



**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)  
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

**Appeal No. EA/2012/0217**

**BETWEEN:**

**DEPARTMENT FOR WORK AND PENSIONS**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

**HEARD ON 16 APRIL 2013 AT FIELD HOUSE, LONDON, WC2**

**BEFORE**

**DAVID MARKS QC  
Tribunal Judge**

**Dave Sivers  
Darryl Stephenson**

**Appearances:**

Counsel for the Appellant: James Cornwell  
Counsel for the Respondent: Christopher Knight

**Subject Matter:**

Section 40 and 44 of the Freedom of Information Act 2000: Anonymised Data; Data Protection Act 1998: Data Protection Principles; Child Support Act 1991, sections 2 and 50; Social Security Administration Act 1992, section 123 and Schedule 4, Part 1: whether offence or offences are committed under section 50 and section 123 respectively

**Cases and authorities cited:**

*Department of Health v IC* [2011] EWHC 1430 (Admin)  
*IC v Magherafelt District Council* [2012] UK UT 263(AAC)  
*IC v HMRC and Gaskell* [2011] UK UT 296 (AAC)  
*R (Risk Management Partners Limited) v Brent LPC* [2009] EWCA Civ 490  
*British Telecommunications Plc v Gwynedd Council* [2004] 4 All E.R. 975  
*Svenska Petroleum Exploration AB v Lithuania* [2007] QB 86  
*Veolia ES Nottinghamshire Ltd v Nottinghamshire CC* [2009] EWHC 2382 (Admin)

## **JUDGMENT**

The Tribunal dismisses the appeal by the Appellant herein and upholds the decision of the Information Commissioner (the Commissioner) under Decision Notice, Reference No. FS50447854 dated 18 September 2012.

### **Reasons for Judgment**

#### **General**

1. The principal issues in this appeal concern first the extent to which anonymised data can be said in effect to constitute personal data within the meaning of the Freedom of Information Act 2000 (FOIA) and the Data Protection Act 1998 (the DPA) and second whether, and if so to what extent, the disputed information in this case is exempt from disclosure pursuant to the provisions of section 44(1)(a) of FOIA.

#### **Background**

2. The public authority in this appeal is the Department for Work and Pensions (DWP). The complainant sought information from the Child Maintenance Enforcement Commission (the CMEC). The request which is dated 10 March 2012 was requested in the following terms, namely:

“What are the 10 highest amounts currently owed by individuals in child maintenance arrears? Please list them and for each figure, indicate how many dependents relate to the case and disclose the sex of the parent.”

3. The CMEC responded on 4 April 2012. It should be noted at this point that from 1 August 2012, the DWP took over the functions and responsibilities of the CMEC. There was a refusal to disclose the information requested, relying on section 40 of FOIA. It is perhaps appropriate to refer to certain key statutory provisions contained in that section at this point. Section 40 provides as follows, namely:

“(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 conditions below is satisfied.”

Subsection (3) addresses the first condition. It provides as follows, namely:

- “(3) The first condition is –
- (a) in a case where the information falls within any of paragraphs (a) to (d) for 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

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- (b) in any other case that the disclosure of the information to a member of the public otherwise and 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

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- (7) In this section –

“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 ...

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

4. The data protection principles are set out in Schedule 1 to the DPA. The first data protection principle is as follows and is set out in Part I:

“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.”

5. By common consent, the only relevant condition under Schedule 2 to the DPA in this case is in paragraph 6(1) which reads as follows, namely:

“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.”

6. In the DPA, “data” is defined in the following terms, namely:

“1(1) In this Act, unless the context otherwise requires –

“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 paragraphs (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).”

7. Section 1(1) also defines personal data as meaning:

“... 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 or any indication of the intention of the data controller or any other person in respect of the individual;”
8. The relevant case law regarding the extent to which anonymised data can properly be regarded as constituting personal data is referred to in further detail below.
9. The CMEC subsequently upheld its initial response and refusal to disclose the requested information after it had conducted an internal review. It again relied on section 40, and in particular section 40(2).
10. The complainant then duly contacted the Commissioner. He took issue with the principal contention made by the CMEC that disclosing the information which was sought would be unfair to the individuals concerned and would risk disclosure of those individuals' identities.
11. The Decision Notice addressed two exemptions which are referred to at the outset of this judgment. They are sections 40 and section 44. As to the former, after setting out the provisions of section 40(2) at paragraph 13, the Commissioner stated that it was his view that the information requested did not constitute personal data. The DWP (and from this point, reference will be made to the DWP as distinct from the CMEC) had argued that the individuals would not expect their arrears details to be put in the public domain and to do so would breach the first data protection principle referred to above. Secondly it had argued that individuals would be able to recognise themselves, as would their former partners, and that information could then be, as it was put, “used against them”.
12. At paragraphs 16-18 of the Decision Notice, the Commissioner stated that having considered the information provided by the DWP, it was noted that the said information did not contain any identifying information, for example, there was an

absence of any reference to any geographical area supplied or otherwise referred to and there was not similar reference to any date of birth. The DWP had also indicated that the information might not be entirely accurate, and it was possible that several other individuals might have the same or similar data, should the information be accurately reassessed.

13. Nonetheless, the Commissioner took the view at paragraph 18 of his Decision Notice that the arguments regarding fairness and the first data protection principle did not apply as the information requested was not personal data at all.

14. The Commissioner then turned to address the applicability of section 44. Section 44 constitutes an absolute exemption under FOIA and provides in material part, namely:

“(1) Information is exempt information if a 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.”

15. It is the first of these provisions, namely the prohibition addressed by subsection (a) that is in issue in this appeal.

16. The DWP referred to section 2 of the Child Support Act 1991 (the CSA 1991). The DWP had relied on the requirement in section 2 that required it in taking any decision in relation to day-to-day activities with regard to any case handling that it “shall have regard to the welfare of the child likely to be affected” by any decision which it took in exercising any discretionary power conferred by the 1992 Act. The DWP had also argued that it would not be in the interests of the child’s welfare if it were to become public knowledge via the media that the child’s mother or father was one of the top 10 people in the country with child maintenance arrears.

17. At paragraph 22, the Commissioner stated that it was his view that in order for the children to be identified, it would first be necessary to identify the parents from the information disclosed. That was not a possibility since it was the Commissioner’s view that the said information was not personal data as indicated above with regard to the earlier part of the Decision Notice.

18. In addition, the DWP had contended that, as well as section 2 of the CSA 1991, section 44(1)(a) would also be engaged by virtue of section 123(1) of the Social Security Administration Act 1992 (SSAA) which provides as follows, namely:

“(1) A person who is or has been employed in social security administration or adjudication is guilty of an offence if he discloses without lawful authority any information which he acquired in the course of his employment and which relates to a particular person.”

19. The DWP had argued that Schedule 4, Part I of the SSAA provides that a person employed in social security administration or adjudication, includes a person who is described as “a civil servant” in the DWP. As indicated above, the DWP maintain that since 1 August 2012, all employees previously working for the CMEC were now and are now DWP civil servants.

20. The Commissioner responded by saying that at the time of the request which is shown above was made on 10 March 2012, CMEC employees were not DWP civil servants. Moreover, section 123(3) of the SSAA stated that:

“It is not an offence under this section –

(a) to disclose information in a form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it.”

21. In the result, the Commissioner, on being satisfied that DWP had incorrectly applied the section relied on, determined that the information requested needed to be disclosed.

### The Grounds of Appeal

22. By way of an opening general observation, the DWP pointed out in its Grounds of Appeal that the definition of “personal data” under sub subsection (b) of section 1(1) which has been set out above must be read as including the possibility of identification by any other person to whom the requested information might be disclosed. This in turn entailed the right to take into account all likely means which might reasonably be employed by another person to identify a data subject. Reliance was placed on two decisions, one in the High Court and one in the Upper Tribunal and further reference will be made to these authorities below. They are respectively *Department of Health v Information Commissioner* [2011]

EWHC 1430 (Admin), a decision of Cranston J and the second is that of *Information Commissioner v Magherafelt District Council* [2012] UK UT263 (AAC), a decision of Judge Mullan.

23. Not surprisingly perhaps, the DWP placed emphasis on those portions of both the CSA 1991 and the almost identical provisions in section 123 of the SSAA which referred to disclosure without lawful authority of any information which “relates to a particular person”.
24. The DWP advanced three Grounds of Appeal.
25. The first alleged that the Commissioner was mistaken and erred in law in the exercise of his discretion by dismissing the DWP’s reliance on section 123(1) of the SSAA on the ground that this provision did not apply to the CMEC at the time of the request. This is a reference to the determination made by the Commissioner in paragraphs 23-25 inclusive of his Decision Notice.
26. The DWP accepted, rightly in the Tribunal’s judgment, that the application of an exemption has to be considered at the time of the request, or possibly at the very latest, at the time of any internal review by a public authority. The DWP also accepted, again correctly in the Tribunal’s judgment, that at that stage, i.e. at the latest on 8 May 2012, the CMEC remained the only relevant public authority and that section 123(1) did not then apply to CMEC employees.
27. The DWP however maintained that by the date of the Decision Notice, namely 18 September 2012, DWP had become and was the relevant public authority as a result of which the prohibition in section 123(1) thereby applied to DWP employees.
28. Particular reliance was placed on the decision of the Upper Tribunal, namely *IC v HMRC and Gaskell* [2011] UK UT296, a decision of the Administrative Appeals Chamber and in particular the observations made in that decision (which is otherwise binding on this Tribunal) to the effect that the Commissioner enjoys a discretion as to whether or not to order disclosure: see particularly paragraph 31 of the said Decision. The *Gaskell* decision is cited as authority for the proposition that in exercising that discretion, the Commissioner must have regard to all relevant considerations. In the present case it is claimed that one material factor is the fact that disclosure by the DWP at the time of the Decision Notice would be an offence contrary to the provisions of section 123(1) of the SSAA. Put shortly,



the DWP claims that the Commissioner, in the Decision Notice, simply did not address the point that section 123(1) might be relevant to the exercise of the Commissioner's discretion as to remedy.

29. In *Gaskell supra*, the Upper Tribunal considered an appeal from this Tribunal. The request had been addressed to the public authority, being a rent service agency, for a list of letting agencies in an area in southern England. The request had initially been refused. After the complainant's referral of the refusal to the Commissioner, the functions of the particular rental service were transferred to a branch of the Revenue. That branch in the Revenue was called the Valuation Office Agency (VOA). The Decision Notice ruled that the VOA could not be required to disclose the information. This was on account of section 44 when read with section 18 of the Commissioners for Revenue and Customs Act 2005 which barred disclosure of information held by the Revenue in connection with any of its functions. Section 18(1) did not apply at the time of the original request.
30. The First-tier Tribunal reversed the decision of the Commissioner which had upheld the refusal to release the information requested. The Tribunal had ruled that the Commissioner had no discretion when considering what steps a public authority should be required to take under section 50(4) of FOIA. The Commissioner argued before the Upper Tribunal that he did enjoy a discretion when considering what steps he could require the public authority to take or make when, under section 50(4) a public authority had among other matters, failed to communicate any information at all. The Commissioner contended that since the information in question was, by the time of the First-Tier Tribunal's decision, having been covered by the statutory bar imposed by section 18 of the 2005 Act, the Commissioner could properly decide not to require it to be communicated to the complainant.
31. The Upper Tribunal agreed with the Commissioner's contentions that there were cases (even though there might be exceptions) where a public authority could have communicated information at the time it was requested, but where, for example, by the time of the Commissioner's consideration, the circumstances had changed such that disclosure had become, for example, unlawful. The Upper Tribunal therefore accepted that section 50(4) of FOIA should be construed as imposing an obligation on the Commissioner to specify all steps as

he considered should be taken by the public authority to comply with the relevant request: (see again paragraph 31 of the Upper Tribunal decision).

32. As indicated above, the Tribunal is of course bound by an Upper Tribunal decision. The *Gaskell* case is clear authority for the proposition that in a case where a statutory bar is imposed on disclosure by the time of the Commissioner's issuance of his Decision Notice, he can properly exercise a discretion in refusing disclosure accordingly: see also paragraphs 40 and 41 of the same Decision.
33. The Commissioner responded to this ground by pointing to paragraphs 23 to 26 of the present Decision Notice. Put shortly, the Commissioner claims that he did consider section 123 of the SSAA but, as explained in the said paragraphs, he did not find that it applied to disclosure of the disputed information.
34. In essence, this response by the Commissioner has been accepted by the DWP, but only to the extent that what it calls the ultimate success of this first ground depends on the DWP also succeeding on its second ground, and it is to the second ground that the Tribunal will now turn.
35. In its second Ground of Appeal, the DWP claimed that the Commissioner was mistaken and erred in finding that no offence would be committed if the requested information were disclosed and in consequence, the Commissioner was mistaken and erred in concluding that section 44(1)(a) was not engaged.
36. This contention involves revisiting the submission which has already been referred to in the context of the Decision Notice itself that disclosure of the requested information at the time of the initial refusal by the CMEC and by its internal review, would have constituted an offence under section 50(1) of the CSA 1991.
37. The gist of the second Ground of Appeal takes issue with the determination in the Decision Notice and at paragraph 23 in particular, and with the Commissioner's interpretation of the terms and effect of section 123(1) of the SSAA. It has been noted that in substance an offence will be committed by an employee in relation to social security administration or adjudication if there is disclosure by such a person without lawful authority on the information which that employee "acquired in the course of his employment" and which "relates to a particular person".

38. It has also been noted above that the Commissioner in paragraphs 25 and 26 of the Decision Notice also drew attention to the fact that it was not an offence under section 123 (by virtue of section 123(3)(a)) to disclose information:

“... in the form of a summary or collection of information so framed as not to enable the information relating to any particular person to be ascertained from it ...”

39. The DWP makes a number of observations in relation to this second ground. First, it no longer relies on section 2 of the CSA 1991 as referred to in paragraph 20 of the Decision Notice. It now seeks to rely on section 50 of the CSA 1991 which did apply to CMEC employees at the relevant time and which is framed in terms similar to those set out in section 123(1) of the SSAA.
40. The Tribunal pauses here to say that insofar as it recognises that it is appropriate and fair for the DWP to rely on a provision which was not addressed by the Decision Notice, it can plainly do so in cases where no prejudice can be seen to have been incurred by the Commissioner or any other party in that regard: see generally *Home Office v IC* [2011] UK UTIT (AAC), especially at paragraph 18.
41. The DWP alleges in its response that, as might be expected, the requested information consists of a short table of 10 lines, each of which provides the debt amount, the amount, the sex, and the number of dependent children for a particular non-resident parent referred to for present purposes as a NRP. The individual however is not named on the table, nor is there any other data relating to the individual, such as date of birth or geographical location.
42. The DWP points to that part of the statutory language which specifies that the information must “relate to a particular individual”. The DWP refers to the Shorter Oxford English Dictionary (6<sup>th</sup> edn., Vol. 2) inclusion of the following terms amongst the definitions of the word “relate”, namely:

“6            Have reference to, concern ...

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8    Have some connection with, be connected to ...”

43. It is therefore claimed that the information in each line of the table which constitutes the requested information plainly “relates” to the particular individual NRP, even though the NRP himself or herself is not named.
44. The DWP adds in paragraph 37 of its written grounds that section 50(2)(a) of the CSA 1991 is “intended to address the situation where information has been aggregated so it no longer relates to (i.e. is connected with, concerns) a particular person, but instead relates to a group of persons or no longer relates to persons at all.” (emphasis in original).
45. The DWP contends therefore that the requested information has not been summarised in a format such that section 123(3)(a) or section 50(2)(a) applies: the information has been merely anonymised.
46. The DWP in its grounds of appeal states that the reasoning of the Commissioner in the Decision Notice “is extremely brief”, but in the DWP’s view, that reasoning reflects the assumption that both the above-mentioned sections should be read as referring to “information relating to any particular identified or identifiable person” (emphasis in original).
47. The DWP contended that where Parliament has created a prohibition on disclosure of information relating to individuals, if such a prohibition is not intended to apply where the individual cannot be identified, the provisions will have been expressly drafted on that basis. It points to such statutes as the Census Act 1920, section 8 where there is an express reference to identifiability in the definition of the information covered by the prohibition and the Commissioners for Revenue and Customs Act 2005, section 23(1) where the information specifies the identity of the individual, or where the individual’s identity can be deduced from the information. Similar language can be found at section 59(1) of the DPA which prohibits disclosure of information by the Commissioner or by his staff of any information which relates to “an identified or identifiable individual, or business”: see section 59(1)(b).
48. In his Response, the Commissioner referred to the fact that section 50(1) of the CSA 1991, as well as section 123(1) of the SSAA were amongst the statutory provisions and bars considered by the then Department of Constitutional Affairs (DCA) in its 2005 report entitled “Review of Statutory Prohibitions on Disclosure”. Specific reference is made on page 23 of Chapter 4 to the fact that the offence

under section 50 prohibiting the disclosure of information relating to individuals by an actual or former child support officer or person employed in connection with the child support tribunals or in carrying out any functions under the Act does not apply to disclosure made in summary “or anonymised form where individuals cannot be identified”. The Commissioner therefore contended that the above department, i.e. the DCA at least, envisaged that section 50 would not apply to anonymised information. The same contention is made with regard to section 123 SSAA.

49. The Commissioner’s contentions, and in particular, his reliance on the passages quoted from the Review are strongly rejected by the DWP in the DWP’s reply. The DWP accepts, rightly, that success on its first ground depends on the second ground. In any event, the Commissioner in effect stands accused of assuming a conclusion that he seeks to establish. The DWP reiterates its main contention that the provisions in question, namely section 50(1) of the CSA 1991 and section 123(1) of the SSAA should be given their literal interpretation without inserting extra words that Parliament has chosen not to include. In particular, the DWP claims that it is “striking” that whereas section 50(1) of the CSA 1991, for example, has a single requirement that the information relate to a particular person, the definition of personal data in section 1(1) of the DPA not only requires that the data relate to a living individual, but also in addition requires that the individual should be identified from those data or from those data and other information which is in the possession of, or is likely to come from or into, the possession of the data controller.
50. The DWP therefore contends that had Parliament intended to mirror the effect of that definition, it would have been at least drafted in terms of the CSA 1991 and the SSAA differently. It follows, so the DWP claims, that the interpretation afforded by the Commissioner to the word “relates” in the words of the DWP’s written reply are such as to render the additional element in the definition of personal data in section 1(1) of the DPA entirely otiose.
51. The DWP goes on to reject the reliance placed by the Commissioner on the Review referred to above as “misconceived”. First, it claims that the Commissioner has provided no explanation as to the purported basis on which the DCA Review might be treated as a proper aid to statutory construction. Second, it says that although the authority suggests that official statements on the meaning of legislative provisions by a government department might be

persuasive authorities to the meaning of provisions, the Court of Appeal has restricted the scope of this principle, emphasising that such statements are just guidance since the ultimate responsibility of instruction lies with the court: see in particular *R (Risk Management Partners Ltd) v Brent LBC* [2009] EWCA Civ 490, especially at para 111, [2010] PTSR 349. Next it is claimed that statements of guidance as to the operation of a statutory scheme shall follow the language of the statute or give the reasons why that is not being done: see e.g. *British Telecommunications Plc v Gwynedd Council* [2004] 4 All E.R. 975, especially at para 88. Next it is claimed that in any event, the Review was not statutory guidance in any shape or form and indeed post-dated the enactment of section 123 of the SSAA by some 13 years and section 50 of the CSA 1991 by some 14 years and in any event was not produced by the department responsible for those statutes, namely the DWP itself. Finally, the DWP claims that the Review itself on its own express terms stated that it was no more than an expression of the “government’s view” as to whether enactments were capable of preventing disclosure under section 1: (see the Review at pages 5 & 6).

52. Before turning to the issues as argued on the appeal, the Tribunal is of the view that it should first revisit the DWP’s third Ground of Appeal. As indicated above, this ground takes issue with the finding by the Commissioner that section 40(2) was not engaged in relation to some information. This is in effect taking issue with what could be said to be the primary finding made by the Commissioner, namely that the requested information in any event did not constitute the personal data of the individuals concerned. It has been noted already that the Decision Notice showed the Commissioner rejected the DWP’s contention that disclosure of the requested information would have enabled an individual “to be able to recognise themselves as would their partners” and that the information could then be “used against them”. In particular, the Commissioner had noted that the requested information did not contain any identifying information in geographical terms.
53. In the Tribunal’s judgment it necessarily follows that if the third Ground of Appeal was rejected then, quite apart from the other considerations, in particular the terms and effect of what is now section 123(3) of the SSAA, much if not all of the basic contentions advanced by the DWP in respect of its second Ground of Appeal fall away. On any view, it is not possible to say that the information

“relates” to a particular person if the information which is considered is not sufficient in any event to constitute personal data.

54. Indeed, the resolution of this third Ground of Appeal has if anything been rendered easier by the concession made by the Appellant that it no longer seeks to challenge the Commissioner’s findings on section 40(2) other than with regard to certain information.
55. In relation to the particular requested material which remains in dispute, the DWP nonetheless continues to maintain that the said information amounts to personal data for the purposes of limb (b) of the definition of personal data of the DPA, namely data relating to a living individual who can be identified “from those data” and from other information in the possession of the data controller.
56. The third ground of appeal is to the effect that the Commissioner’s decision notice was not in accordance with the law in finding that section 40(2) was not engaged in relation to some particular information. The DWP sets out which part of the requested information this third ground relates to in a confidential annex to its grounds of appeal. In its Grounds, the DWP formally states that it does not challenge on the appeal the Commissioner’s conclusion in relation to section 40(2) in relation to the rest of the requested information. As to the information in relation to which the DWP claims that the exemption was engaged, the DWP claims that the information amounts to personal data for the purposes of limb (b) of the definition of personal data under section 1(1). The type of person who is the subject of the disputed information is called a Non-Resident Parent (or NRP). The DWP therefore claims that for the reasons set out in the confidential annex to the grounds of appeal a specific individual NRP would be identifiable from the requested information, as well as from other information reasonably available to persons to whom the requested information might be disclosed.
57. The DWP went on to claim that since an NRP could be identified, so too could the related persons known as the Parents With Care (the PWC). The requested information would therefore also disclose the information about the PWC, i.e. the number of children they had care of and the amount they were owed by way of child maintenance. The requested information would therefore lead to the identification of the children via their identities of the NRP and/or the PWC. In time, all that would in turn reveal information about the amount of the child maintenance owed in respect of the children.

58. The Commissioner points to the fact that the language in section 50 and section 123 of the respective statutory provisions is expressed in similar form. The Commissioner therefore submits that as the disputed information is in anonymised form, such that it does not constitute personal data, neither statutory bar provided by the relevant statutory provisions will apply.
59. As for the third ground, the Commissioner notes that in the light of the DWP's grounds as a whole, no challenge is made other than with regard to the individual referred to as a NRP. The Commissioner sets out his contentions on this score in a confidential annex in response to the DWP's own confidential annex appended to its grounds of appeal. All these issues, as well as the most recent submissions put to the Tribunal in closed session are discussed and reviewed and are the subject of the judgment in the closed annex appended to this open judgment. Put shortly, the Commissioner does not accept that the information in question constitutes personal data.
60. The Commissioner provided a written response in mid-November 2012. As for the first ground put forward by the DWP, the Commissioner claims that the DWP's argument is misconceived even though he recognised from the *Gaskell* decision that he, the Commissioner, is equipped with discretion about what steps, if any, a public authority needs to apply. The Commissioner responds by saying that in his Decision Notice, the Commissioner did consider section 123 of the 1992 Act. He did not, however, find that it applied to disclosure of the disputed information for the reasons set out in paragraphs 23 to 26 of the Decision Notice which have been referred to above. The Commissioner claims that that analysis was not affected by the relevant timing in this matter and therefore he says he did not err in the way alleged, or at all.
61. As for the second ground, the Commissioner takes issue with the contention that the disputed information does in fact "relate" to ten particular individuals even though those particular individuals are not named. The Commissioner alleges that while it may be the case that other statutory bars include additional wording to convey the concept of "identifiability", it must be correct that the statutory bar relied on in the present case is what was intended for. The Commissioner points to the views expressed to that effect in the Review published by the DCA in 2005 (referred to above). In the Review, specific reference is made at page 24 in Chapter 4 to the offence created by section 50 of the CSA 1991 which is explained and described as an offence which "does not apply to disclosures



made in summary or anonymised form where individuals cannot be identified". The Commissioner therefore claims that the DCA "envisaged that section 50 would not apply to anonymous information".

62. Overall therefore, the DWP claims that the disclosure of such information to the public would be contrary to the reasonable expectation that each and all of such persons would have as to the complete confidentiality of information held by the CMEC or the DWP, especially in the light of statutory prohibitions on disclosure of the type illustrated by section 50 of the CSA 1991. Moreover, it would go against the assurance the DWP gave, or gives, to its customers that they will act in accordance with their obligations, under both the DPA and the CSA itself.

DWP: the evidence

63. The Tribunal was provided with a written statement from Sarah Margaret Wishart Baird. She gave evidence at the appeal both in open and closed session and was cross-examined. Part of this statement was redacted and was the subject of a closed session dealing as it does with matters which form the subject matter of the closed annex. Ms Baird was appointed Head of Management Information of the Child Support Agency in 2007. In November 2009, she assumed the role of Head of Performance Reporting for the Child Maintenance and Enforcement Commission. She has what she calls head responsibility for the production of data in connection with child maintenance.
64. Much of what Ms Baird recounts need not be referred to except briefly. The CSA oversees a statutory set of arrangements for Parents With Care, i.e. the PWC and Non-Resident Parents, i.e. NRPs. The CSA is responsible for collecting, arranging and maintaining payments between NRPs and PWC.
65. Ms Baird states her belief that it is unlikely that it would be within the expectation of PWC or NRPs that their personal details would be released into the public domain. The information received and maintained by the CSA from such persons, she states, is highly personal, dealing with such matters as family arrangements and financial affairs.
66. She adds that the DWP has regard to the welfare of any child likely to be affected by the release of the information being sought. She claims it would be not in the interests of the child's welfare if it were to become public knowledge that his or

her mother or father was one of the top ten people in the country with child maintenance arrears. At paragraph 18 of her statement she states that:

“The DWP is concerned that if information about individual arrears’ levels and the numbers of children is released, this would mean publishing information about individuals rather than protecting their personal data.”

67. At paragraph 19 she adds that: “The DWP was very concerned that to put this information into the public domain would mean releasing such information about individuals to third parties which could allow them to identify the person concerned as well as enabling the individuals to identify themselves”.
68. She then formally confirms that the DWP is not, at least in relation to the matters in issue in the present appeal, challenging the Commissioner’s conclusion that individual PWCs or NRPs could not be identified from the requested information principally because the arrears’ amounts were not entirely accurate in relation to the majority of the information requested. The confirmation just referred to was expressly stated to be without prejudice to the DWP’s third ground of appeal. However, she qualifies this by saying that if identification of NRPs or PWC were made, it would have, in the DWP’s view, a quite significant effect in “confidence” among NRPs and PWC that their personal information would not be made public and it would have adverse effects on the operation of the schemes she describes.

#### The issues of the appeal

69. Despite the way in which the formal grounds of appeal are set out in the Notice of Appeal as addressed and set out above, in the Tribunal’s judgment, there are two main issues in this appeal.
70. The first is whether the Commissioner erred in concluding that an offence under the CSA 1991, section 50(1) and/or the SSAA 1992, section 123(1) would not be committed if disclosure occurred, and in consequence, he wrongly concluded that section 44(1)(a) of FOIA was engaged. In effect, this reflects the second ground in the original Notice of Appeal.
71. The second issue concerns section 40(2) as to the one remaining aspect of the disputed information to which the DWP seeks to apply the exemption dealing with personal data. This second issue can only be addressed in general terms in this

open judgment. Necessarily, the reasons underlying the Tribunal's judgment on this second issue must be set out in a closed annex, to which reference has already been made.

The first issue

72. The Tribunal will begin this part of its judgment by accepting that although it constituted the first ground in the original Notice of Appeal, the question of whether or not the Commissioner should nevertheless have exercised his remedial discretion and recognised that to order disclosure would have constituted an offence under section 123 SSAA is not a matter which needs to be resolved.
73. There are two reasons for this. First, it only arises if the first issue is resolved in the DWP's favour and the DWP accepts this. At the time of the request, the relevant public authority was the CMEC. The CMEC was subject to section 50 CSA 1991. The two provisions which have been addressed already in this judgment are in materially identical form. If the DWP is correct in its contentions, and section 44 does apply, there would be a substitute Decision Notice upholding the DWP's refusal to provide the information requested.
74. In any event, the Tribunal formally confirms that to the extent reliance is placed on the interaction between section 44 in FOIA and section 50, then this represents reliance on the new exemption. It is well established, as already indicated above, that the DWP is entitled as a right to raise an exemption for the first time in its grounds of appeal subject only to the tribunal or court's case management powers: see e.g. *Birkett v DEFRA* [2011] EWCA Civ 1606; [2012] 1 Info LR1.
75. At the heart of the DWP's contention lies the interpretation properly to be given to the term "relate" as found both in section 123 and section 50. It is claimed that for the relevant offences to be committed the information must relate to a particular individual. Here, the information requested comprises a table of ten lines showing the debt amount, the sex and the number of dependent children for a particular NRP. No individual is named. Nor is there any address.

76. Reference is made to the type of statutory provisions already referred to, e.g. section 23(1) of the Commissioners for Revenue and Customs Act 2005, the DPA 1998, section 59(1) and the Census Act 1920, section 8(7) where the notion or fact of identification is expressly referred to or specified.
77. It follows in the DWP's contentions that the fact that section 50 and section 123 are drafted in different terms from the above-mentioned sections is compelling evidence that Parliament in those cases intended a different effect.
78. The DWP stresses the fact that the DPA 1998 in section 1(1) requires not only that the data relate to a living individual, but also requires that that individual could be identified from those data or from those data and other information in the possession of, or likely to come into the possession of the data controller. However, it contends that had Parliament intended to mirror the effect of that definition, it would have drafted section 50 and section 123 in a different form.
79. The Commissioner responds by pointing to the purpose and purposes of section 50 and section 123. It is claimed that their purpose in each case is to discourage the disclosure of information relating to a particular identifiable person without lawful authority.
80. In this regard, the Tribunal finds some support for this contention from what has already been said about Ms Baird's evidence. The information provided to the DWP is, or was, certainly intended to be personal, private and confidential. Sometimes, perhaps frequently, it will be given under compulsion.
81. The Commissioner in effect contends that it is part and parcel of the DWP's functions that it be provided with a full and truthful picture of the requisite information. Those functions, it is said, would be undermined if such information was unlawfully disclosed without a suitable penalty or punishment.
82. In the Tribunal's judgment, these other contentions as reflected in the previous paragraph, are compelling in terms of the DWP's obligations to protect personal information about identifiable individuals. There will however be no infringement of the statutory provisions if the information disclosed does not identify anyone. Particular importance in the Tribunal's judgment can and should be placed on the relevant defence provisions in section 50(2) and section 123(2) of the respective statutes. They provide a defence if the disclosure is in summary form in order that "information relating to any particular person" cannot be ascertained. In the

Tribunal's judgment, this defence can be justified only because the disclosure does not enable any particular person to be identified from the appropriate summary or collection of information. This conclusion is further justified, in the Tribunal's view, by the use of the word "particular" to qualify the noun "person". Such language in the Tribunal's view indicates that Parliament was concerned with a specific individual, in other words, a particular individual who could be identified from the disclosure.

83. As has been seen, the DWP has laid some stress on the choice of the terms "relates to" and "relating to". The Commissioner points to authorities which reflect the fact that those expressions with their use of the verb "relate" are capable of bearing a broader or narrower meaning in accordance with the relevant context: see e.g. *Svenska Petroleum Exploration AB v Lithuania* [2006] EWCA Civ 1529; [2007] QB 886, especially at para 137. See also *Veolia ES Notts Ltd v Nottingham CC* [2009] EWHC 2382 (Admin); [2010] PTSR 79 at para 56 per Cranston J.
84. The Tribunal therefore agrees with the Commissioner to the effect that, at worst, the specific language employed in section 50 and section 123 is ambiguous. On this basis there is proper justification for the application of the principle against doubtful penalisation. Were the DWP's construction and approach to be adopted, disclosed information which does not, and could not, identify individuals would otherwise constitute a criminal offence, even though no evident harm might result.
85. Moreover, the flexibility inherent in the word "relate" as well as the possibility of ambiguity is reflected in another definition of the word also taken from the Shorter Oxford English Dictionary, referred to above, which explains and defines the term as referring to, or being:
- "Bring (a thing or person) into relation with; establish a connection between ..."
86. The Tribunal is not persuaded that reliance upon, or reference to, other illustrations drawn from other legislation, assists. The DWP contends that the Commissioner's approach would render the words "can be identified" in section 1(1) DPA otiose. The Tribunal respectfully disagrees. The DPA simply adopts an alternative approach to the issue of the identifiability of an individual.

87. Reference has already been made on more than one occasion in this judgment to the DCA Review. This Tribunal does not rely on the specific passages in the Review reflected by the Commissioner as in any way being decisive as to the resolution of the first issue in this appeal. The Tribunal's conclusions rest on the construction of the statutory provisions.
88. However, the Tribunal will accept that the expression of an official body which was made to study a specific legislation and which has reported on its meaning and effect can generally be regarded as a legitimate and admissible aid to construction. To that extent, the Review offers support for the construction independently adopted by the Tribunal in this case.
89. Taking all the above considerations into account, the Tribunal therefore finds in favour of the Commissioner on the first issue.

The second issue

90. The second issue is whether in effect the disputed information, but only in respect of one item if disclosed, would lead to identification of the relevant NRP.
91. The Tribunal is entirely satisfied that such disclosure would not do so. It sets out its reasons in the closed Annex to this judgment. The Annex will remain closed until any appeal by the DWP against the Tribunal's decision is disposed of or otherwise resolved subject to any further relevant direction issued by the Tribunal. It may well be that dependent on the future course of this appeal, the parties would prefer to have the closed Annex remain confidential.
92. The Tribunal starts with the proposition that anonymous or anonymised data which do not lead to the identification of a living individual does not constitute personal data: see generally *Department of Health v IC* decision referred to above, particularly at paragraph 51.
93. The test which is said to be applicable and accepted as being applicable by both parties is to have regard to "all the means likely reasonably to be used either by the controller or by any other person to identify the said person". This is the approach adopted in *The Department of Health* decision supra at paragraph 22 and in the *Magherafelt* decision, particularly at paragraphs 63, 79 and 86.
94. The Commissioner invited the Tribunal to adopt the viewpoint of a motivated intruder, i.e. someone with access to the disputed information and with a

motivation to attempt identification. Such an intruder can be assumed to have access to all ordinary resources and public documents as well as in a position to be able to employ basic investigative techniques. A journalist would be a good example, perhaps a typical example, of such an intruder.

95. In the *Magherafelt* decision at paragraph 78 it was pointed out, rightly in the Tribunal's view, that it is not enough simply to make a generalised statement that there is a risk or even a very real risk of identification. An explanation must be provided as to how such identification is likely to occur and there must be an identification or specification of what other information might be available to a motivated intruder or what form that information might take, the person or persons in possession of it and whether such person or persons are likely to disclose such information to a motivated intruder.
96. For all the reasons set out in the closed Annex, the Tribunal is entirely satisfied that no identification of an individual would occur if disclosure were to be made in this case.

#### Conclusion

97. For all the above reasons, the Tribunal dismisses this appeal and upholds the Decision Notice of the Commissioner. As referred to above, the closed Annex will remain closed until further order in the way identified above.

Signed

**David Marks QC**  
**Tribunal Judge**

Dated: 14 May 2013

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17 May 2013: typographical errors and omissions corrected in accordance with rule 40 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.