to us that the Department clearly discharged it. In its email of 10 May 2005 rejecting the Request its representative wrote “*I presume that you do not want the document/folder identified without the creator’s name. Please let me know if you do.*” That was plainly in response to the Appellant’s earlier emails in which he had made it clear that he wanted nothing less than the names of the document creators in order to secure a ruling on the section 40 point. It was a correct reading of the e-mails, which the Appellant conceded, because in his next email he stated “*You are correct, I do not want the identifiers without the names*”. Against that background it is not open to the Appellant, at this stage, to invite us to interpret the Request as one that should have triggered a response from the Department offering anonymised data.

7. The offer made by the Department had not been accepted by the Appellant by the time we came to decide the Appeal, although we had given the parties time to reach agreement. We are therefore faced with a very artificial situation. The Appellant has argued that the Department should have offered anonymised data and the Department has offered to provide it in that form. If it had been requested in that form it would not have even fallen within the statutory definition of personal data. Yet, in the absence of any agreement disposing of the appeal, we have to proceed on the basis that the Request covered, and was intended to cover, personal data and that the question of whether or not it should have been complied with must be determined solely by reference to the competing interests of privacy and freedom of information encapsulated in FOIA section 40 and the provisions of the Data Protection Act 1998 (“DPA”) that are cross referred from within it. We therefore now turn to consider those provisions in detail.

The Law

8. FOIA section 40 provides, in relevant part, 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) ... 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) ...

(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).*

(5) ...

(6) ...

(7) *In this section—*

(8) *“the data protection principles” means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;”*

9. It is not disputed that the information in question falls within the definition of personal data under Section 1 (1) of the DPA. The requirement of FOIA

section 40 (2) (a) is therefore satisfied, so that the information will be exempt if the conditions in either subsection (3) or subsection (4) were satisfied at the relevant time. However, subsection (4) is not relied on. The relevant test is therefore whether disclosure would contravene either a Data Protection Principle or DPA section 10. We do not need to spend time considering section 10 because its effect is simply to apply broadly the same principles in circumstances where the law is being applied to a data subject's right to prevent the processing of personal data.

10. The Department relies principally on the first Data Protection Principle. That is to be found in DPA Schedule 1 and provides:

“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, ...”

(For the purposes of this Appeal, of course, “processing” means disclosure in response to the Request).

11. The relevant Schedule 2 condition is paragraph 6 (1), which reads:

“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.”

12. In *Corporate Office of the House of Commons v Information Commissioner* [2008] EWHC (Admin) 1084 the Divisional Court recorded, as common ground between the parties in that case, but with apparent approval, that for these purposes “necessary”:

“should reflect the meaning attributed to it by the European Court of Human Rights when justifying an interference with a recognised right,

namely that there should be a pressing social need and that the interference was both proportionate as to means and fairly balanced as to ends. We note the explanation given by the court in The Sunday Times v United Kingdom (1979) 2 EHRR 245 paragraph 59:

"The court has already had the occasion ...to state its understanding of the phrase "necessary in a democratic society" the nature of its functions in the examination of issues turning on that phrase and the manner in which it will perform those functions.

The court has noted that, while the adjective "necessary", within the meaning of article 10(2) is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable" and that it implies the existence of a "pressing social need."

13. Our attention was also drawn to Part II of Schedule 1, which provides guidance on the interpretation of the Data Protection Principles, including, at paragraph 1 (1):

"In determining for the purposes of the first principle whether personal data are processed fairly, regard is to be had to the method by which they are obtained..."

14. Finally, we remind ourselves that the effect of a finding in the Appellant's favour would be to disclose the information to the world at large and that, although the motive behind any particular request is not relevant, we do have to take account of the Appellant's proposed research when considering, in particular, the legitimate expectations of the relevant data subjects and (for the purpose of paragraph 6 (1) of Schedule 2) the interest intended to be served.

The issues on this part of the Appeal

15. In considering if the exemption in FOIA section 40 should therefore apply we have to consider whether disclosure in response to the Request would be:

- (a) fair; and
- (b) lawful; and
- (c) necessary for the purposes of the legitimate interests of those to whom disclosure would be made; but not
- (d) “unwarranted ... by reason of prejudice to the rights and freedoms or legitimate interests” of those whose personal data would be disclosed.

16. For the reasons set out below we conclude that disclosure should have been made in the case of senior civil servants and that it may have been appropriate in respect of some more junior civil servants, dependent on the subject matter of individual documents to which their name has been linked, as well as some of those outside the Department (dependant, again, on seniority and subject matter). This gives rise to a further issue, which is whether the cost of carrying out that analysis, document by document, would have exceeded the limit set by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Cost Regulations”) and whether, in consequence, the Department would have been entitled to refuse the Request under FOIA section 12(1).

17. Before considering each of those issues in turn we summarise the evidence which the Appellant and the Department adduced.

Evidence

18. The Department filed a witness statement signed by Karen Pile. Ms Pile the Department's Director of Information Strategy and Services produced a witness statement to which we referred in the First Decision. In her second witness statement Ms Pile reiterated that (as summarised in paragraph 32 of

the First Decision) the information requested would disclose the names of the Department's staff, contractors and temporary employees responsible for the production of documents, as well as those who had prepared communications addressed to the Department, and that the information could be misleading as to who the true author was and the department in which he or she operated. In some cases, she said, this could lead to an individual being linked, correctly or incorrectly, with a particularly controversial or sensitive area of the Department's work. Ms Pile did not think that any of the identified categories of individual would have had any expectation of disclosure.

19. Ms Pile also commented on the possibility of extracting a more limited data set so as to exclude, for example, all names other than those of senior Civil Servants and any personal data that might link an individual to a sensitive area of work. She explained that the Matrix data could not have been manipulated in order to do this automatically at the time of the Request and that the data would therefore have had to be compared against a list of senior civil servants manually. Although this part of the exercise could now be performed electronically manual intervention would still be needed today in order to identify controversial or sensitive areas of work.

20. Evidence filed by The Appellant consisted of witness statements of the following:

- (1) Dr Zhiyong Xu an assistant Professor in the Computer Science Department of Suffolk University in Boston, Massachusetts who provided the expert evidence we have referred to above.
- (2) Michel W. Drapeau, a Canadian lawyer specialising in administrative law as both practising lawyer and academic. His evidence was that the Canadian law equivalent to the DPA does not treat information about an individual's employee status within a government body as personal data. This had led to decisions permitting the disclosure of information about the position a government employee held and the matters for which he or she was responsible. The result, he said, was

that this type of information was included in publication schemes maintained by public authorities and that government employees, who had been apprehensive about the publication of data about their roles and responsibilities when the relevant legislation had been introduced some twenty five years ago, had generally accepted that their concerns had been overstated. Mr Drapeau concluded with the opinion that the disclosure of this type of information had improved public understanding of the operation of government in Canada, without causing harm or distress to individual government employees.

- (3) Professor Robert Hazell a former UK civil servant and now a specialist in freedom of information, on which he has written and advised extensively. He explained how different jurisdictions, including Australia, Canada, Ireland and New Zealand frequently disclose individuals' identities included in information sought from government bodies and that this has not led to any significant media interest in the individuals concerned.
- (4) Daniel J Metcalfe a US lawyer and former Director of the Office of Information and Privacy of the US Department of Justice. He said that under US law there was a strong general rule of disclosure of employee names, with only limited exceptions, which had led to an expectation that, with the exception of personnel operating in law enforcement, security or active warfare, information about an individual's role and responsibility in government employment would be in the public domain. Mr Metcalfe did not think that such disclosure had generally caused any harm to the individuals concerned.
- (5) Peter Timmins a lawyer and freedom of information consultant in Australia. He explained that employee information was generally disclosed under Australian freedom of information legislation unless it related to the private, as opposed to the professional, aspects of the individual's life or there seemed to be a real prospect of personal harassment. He provided detail of a number of judicial decisions generally supporting that view. He added that disclosure had not led

to either harassment, misdirection of public enquiries or blame for policy decisions being placed on employees instead of elected politicians.

Would disclosure be unfair?

21. The Department urged us to take into account the circumstances in which the personal data came to be held when considering whether disclosure would be fair. It said that we were required to do this because of the requirement to interpret the First Data Protection Principle by reference to Part II of Schedule 1 of the DPA. It suggested that the individuals concerned (whether employees of the Department or others who had communicated with it) would not have had any expectation that their personal data would be released and that this would be especially unfair if it led to them being identified as the author of a sensitive document, (particularly if, as we noted in the First Decision, the apparent attribution of authorship might not reflect the true position). The Appellant disputed that the risk is a real one because, he said, Matrix does not record the subject matter covered by particular documents, but only by reference to folders. He suggested that his request could have been refined down to exclude employee names for folders or even to exclude folders altogether. The difficulty here is that the data enabling the subject matter of a folder to be identified was released under the Appellant's first request, as explained in paragraph 4 of the First Decision. Therefore, by the time that the Department came to consider the Request, the subject matter information in respect of folders was already in the public domain. The Department said that a connection could be made from an individual document to a folder, by reference to the folder's number, and that it would be possible from there to identify the subject matter of the document.

22. In determining whether the information sought in the second request falls within the section 40 exemption, we cannot therefore ignore the fact that disclosure of the identity of the authors in question may enable them to be

associated with a particular document. We say “may” because the submissions we received disclosed a disagreement as to whether a connection with a particular document could or could not be established. As we have mentioned, the Appellant said that it could not, because subject matter was only recorded against folders and not individual documents. The Department said that this was not correct because the information previously disclosed included a link from a document to its parent folder so that subject matter might be identified indirectly. But the Department further argued that, even without a link to subject matter, disclosure would still not have been justified. It said that, in the case of third parties corresponding with the Department, they are likely in many cases to have been unaware that the document in question had even been forwarded on to the Department or that Matrix had captured their personal data and that, even if they had been aware, they would still expect their personal data to be protected. In the case of the Department’s own employees, it said that they would have a reasonable expectation that disclosure would not be made other than in circumstances where an important public interest justified it (which it said did not exist in this case) and that it was not appropriate for individual civil servants, as opposed to Government Ministers, to be publicly identified with documents they had prepared. The Information Commissioner made the point, consistent with a number of earlier Tribunal decisions, that senior civil servants should not expect the same level of privacy enjoyed by their more junior colleagues. We did not interpret the Department’s submissions as seriously challenging the point, in general terms, although, as appears below, it did rely on the cost of any exercise to separate categories of employee to support its arguments against disclosure.

23. The Department further argued that disclosure might enable an individual’s area of work to be publicly identified. The Appellant drew attention to the difficulty of doing this, in view of the acronyms used within Matrix to identify individual organisational units, which he said made the fear expressed by the Department somewhat fanciful. He also relied on the evidence referred to

above concerning the practice in other countries. That evidence was countered by an argument by the Department that we should only consider material relevant to the law in the United Kingdom including, where relevant, EU law and the European Convention on Human Rights. The Department argued that the experience of other nations, whose law is not derived from, or influenced by, those sources is not relevant.

24. The Appellant also argued that the reasonable expectations of employees, at the time they saved a document into the Matrix system, would have taken account of a risk of disclosure under FOIA. The Department urged us to disregard the point because the expectation of individuals would have been based on their rights to privacy under the DPA; rights that it says were preserved when FOIA was enacted.

25. After giving all those arguments due consideration we have concluded that disclosure would create a risk that, when combined with other information already in the public domain, an individual creator could be connected to a particular document and to its subject matter, as well as to his or her area of work. The reasonable expectation of the individual will be dependant upon his or her seniority, the circumstances in which each document came to be recorded in the Matrix system and the nature of the subject matter. In general terms we think that a senior civil servant (by which we mean someone at Grade 5 or above) would not have a reasonable expectation of anonymity in respect of any document, even one with sensitive content (although even then there may be an occasional exception). At the more junior levels we think that anonymity is a reasonable expectation although that expectation may lessen with increasing seniority and be influenced by the extent to which he or she occupies a public facing role. For example, a relatively junior civil servant, such as a local Jobcentre Manager, may occupy a post with a representational role which required their identity and responsibilities to be known. In this case, the subject matter of documents is also relevant. For example, the association of the name of a junior civil servant with a thesaurus

term relating to animal rights could make them a target for attack by extremists in a manner that would prejudice their rights and freedoms, within the meaning of paragraph 6 (1) of schedule 2 to the DPA. We think that a similar degree of flexibility is required, based on subject matter of the document and seniority of the creator, when considering documents created by those communicating with a government department from outside.

26. In approaching this issue we have noted the experience of other countries with broadly similar freedom of information regimes. We do not think that the evidence assists us in interpreting legislation (for the self evident reason that the underlying law is not expressed in identical terms). However, the impact of disclosure on both recipients and those whose personal data has been disclosed may provide some assistance in assessing what is fair. Although, in this case, the value of the evidence was reduced by the lack of detail, (particularly in respect of the examples used in support of the views expressed) we have taken it into account when considering the extent of disclosure we are prepared to allow.

Would disclosure be lawful

27. We approach the issue of lawfulness on the basis that the test will be satisfied if disclosure is justified under FOIA. That brings into play the Data Protection Principles and Schedule 2 conditions relied on by the Department and set out above.

28. The Department argued that in considering whether disclosure would be lawful we should also take into account whether or not it would involve a breach of an individual's right to privacy under Article 8 of the European Convention on Human Rights, as the Divisional Court suggested in the passage we have quoted above from *Corporate Office of the House of Commons v Information Commissioner*. It argued, on that basis, that there should be no interference with privacy beyond that which would serve a

pressing social need and was proportionate to the legitimate aim being pursued. It said that, although the information in question might be useful for the Appellant's research, that did not constitute a pressing social need for disclosure.

29. The Appellant identified the relevant "legitimate interest" as the promotion of scholarly research and suggested that the Tribunal did not apply the appropriate criteria when, in the First Decision, it considered whether the public interest in disclosure was outweighed by the public interest in maintaining the exemption under consideration at the time. We said then:

"The public interest in favour of disclosure was said by Professor Roberts to lie in the research work which the requested information would enable him to carry out and thereafter to publish for the benefit of the public generally. ... having carefully considered what he has said about the value of metadata in research in the area of organisation-environment relationships, and having read an earlier research paper he provided to us, we have to say that, with great respect to Professor Roberts, we were not convinced that it would be of such value in terms of the public interest as to outweigh the factors in favour of maintaining the exemption, as summarised [earlier in the First Decision]."

We were, of course, considering a different issue in that passage than the one we address here. However, the Appellant has said that our observations were significantly flawed and has asked us to reconsider them, although he did not adduce any new evidence on the point.

30. We must, of course, give proper consideration to the existence of a legitimate interest in disclosure, and the weight to be applied to it, whether or not we have previously decided an issue that has some similarity with it or involved the same or similar considerations, and whether or not our previous conclusion has attracted criticism. The Appellant argued that, in assessing this part of the Appeal, we should acknowledge that there is, in general, a

legitimate interest in promoting academic research. He went on to suggest that the weight to be given to it in any particular case should be assessed on the basis of the qualifications and track record in the relevant field of research of the individual seeking information for his or her research and peer appraisal of the proposed project. He claimed that we did not take those criteria into account when considering the balance of public interest test and that we should do so now.

31. The Department did not challenge that there is a public interest in encouraging high quality scholarly research or that the Appellant has a legitimate interest in requesting data for the purposes of his scholarly research. However it pointed out that the disclosure requested is disclosure to the world and not just to the Appellant and that the legitimate interest to be considered is not just that of the Appellant but, in the language of paragraph 6 (1) of DPA Schedule 2, "parties to whom the data are disclosed".

32. We consider that the legitimate interest to be considered must extend wider than the narrow one of the researcher and his or her peer group. It must be assessed by reference to its potential value to the public as a whole. In this case the proposed research clearly has some value but in order to overcome the statutory restriction on disclosure it must be such as to give rise to a pressing social need for the data in question to be made available to the researcher. For the reasons set out in the First Decision we do not regard the outcome of the research under consideration here to be so valuable as to convince us that such a need for disclosure exists.

Would disclosure involve an unwarranted interference with the rights of the document creators?

33. The Department argued that, even if disclosure was "necessary" in the terms of paragraph 6 (1), it would still constitute an unwarranted interference with the rights of the individuals to whom the information related because of the

risk of them being linked to particularly sensitive documents. It argued that the potential prejudice to those individuals should be recognised even though the information disclosed would relate to the performance of their duties as public servants, and not in their capacity as private citizens.

34. We have already concluded that disclosure would be unfair in many cases, depending on the seniority of the individual concerned and the subject matter of the document to which his or her name would be connected. The same criteria that led us to that conclusion also support the view that disclosure might involve an unwarranted interference in their rights, based on the same criteria.

Would the process of assessing the documents exceed the relevant cost limit

35. FOIA section 12 provides that a public authority is not obliged to comply with a request for information if it estimates that the cost of complying would exceed the limit of £600 currently set out in the Costs Regulations. The Costs Regulations provide that the limit should be calculated by attributing an hourly rate of £25 to the work involved in complying with the request. Regulation 4(3) provides that, when carrying out that calculation, the public authority should:

“... take account only of the costs it reasonably expects to incur in relation to the request in-

- (a) determining whether it holds the information,*
- (b) locating the information, or a document which may contain the information,*
- (c) retrieving the information, or a document which may contain the information, and*
- (d) extracting the information from a document containing it.”*

36. In the course of the Information Commissioner’s investigation the Department prepared a costs estimate for preparing a list of documents and

folders with selected (senior/public-facing) names only. It demonstrated that there were 23, 994 records falling within the dates specified in the Request and that the process would have costed £675 at the specified hourly rate. However, the exercise did not include any attempt to either identify those from outside the Department who may have been recorded as the creator of a document sent to it or to assess whether the subject matter of particular documents required different treatment. The Information Commissioner also raised an issue as to whether part of the process covered by the cost estimate might have related to the task of redacting names from documents identified as falling within the scope of the Request. Any time involved in carrying out that task falls outside the categories of work listed in Regulation 4(3) and should have been disregarded.

37. We do not find it necessary, in the context of this particular case, to attempt a precise delineation between activity falling within the scope of regulation 4(3) and activity falling outside it. It is clear from what we have said that the task of determining which of the creator names should be disclosed and which should be withheld will involve individual assessment of many of the documents falling within the scope of the Request. This will be needed in order to establish, among other things:

- (a) The identity of the individual;
- (b) His or her status as an outsider or a Civil Servant;
- (c) His or her seniority and role;
- (d) The subject matter of the documents, where the question of disclosure cannot be determined solely on the basis of the status of the creator.

The cost estimate previously prepared for the Information Commissioner previously covered only part of those tasks. And where the task is as complex as it would have been in this case, we do not think it appropriate for the whole process to be ignored for cost estimate purposes simply on the basis that it could be said to fall within the broad scope of "name redaction". That may be appropriate where the task is simply to locate individuals' names

and redact them if they fall below a particular grade of seniority. But where, as here, the process requires a judgment to be made, document by document, balancing the various criteria we have identified, then we believe that much, if not all, of the process should be regarded as retrieving from each document the information which requires to be disclosed and therefore properly included in the cost estimate.

38. We conclude, on the basis of the previous estimate and the magnitude of the other tasks that were not included in it (including the seniority of those who would be required to make the final decision on marginal documents) that the overall cost of complying with the Request, in the way that we say it should have been dealt with, would have exceeded the costs limit. The Department would therefore have been justified in refusing it pursuant to FOIA section 12.

39. We should add that, in view of the Appellant's current residence in the USA, the Department also relied on Data Protection Principle 8 (transfer of personal data outside the EEA). However, because of the conclusion we have reached above it is not necessary for us to consider this issue further.

Conclusion

40. For the reasons we have given we believe that the Department would have been justified in refusing to comply with the Request, as presented to it, but should have assessed which information falling within its scope should have been disclosed in light of the subject matter of the documents in question and the seniority of the individual recorded in Matrix as having created it. However, as complying with the Request on that basis would have caused the costs limit established under FOIA section 12 to have been exceeded, the Department would have been entitled to refuse it on that basis. We therefore dismiss the Appeal. Although we have reached our conclusion on a different basis to that set out in the Decision Notice, the outcome is the same, namely, that the Department acted in accordance with the FOIA and is not required to take any further action.

41. Our decision is unanimous.

42. An appeal against this decision may be submitted to the Upper Tribunal. A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify the error or errors of law in the decision and state the result the party is seeking. Relevant forms and guidance for making an application can be found on the Tribunal's website at www.informationtribunal.gov.uk

Signed:

Chris Ryan
Tribunal Judge

26th May 2010