



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

EA/2009/0083

ON APPEAL FROM:

The Information Commissioner's Decision No: FS50138960

Dated: 26 August 2009

Appellant: Joanne Bryce

Respondent: Information Commissioner

Additional Party: Cambridgeshire Constabulary

Determined on the papers on: 16 March 2010, 6 May 2010 and 2 June 2010

Date of decision: 8 June 2010

Before

**Anisa Dhanji
Judge**

and

**Jacqueline Blake and Pieter De Waal
Panel Members**

Representation:

For the Appellant: Heather Rogers, QC (instructed by Leigh Day and Co, Solicitors)

For the Information Commissioner: Richard Bailey, Solicitor

For the Additional Party: Belinda Moore (Weightmans Solicitors)

Subject matter:

FOIA, section 40(1) and (2) – whether information is personal data, whether processing is in breach of the first data protection principle

Cases:

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

Durant v Financial Services Authority [2003] EWCA Civ 1746

Guardian News & Media v Information Commissioner (EA/2008/0084)

Johnson v Medical Defence Union [2007] EWCA Civ 262

Kelway v Information Commissioner & Chief Constable of Northumbria Police (EA/2008/0037)

Waugh v Information Commissioner and Doncaster College (EA/2008/0038)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal in part and substitutes the following Decision Notice in place of the Decision Notice dated 26 August 2009.

SUBSTITUTED DECISION NOTICE

Dated: 8 June 2010

Public Authority: Cambridgeshire Constabulary

Address of Public authority: Hinchingsbrook Park
Huntington
Cambridgeshire
PE29 6NP

Name of Complainant: Joanne Bryce

The Substituted Decision

For the reasons set out in our determination, we allow the appeal in part and substitute the following Decision Notice in place of the Commissioner's Decision Notice dated 26 August 2009.

The Tribunal finds that those parts of the Report (as defined in the determination) marked in blue on the Confidential Annex comprise personal data of third parties, and disclosure would breach the first data protection principle. Such information is therefore exempt under section 40(2) of the Freedom of Information Act 2000.

Action Required

Within 20 working days of the Tribunal's determination being promulgated, the Public Authority must disclose to the Appellant the entire Report except for (1) those parts marked in blue on the Confidential Annex which should be redacted; and (2) those parts previously disclosed by the Public Authority to the Appellant in response to her subject access request under the Data Protection Act 1998.

Should the Appellant prefer the Public Authority to provide the information required to be disclosed hereunder, together with the information previously disclosed, in a single document, that is a matter for her to discuss with the Public Authority. The Appellant should be aware, however, that the entire document thus disclosed may then be in the public domain.

The Confidential Annex

The Confidential Annex will not be provided to the Appellant nor published with the determination on the Tribunal's website or elsewhere.

Signed

Tribunal Judge

REASONS FOR DECISION

Introduction

1. This is an appeal by Mrs Joanne Bryce (the “Appellant”), against a Decision Notice issued by the Information Commissioner (the “Commissioner”) on 26 August 2009, upholding a refusal by the Cambridgeshire Constabulary (the “Public Authority”) to provide the Appellant with certain information she had requested under the Freedom of Information Act 2000 (“FOIA”).

The Request for Information

2. On 29 September 2005, the Appellant made a request for information contained in an investigating officer’s report (the “Report”).
3. The Report had been produced following an inquiry undertaken after the Appellant and two other individuals raised concerns about the way in which the Public Authority had investigated the death of the Appellant’s sister, Claire Oldfield-Hampson, who had been killed by her husband (the “Offender”), in September 1996. The Report addresses the adequacy of the criminal investigation, as well as with the way in which the Public Authority dealt with the Appellant and the other complainants.
4. The Public Authority replied to the Appellant’s request on 20 October 2005. It confirmed that it held the information, but refused to disclose it on the basis of the exemption contained in section 30 of FOIA because the Report related to a criminal investigation. It stated, however, that the Appellant might be entitled to the information under the Data Protection Act 1998 (“DPA”).
5. On 25 October 2005, the Appellant made a request under the DPA. On 22 December 2005, the Public Authority informed the Appellant that in fact, under the DPA, she would be entitled only to those parts of the Report that referred to her, and not to her deceased sister, the investigation, or the officers involved. It offered to provide her with those redacted references, although it indicated that the Report thus redacted would likely fall far short of what the Appellant was seeking.
6. On 14 January 2006, the Appellant sought an internal review of the Public Authority’s decision. Some 8 months later, on 29 September 2006, the Public Authority wrote to the Appellant maintaining its refusal under section 30. It said that it was also refusing her request under section 40 of FOIA on the basis of both section 40(1) (personal data of the Appellant), and section 40(2) (personal data of third parties).

The Complaint to the Commissioner

7. On 19 October 2006, the Appellant wrote to the Commissioner to complain about the Public Authority's refusal to provide her with the information requested.
8. On 5 June 2008, the Commissioner informed the Appellant that he considered that all the information in the Report was her personal data, and accordingly, it was exempt under section 40(1) of FOIA. However, he considered that she might be entitled to the information by way of a subject access request under section 7 of the DPA. She was informed that the request was now being considered by the Commissioner as a DPA request
9. On 31 March 2009, the Commissioner again informed the Appellant that all the information in the Report was her personal data. He went on to explain that this did not mean that she was entitled to the entirety of the Report; there were various exemptions to the subject access rights in the DPA that might be relevant.
10. On the same day, following discussions between the Commissioner and the Public Authority, the Public Authority disclosed the Report to the Appellant in redacted form. It contained only the information which the Public Authority considered was the Appellant's personal data.
11. On 17 May 2009, the Appellant wrote to the Commissioner to complain that the remainder of the Report should also be disclosed. She also requested a Decision Notice under FOIA so that she could appeal against the Commissioner's findings.
12. Initially, the Commissioner refused to issue a Decision Notice, but later did so. The Decision Notice which was issued on 26 August 2009 stated that the entire Report comprised the Appellant's personal data, and therefore, the entire Report was exempt from disclosure under section 40(1). The Decision Notice did not address the other exemptions relied on by the Public Authority, namely, sections 30 and 40(2).

The Appeal to the Tribunal

13. By a Notice of Appeal dated 17 September 2009, the Appellant appealed to the Tribunal against the Decision Notice. She challenged the Commissioner's findings that the entire Report comprised her personal data. She accepted that parts of it did, but says that the Report is wide ranging and that it could not be the case that the whole Report was her personal data. Significant parts of it clearly were not, and the Commissioner should have considered whether those other parts should have been disclosed.
14. During the course of the appeal, the Commissioner revised his position quite substantially from that set out in the Decision Notice. He has now accepted (quite rightly in our view), that the entire Report cannot constitute the Appellant's personal data just because it was created as a result of her complaint. He says, however, that the information in the Report is nevertheless exempt, in part under section 40(1), and in part under section 40(2).

15. In particular, he says that the Report deals with two distinct issues, namely (1) how the Appellant and the other complainants were treated during the police investigation (which he calls the “first issue”); and (2) the adequacy of the investigation itself (which he calls the “second issue”).
16. He says that the Appellant is clearly the main focus of the first issue, and that the exemption in section 40(1) is therefore engaged in respect of those parts of the Report that deal with the first issue.
17. The Commissioner says that the information in those parts of the Report dealing with the second issue constitute the personal data of third parties and disclosure would breach the first data protection principle. Such information is exempt under section 40(2), which, read together with sections 40(3)(a)(i) and 40(3)(b), provides an absolute exemption if disclosure of third party personal data would breach any of the data protection principles.
18. In response to the panel’s directions, the Commissioner has confirmed that he considers that all the information in the Report comes within the scope of either issue (1) or (2). In effect, the Commissioner says that the entire Report comprises information that is either the personal data of the Appellant, or personal data of third parties.

The Tribunal’s Jurisdiction

19. The scope of the Tribunal’s jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the notice is not in accordance with the law, or to the extent the notice involved an exercise of discretion by the Commissioner, he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
20. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, the Tribunal will often receive evidence that was not before the Commissioner.
21. Although this appeal started as an appeal to the Information Tribunal, by virtue of The Transfer of Tribunal Functions Order 2010 (and in particular articles 2 and 3 and paragraph 2 of Schedule 5), we are now constituted as a First-tier Tribunal.
22. The procedural aspects of the appeal have been governed by the Information Tribunal (Enforcement Appeals) Rules 2005. The appeal has been determined without a hearing, pursuant to Rule 16 of those Rules.
23. The Commissioner considered that the appeal should be determined on the papers. The Appellant requested an oral hearing. After considering submissions made by the parties, the Tribunal ruled that the appeal should be determined without an oral hearing. This is not a case which turns on a factual dispute where the evidence or credibility of witness evidence is important. Although the Appellant has lodged statements from several

witnesses, neither of the other parties has indicated a wish to cross examine those witnesses. We also do not regard their evidence as being material to the key issues in this appeal. This is not intended to diminish what they say; but simply reflects their areas of expertise and knowledge, and the fact that they have not had sight of the Report. An oral hearing would therefore have been largely a matter of legal argument. All parties are legally represented, and have been able to put forward written arguments. Without having sight of the Report, the Appellant and her representatives would not have been able to assist in applying the law to the Report, nor in considering which passages in the Report are or are not exempt. In short, having regard to the nature of the issues raised, and the nature of the evidence, the Tribunal was satisfied that the appeal could properly be determined without an oral hearing.

Legislative Framework

General

24. Under section 1 of FOIA, any person who makes a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information.
25. The duty on a public authority to provide the information requested does not arise if the information sought is exempt under Part II of FOIA or if certain other provisions apply. In the present case, the Commissioner found that the information was exempt under section 40(1).

Section 40

26. In so far as it is relevant, section 40 provides as follows:

Personal Information

(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 [1998 c. 29.] 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 [1998 c. 29.] 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 [1998 c. 29.] 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).

(7) In this section—

“the data protection principles” means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

“data subject” has the same meaning as in section 1(1) of that Act;

“personal data” has the same meaning as in section 1(1) of that Act.

Evidence and Submissions

27. The parties have lodged an agreed bundle of documents comprising some 293 pages. It includes three documents which it may be helpful to mention specifically:
- a letter dated 5 June 2003 from the Public Authority to the Appellant and her husband responding in some detail to complaints they had made about the investigation and related matters. To a large extent, the letter summarises the contents of the Report (although it does not state that explicitly);
 - transcript of the proceedings at the Crown Court at Northampton on 26 and 28 October 1999, relating to the sentencing of the Offender, including submissions in mitigation made on the Offender's behalf; and
 - extract from Hansard Debates on 8 January 2001, setting out the remarks made by Mr. Andrew George, MP for St. Ives, in relation to the investigation, the sentencing of the Offender, and the treatment of the Appellant and her family.
28. Although the letter of 5 June 2003 is addressed to the Appellant and her husband, there is nothing in the letter to suggest that its contents were being imparted in confidence. The other two documents are clearly in the public domain.
29. The Appellant has lodged witness statements from Eric Metcalfe, Frank Mullane, Christine Hurst, and Margaret Watson and from herself. The Public Authority had indicated that it would be relying on witness evidence but no such evidence has been submitted.
30. The Appellant's witnesses address, in the main, the importance of disclosure of a police report following an internal investigation from the point of view of the victim, as well as in order to ensure the accountability of the police. We

have taken what they have said into account, particularly when considering the issue of fairness under the first data protection principle, even if we have not referred to their evidence specifically.

31. In addition, the parties have also lodged written submissions. In the case of the Public Authority, this has taken the form of a very brief Reply to the Grounds of Appeal in which it says no more than that it adopts the Commissioner's Reply. It has not made any further submissions.
32. We have also been provided with the Report, comprising 96 pages divided into 6 chapters. We have been provided with 2 versions of the Report. The first is the Report in its entirety. The second is the Report in redacted form as provided to the appellant pursuant to her subject access request under the DPA. This comprises 38 pages, many of which have been partially redacted. What we say in this determination about the contents of the Report, will, of necessity, be quite general since to be specific risks disclosure of the very information that is the subject of this appeal.
33. There are several Appendices to the Report. We have not had sight of them. They are also not listed in the Report although they are referred to in the text. It appears that for the most part, these Appendices comprise pre-existing documents rather than documents prepared as part of the inquiry. We have understood the Appellant's request as being for the main body of the Report. Indeed she has referred to her request as being for the 96-page report. The scope of this appeal, therefore, is confined to the Report itself and does not cover any additional documents that may have been appended to the Report.
34. The Appellant has set out, in her witness statement, her concerns about certain aspects of the police investigation and the subsequent judicial process, and she has explained why the Report is of such importance to her and her family. The Tribunal's jurisdiction is limited, however, to the question of whether, under FOIA, the Public Authority was entitled to refuse the Appellant's request for the Report. We may refer to the background to the request where relevant to the issues before us, but if we do so only to that extent, it should not be taken to mean that we have not noted the concerns expressed by the Appellant or that we do not recognise that she and her family have suffered a tragic loss.

Issues

35. There are two issues for the Tribunal to determine:
 - Does all the information in the Report comprise either the personal data of the Appellant or of third parties? If not, and if no other exemptions are engaged, the information must be disclosed.
 - In relation to information which comprises personal data of third parties, would disclosure breach any of the data protection principles? If yes, the information is exempt. If not, it must be disclosed.

Findings

(a) **Does all the information in the Report comprise either the personal data of the Appellant or of third parties?**

36. The Commissioner says that all the information in the Report comprises personal data, either of the Appellant, or of third parties. We need to begin by considering what “personal data” is.

37. Section 40(7) of FOIA incorporates the definition of “personal data” found in section 1(1) the DPA which is 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;*

38. The DPA gives effect to Directive 95/46/EC of 24 October 1995 on The Protection Of Individuals With Regard To The Processing Of Personal Data And On The Free Movement Of Such Data (“the 1995 Directive”). It may be helpful to also set out the definition of “personal data” from the 1995 Directive (Article 2(a)):

“... any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;”

39. In the Court of Appeal’s decision in Durant v Financial Services Authority “personal data” was defined by Auld LJ as follows:

“...not all information retrieved from a computer search against an individual’s name or unique identifier is personal data within the Act. Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject’s involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person’s or body’s conduct that he

may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity.”

40. On this basis it is clear that not all the information in the Report comprises personal data. For example, we consider that there is nothing in the Introduction, and very little in the Glossary of Terms and Abbreviations, or in the Executive Summary and other general background material that comprises personal data of either the Appellant or third parties. Most of that information does not identify any living individual, much less does it contain any information which could be said to be personal or biographical of any person. In the absence of any other exemption being engaged, such information must therefore be disclosed.
 41. We note that the Public Authority had refused the Appellant’s request on the basis of section 30 as well. Having found that the information was exempt under section 40, the Commissioner did not consider section 30. The Public Authority has adopted the Commissioner’s position and has made no further submissions. It is not clear therefore, to what extent, if any, reliance is still being placed on section 30.
 42. In any event, we do not consider that section 30 is engaged. That exemption is concerned primarily with information held by a Public Authority for pre-criminal proceeding purposes, for example, whether to charge someone with an offence or for the purposes of an investigation which may lead to criminal proceedings. In the present case, the Report relates to an inquiry conducted well after the criminal proceedings in question had been concluded. The Report relates to how those investigations had been carried out, and in our view, it falls entirely outside the scope of section 30.
- (b) Is some or all of the information in the Report which comprises personal data of third parties exempt under section 40(2)?**
43. All information in the Report comprising the Appellant’s personal data should have been disclosed to her in response to her subject access request under section 7 of the DPA. The key issue in this appeal concerns the information which is personal data of third parties.
 44. Applying the definition of personal data as further explained by **Durant**, not all information relating to third parties in the Report constitutes their personal data. It is not permissible, therefore, to take a blanket approach. Rather, it is necessary to consider the information in each case, including to what extent the focus of the information is the third party in question, and to what extent the information is biographical, has personal connotations or affects the data subject’s privacy.
 45. It is clear that the Report does contain information which, properly construed, is personal data of third parties.
 46. We also note for completeness that we have not sought to identify separately whether there is any personal data of the Appellant which has not been disclosed as part of her subject access request. That is not an issue the Appellant has put before the Tribunal, and in any event such information would be exempt from disclosure under FOIA by reason of section 40(1).

However, on the basis that the Public Authority has, by its previous disclosure, indicated that it is willing to provide such information to the Appellant, to the extent that any part of the Report not redacted as set out in the Confidential Annex contains any personal data of the Appellant not previously been disclosed, we do not anticipate that it will give rise to any difficulty.

Would disclosure breach the first data protection principle?

47. Whether personal data of third parties in the Report is exempt depends on whether disclosure would breach the first data protection principle. If so, then section 40(2), read together with sections 40(3)(a)(i) or 40(3)(b), means that there is an absolute exemption for such information. The Commissioner does not say that any other data protection principle would be breached, nor that section 10 of the DPA is in issue.
48. We will first set out the law and general principles to be applied. We will then seek to apply those principles to the personal data of the various third parties.
49. The first data protection principle provides as follows:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

- i. at least one of the conditions in Schedule 2 is met, and*
- ii. in the case of sensitive personal data, at least one of the conditions in schedule 3 is also met.”*

Fair Processing

50. “Processing” as defined in section 1(1) of the DPA to include disclosure.
51. In the case of all third party data subjects, the Commissioner says that disclosure of the Report would not be fair. Having made this finding, he did not regard it necessary to go on to consider the conditions in Schedules 2 or 3.
52. The first question in relation to personal data of third parties is whether disclosure would amount to fair and lawful processing. If it does not, then the information is exempt. If we find that disclosure would amount to fair and lawful processing then it is necessary to look further to establish whether processing would also meet the conditions in Schedules 2 or 3, as applicable.
53. That is not to say, however, that the question of fairness is a narrow construct divorced from the considerations involved in Schedules 2 and 3. We accept that fairness is in fact a broad concept, capable of embracing a range of considerations. In particular, we accept that fairness should not be considered from the point of view of the data subject alone. It is necessary to also consider the interests of the data user (here, the Appellant), and also, where relevant, the wider considerations of accountability and transparency implicit in FOIA.

54. We have found the following observations of Arden LJ in **Johnson v Medical Defence Union**, to which the Appellant has referred us, to be helpful guidance on the proper approach to take when assessing fairness:

“Recital (28) [of Directive 95/46] states that “any processing of personal data must be lawful and fair to the individuals concerned”. I do not consider that this excludes from consideration the interests of the data user. Indeed the very word “fairness” suggests a balancing of interests. In this case the interests to be taken into account would be those of the data subject and the data user, and perhaps, in an appropriate case, any other data subject affected by the operation in question.”

55. We do not take this to mean, however, that one starts with the scales evenly balanced. Although a consideration of fairness requires other interests to be taken into account, where section 40 is engaged, the data subject’s interests are clearly paramount. We remind ourselves of the emphasis placed by Lords Hope and Rodger in **Commons Services Agency v Scottish Information Commissioner**, on the continued primacy of the DPA notwithstanding the passage and implementation of FOIA

Schedule 2 conditions

56. Schedule 2 contains 6 conditions which are relevant for the processing of any personal data. At least one condition has to be met if the data controller is to comply with section 4(4) of the DPA. The conditions include whether consent has been given by the data subject, whether processing is “necessary” to comply with a legal obligation, or whether it is “necessary in the interests of justice”.

57. Of particular importance in the present case is condition 6 which requires that:

“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.”

58. Where Schedule 2 is engaged, therefore, condition 6 requires a consideration first of whether there is a legitimate interest in disclosure on the part of the Public Authority, the Appellant or the wider public.

59. If there is, the next question is whether disclosure is necessary to meet that legitimate interest. In **Corporate Officer of the House of Commons v Information Commissioner**, “necessary” in the context of condition 6 was taken to reflect the meaning attributed by the European Court of Human Rights when justifying an interference with a Convention right, namely, that there should be a “pressing social need” and the interference should be “both proportionate as to means and fairly balanced as to ends”.

60. Even if these two questions are answered in the affirmative, disclosure is only permissible if it is not “unwarranted” by reason of “prejudice to the rights and

freedoms or legitimate interests” of the third parties whose personal data is contained in the Report.

Schedule 3 conditions

61. Schedule 3 is only relevant if any third party personal data is “sensitive personal data”. Such data must not be processed unless at least one of the conditions in Schedule 3 (as supplemented by the provisions of The Data Processing (Processing of Sensitive Personal Data) Order 2000, SI 2000/417), is met.

62. Sensitive personal data is defined in section 2 of the DPA as personal data consisting of information as to (inter alia) a person’s:

(e) physical or mental health or condition,

(g) the commission or alleged commission by him of any offence

63. As the House of Lords in **Common Services Agency v Scottish Information Commissioner** made it clear, section 2 does not provide a stand-alone definition of “sensitive personal data”; rather, the definition of “personal data” must be read in.

64. There are 10 conditions in Schedule 3. Of particular relevance in the present case is condition 5:

“The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.”

Application to the present case

65. The Commissioner says that the Report contains personal data of the following third parties:

- *police officers;*
- *the Offender; and*
- *the Offender’s family.*

To these, we would add:

- *witnesses who assisted in the investigation;*
- *the deceased’s family; and*
- *the daughter of the Offender and the deceased.*

We will look at the position of each individual or group in turn.

66. For the avoidance of doubt, we should say that the Report also contains information about the deceased. However, this is not in issue since information can only be personal data as defined by the DPA if it relates to a

living person. Such information may be relevant, however, where it concerns the deceased's relationship with a living person, for example, her daughter. In such cases, the information will likely be the personal data of that other person.

Police Officers

67. The Report contains references to the conduct of individual police officers involved in the investigation. The officers are of varying ranks. They are named, their roles are described, and their activities in the investigation forms part of the narrative of the Report. The Report also considers allegations made in relation to individual officers. In some cases, the allegations are found to be unsubstantiated. Where they are substantiated, the Report recommends that the matter be dealt with by way of management advice to the officers concerned, rather than formal warnings.
68. We do not consider that generic comments about the officers as a group or simple references to what officers did on a particular day during the investigation, constitutes their personal data. Such information relates to the officers acting in their public capacity. The information is not biographical and not personal, and in most cases, the officers are not the focus of what is being said. Such information is therefore not exempt and must be disclosed.
69. However, many parts of the Report clearly do contain personal data of the individual police officers. We accept that where the Report identifies the police officers involved in the investigation, and their role in the investigation, that is their personal data. Allegations or criticisms in the Report about individual officers and personal opinions expressed by any officers, is also personal data.
70. As to whether disclosure of any such personal data would breach the first data protection principle, it is not possible to do justice to the question by saying that disclosure is either fair in all cases or unfair in all cases. It is necessary to look at the various relevant factors that point towards fairness or unfairness in the case of each piece of information.
71. Most of the information about police officers relates to them in the context of their work, carrying out public functions. Clearly, the public have an interest in the police carrying out their duties properly, and in seeing that lessons learned from this investigation are applied in future investigations. These factors point towards disclosure being fair.
72. As to allegations made in respect of the conduct of individual police officers, a lower threshold of what is unfair may be appropriate in relation to more senior officers who might reasonably expect greater scrutiny of and public interest in, their conduct. However, we consider that the Commissioner's concerns about the harm that disclosure may cause to the careers of any of the police officers involved, is, in our view, overstated. The Report relates to an investigation carried out over 10 years ago and the passage of time is likely to significantly reduce any career damage. Even as at the date of the refusal, 7 years had already elapsed since the events covered by the investigation. There is no evidence before us that there has been any career damage arising from any of the disclosures made to date.

73. We accept the Commissioner's argument that in assessing fairness, the reasonable expectations of the police officers in question is a relevant consideration. However, there is no evidence before us from any of the officers as to what their reasonable expectation would have been or is. There is also no evidence that they were given any assurance that the Report would be kept confidential. We find it likely that the police officers would have known that the enquiry was being undertaken as a result of complaints by the Appellant and her family about the shortcomings of the Public Authority, and in these circumstances, it seems likely that there would have been a reasonable expectation that the Report would, in fact, be made public.
74. We have been referred to the Tribunal's decision in **Waugh v Information Commissioner and Doncaster College**, which upheld the refusal to disclose information relating to the dismissal of the Principal of Doncaster College. The Tribunal considered that there is a "*recognised expectation that the internal disciplinary matter of an individual will be private*". The present case, however, is quite different. First, the focus of the Report is about the way in which the Public Authority carried out the inquiry rather than being about any particular officer. While the Report does consider certain complaints against individual officers, the information about disciplinary consequences is limited to a brief mention that management advice is recommended. We also note that the Public Authority's letter to the Appellant and her husband dated 5 June 2003 (referred to in paragraph 27 above), contains essentially the same information. In particular, it sets out the names of individual officers against whom disciplinary action (by way of management advice), had been taken. In addition, the redacted Report as disclosed to the Appellant in response to her subject access request, also contains names of certain officers, identifies complaints against them and sets out the Report's findings and recommendations. Although these disclosures were made to the Appellant and not to the world at large, as already noted, they were not made in confidence, and it is clear that they have not been treated in confidence. Indeed it would be surprising if they had been since one of the Appellant's stated objectives has been to bring about changes in the way investigations are carried out and how families of the victim are treated. In these circumstances, we consider that disclosure would be fair.
75. We do, however, consider that in relation to certain parts of the Report which records opinions expressed by officers in what appear to be an "off the cuff" manner, there would likely have been a reasonable expectation that they would not be disclosed. We consider that disclosure of such information would not be fair.
76. For the most part, however, for the reasons set out above, we find that disclosure of the information is fair. It is necessary to go on to consider, then, whether any of the conditions in Schedule 2 are met. The relevant condition is (6), set out at paragraph 57 above. The question is whether disclosure is necessary for the legitimate interests of the Public Authority, the Appellant, or the wider public, and if so, whether it is "unwarranted" by reason of prejudice to the rights and freedoms or legitimate interests of the police officers.
77. There is no evidence before us as to the Public Authority's interests. The Appellant's interest is in transparency as to the investigation of her sister's

death, the way in which she and her family were treated in the process, and about the actions or omissions of the Public Authority that led to the Offender being able to make unchallenged derogatory remarks about her sister in Court. There is also a wider public interest in transparency and accountability in relation to the investigation of serious offences and in ensuring that mistakes made are identified and not repeated. Against these interests, are the interests of the police officers in the privacy of their personal data. The protection afforded by condition 6 is in relation to unwarranted disclosure. The factors set out above which point to the fairness of the disclosure, in our view, also support a finding that on the facts of this case, any prejudice to the rights and freedoms or legitimate interests of the police officers is not unwarranted.

The Offender

78. The Report contains many references to the Offender, including, in particular, as to the details of the offence itself, his actions in the aftermath of the offence, as well as about his motivations for committing the offence, his relationship with the deceased, his financial circumstances, his lifestyle, employment history, mental state before and at the time of the offence, and about other offences which he is alleged to have committed.
79. We accept that most, if not all these references, amount to personal data of the Offender. The information is personal, biographical, and to a large extent, the focus of the information is the Offender himself.
80. We also accept that much, though not all, of this personal data is sensitive personal data as defined in section 2 of the DPA, in that it relates to the commission or alleged commission by him of an offence or to his physical or mental health.
81. The question is whether the disclosure of the personal data (and the sensitive personal data), would be fair. The Commissioner says that it would be unfair because the information is, by its very nature, information that individuals regard as the most private information about them and that disclosure would likely have a detrimental or distressing effect on the Offender.
82. As before, we consider that disclosure cannot be regarded as being fair or unfair in generic terms; it is necessary to consider the specific information that constitutes the Offender's personal data and to ask, whether in each case, disclosure would be fair.
83. We have undertaken that exercise ourselves, keeping in mind the need to balance the Offender's privacy with the legitimate public interest in the investigation of a criminal offence and the interest of the Appellant and her family in this offence in particular. We consider that disclosure of much of the information would be fair. In considering fairness, we have kept in mind the information which the Offender had put into the public domain himself, in the criminal proceedings, as set out in the Court transcript, when seeking to reduce the charge from murder to manslaughter, and in an effort to mitigate his sentence. These proceedings were of course open to the public and were reported in the media, as the Offender would likely have known they would be. In our view, this must diminish the Offender's interest in the privacy of the

information. We have considered whether the fact that the information is in the public domain also diminishes the interests of the Appellant and the wider public. We find that it does to some extent, but we consider that the information about the Offender is an integral part of the review of how the police handled the investigation and there remains a legitimate interest, therefore, in seeing the Report in as complete a form as possible

84. To the extent that the personal data is not sensitive personal data, we must consider whether any of the conditions in Schedule 2 are met. As before, condition 6 is the most relevant. We consider that the objective of transparency and accountability of the Public Authority's handling of the investigation can only properly be achieved through the disclosure of the Report so we find that disclosure is necessary for the legitimate interest of the Appellant and wider public. In our view, disclosure cannot be said to be unwarranted by reason of prejudice to the rights and freedoms of the Offender, where the information is already in the public domain and has been put there by the Offender himself. For the same reason, we consider that in relation to information that is sensitive personal data, condition 5 is met (information that has been made public as a result of steps deliberately taken by the data subject).
85. We do not, however, consider that disclosure of the personal data of the Offender, as contained in the Report, would be fair in all cases. In particular, we do not consider that detailed matters concerning the Offender's past employment or allegations of other offences with which the Offender was either not charged, or which were not pursued against him, can be said to be fair. These are not matters that relate directly to the purpose of the Report,, or to the Appellant's or public's interests identified above. That information, therefore, is exempt.

The Offender's family, the Deceased's family, and other Witnesses

86. There are a small number of references in the Report to the Offender's sister and brother in law. There are more extensive references to the deceased's mother and brother in law (the Appellant's husband), and there are also a number of brief references to friends of the deceased or Offender and others who were interviewed as part of the police investigation. All these people are identified in the Report by name and for the most part, the references to these individuals describe or touch on their personal relationships with the deceased, the Offender, or their daughter. We accept that such information is personal data.
87. We find that for the most part, disclosure would not amount to fair processing. The personal data of these individuals is included in the Report because they had some role to play in the investigation. For the most part, however, they have been peripheral players or have been performing a public service as witnesses, but in their private capacity. In our view, there is a strong and legitimate interest on the part of these data subjects for their personal data to be kept private, and a much less legitimate interest in disclosure. It is not their role but the Public Authority's role that is the proper object of concern as regards accountability and transparency. For the most, we find that the

personal data of these data subjects is therefore exempt from disclosure under section 40(2) of FOIA.

The Daughter

88. The Report also contains information concerning the daughter of the Offender and deceased. This includes information about her relationship with her parents and with their families and her contact with them. It also concerns her actions before and after her mother was killed, and the video of her interview with the police.
89. For the most part, we consider that this information is clearly personal data of the daughter. Bearing in mind that she was not yet 8 years old at the time her mother was killed, and that most of the information relates to her at this time or before, we consider that the interest of the data subject in maintaining the privacy of this information is particularly high, with a relatively low countervailing interest on the part of the Appellant or the general public in information that is, for the most part, not central to the investigation. Although the interest of the Appellant includes what was said in Court about the relationship between the deceased and her daughter, that interest is largely satisfied by those parts of the Report that acknowledge that what was said was inaccurate. We do not consider that any further details contained in the Report, to the extent it involves disclosure of the personal data of the daughter, is justified in furtherance of the Appellant's interests. We find, therefore, that such information is exempt.

Other

90. The Appellant asks us to record, which we now do, that the approach originally adopted by the Commissioner, as set out in his Decision Notice, was wrong in stating that the fact that the Report was created in response to the Appellant's complaints, meant that all of the information in it would be her "personal data". The Commissioner seems to have now accepted that that was clearly incorrect.
91. We also wish to record our concern about the delay on the part of the Commissioner in dealing with the Appellant's complaint. The complaint was made on 19 October 2006. The Commissioner issued its Decision Notice on 26 August 2009, almost three years later. Although we appreciate that the Commissioner dealt initially with the Appellant's complaint as a subject access request, nevertheless the delay on the Commissioner's part was unfortunately, quite excessive.

Decision

92. For all the reasons set out above, this appeal is allowed in part.
93. This decision is unanimous.
94. Under section 11 of the Tribunals, Courts and Enforcement Act 2007 an appeal against a decision of the First-tier Tribunal on a point of law may be submitted to the Upper Tribunal. A person wishing to appeal must make a written application to the First-tier Tribunal for permission to appeal within 28

days of receipt of this decision. Such an application must identify any error of law relied on and state the result the party is seeking. Relevant forms and guidance can found on the Tribunal's website.

Signed

Date: 8 June 2010

Tribunal Judge

Amended on 17 August 2010 pursuant to rule 40 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009