Appeals under section 57 of Freedom of Information Act 2000

Information Tribunal Appeal Number: EA/2008/0023 and 0025
Information Commissioner's Ref: FS50107084 and FS50133286

Heard at Procession House, London, EC4
On 22 December 2008

Decision Promulgated
26 January 2009

BEFORE

CHAIRMAN

MURRAY SHANKS

and

MALCOLM CLARKE AND MICHAEL HAKE

Between

ALAN DIGBY-CAMERON

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

(1) BEDFORDSHIRE POLICE

(2) HERTFORDSHIRE POLICE

Additional Parties

Representation:

For the Appellant: Anthony Bennett

For the Respondent: Rachel Kamm

For the Additional Parties: (1) Alexander Ruck Keene

(2) Damien Welfare

Subject areas covered:

Public interest test s.2

Personal data s.40

Investigations and proceedings conducted by public authorities s.30

Cases referred to:

Toms v Information Commissioner EA/2005/0027 19.6.06

Guardian Newspapers v Information Commissioner, Chief Constable of Avon and Somerset EA/2006/0017 5.3.07

Durant v FSA [2003] EWCA Civ 1746

Corporate Officer of the House of Commons v Information Commissioner EA/2007/0060, 26.2.08

Alcock v Information Commissioner EA/2006/0022, 3.1.07

Tribunal's determination:

(1) On the appeal against the decision notice relating to Bedfordshire Police dated 28 February 2008 the Tribunal upholds the decision notice and dismisses the appeal.

(2) On the appeal against the decision notice relating to Hertfordshire Police dated 28 February 2008 the Tribunal allows the appeal in part and substitutes the following decision notice.

Information Tribunal **Appeal Number: EA/2007/0025**

SUBSTITUTED DECISION NOTICE

Dated 23 January 2009

Public authority: **Hertfordshire Police**

Address of Public authority: **Headquarters, Stanborough Rd, Welwyn Garden City AL8 6XF**

Name of Complainant: **Alan Digby-Cameron**

The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is as the original save that it is recorded that the public authority wrongly failed to disclose the two additional categories of information mentioned at paras 30 and 31 below and failed to specify and explain any exemption relied on in respect of redactions made in documents supplied to the complainant containing information of the description specified in the his request.

Action Required

The public authority must:

(1) by 4.00 pm on 6 February 2009 supply the complainant with copies of the correspondence between Hertfordshire Police and the insurers and the internal police emails dated 3 March 2004 and 23 July 2004 referred to in paras 30 and 31 below

redacted so as to exclude personal data which they are entitled to withhold under section 40(2) of the Act;

(2) comply with its undertaking to explain to the complainant (in writing and within a reasonable time of any reasonable request made by him in writing) any redactions made in documents already supplied to him relating to the death of his son Andrew.

Dated this 23 day of January 2009

Signed:

Murray Shanks
Deputy Chairman, Information Tribunal

Reasons for Determination

Background facts

1. On 26 July 2003 Mr Digby-Cameron's son Andrew, who was then 27 years old, was killed in a road traffic accident on the A1(M) motorway in Hertfordshire. Andrew was on foot on the motorway at 2.40 am when he was run down by a 40 tonne lorry.

2. Unsurprisingly given those circumstances Mr Digby-Cameron has been anxious that there should be a full and proper investigation into his son's death. Furthermore, evidence emerged at an early stage of events in the village of Shefford in Bedfordshire where Andrew had lived which had taken place during the week before his death and which may have been relevant to such investigation: it was alleged that there had been an incident involving a stolen car and Andrew's company car, which at the time was in the possession of an associate of his who we shall refer to as DH, and subsequent threats made by DH against Andrew because he was concerned that Andrew would report matters to the police. We shall refer to these events as the "Shefford events".

3. The substantive inquest into Andrew's death started on 15 July 2004. Some evidence was taken but the Coroner adjourned so that the Irish driver (who was Irish) could give attend to give evidence and so that investigations into the Shefford events could be carried out by the Bedfordshire Police. It was the latter development which has resulted in both the Hertfordshire and the Bedfordshire police forces being involved in this matter.

4. On 12 December 2005 the lorry driver was convicted of various driving hours and record falsification offences and fined £750 and banned from driving for a year but he was not charged with any offence directly related to Andrew's death.

5. The inquest resumed on 2 February 2006 and further evidence was taken. The Coroner produced a substantial written narrative verdict dated 7 February 2006. Although the lorry driver did not attend to give evidence the Coroner found that he

could not have done anything to avoid the accident and that the offences of which he was convicted, although serious, were not causative of the accident. He stated that there was no evidence that the Shefford events had any direct bearing on Andrew's death; he also remarked that he needed to be careful in making comments about them "…as the Police have indicated that those aspects are still open to further investigation".

Mr Digby-Cameron's requests for information and the public authorities' responses

6. On 27 August 2005 (ie before the conviction of the lorry driver or the completion of the hearing of the inquest) Mr Digby-Cameron wrote to the Bedfordshire Police complaining that he had not been provided with copies of statements or reports relating to the Shefford events or his son's death. That letter was followed by a letter dated 8 September 2005 making what was described as a formal request for such information under the Freedom of Information Act. Some statements (whose makers had consented to their supply to Mr Digby-Cameron) and a report in redacted form were supplied to him but other information coming within the terms of the request was refused on the basis of sections 30 ("Investigations and proceedings conducted by public authorities") and 40(2) ("Personal information") of the Act. The decision to withhold that information was confirmed in a review letter dated 29 November 2005.

7. On 7 March 2006 (ie after the inquest had concluded) Mr Digby-Cameron wrote to the Hertfordshire Police stating that he did not believe that they had carried out a proper investigation into the circumstances of his son's death and asking for copies of all statements and reports in their possession relating to it. Following a number of further requests from Mr Digby-Cameron for all information relating to the death of his son the Hertfordshire Police provided a substantial number of documents (with many redactions) under cover of a letter dated 27 June 2006 which simply stated: "…please find enclosed copies of all the information to which you are entitled": this information was included in volume 2 of the Tribunal bundle at pages 1-135. Mr Digby-Cameron was not happy with the extent of information provided to him and repeated his request for all information relating to the circumstances of his son's death in a letter dated 12 July 2006. Following an intervention by the Information Commissioner this letter was treated by the Hertfordshire Police as a

request for information under the Freedom of Information Act for the first time. On 6 September 2006 they wrote to Mr Digby-Cameron stating that no further information would be supplied and raising the exemptions in sections 40(2) and 30(1)(a) of the Act.

8. Mr Digby-Cameron appealed against that decision and the Hertfordshire Police carried out an internal review the results of which were contained in a letter dated 20 October 2006. The letter enclosed a further substantial number of documents relating to the criminal case against the lorry driver which they were now willing to disclose (again redacted: they are at pages 136-168 of volume 1 of the Tribunal bundle) and identified various categories of documents which they continued to claim to be entitled to withhold as follows: (a) a witness list for the trial of the lorry driver giving names, addresses and other personal details of the witnesses; (b) details of calls and text messages taken from Andrew's mobile phone; (c) correspondence between Hertfordshire Police and the Irish Garda; (d) court process documents relating to the lorry driver; (e) internal memo regarding operational directions; and (f) correspondence between the Hertfordshire Police and the insurers of the lorry driver's Irish employers. The letter stated that section 40(2) of the Act was relied on in relation to categories (a) and (b) and that sections 30(1) and 40(2) were relied on in relation to (c) to (f) but it did not seek to justify the redactions in the documents which had been supplied. In relation to the details taken from the mobile phone the letter stated that the review panel wanted to reassure Mr Digby-Cameron that there were no threats or abusive messages recorded.

<u>The Information Commissioner's decisions</u>

9. Mr Digby-Cameron applied to the Information Commissioner under section 50 of the Act for decisions whether the Act had been complied with by the two police forces. The Commissioner's decisions were unfortunately not forthcoming until 28 February 2008.

10. In relation to Bedfordshire Police the Commissioner found in effect that they held only two documents which remain relevant for the purposes of this appeal, namely a statement taken by them on 16 October 2004 relating to the Shefford events and

the transcript of an interview of DH conducted by DS Dehnel under caution on 15 April 2005 about those events, and we can see no basis for disturbing that finding of fact. (We note here that it appears that the maker of the statement dated 16 October 2004 did not consent to its disclosure to Mr Digby-Cameron but that a heavily redacted copy of the statement omitting anything which might identify the maker was in fact supplied to him voluntarily by the Police). The Commissioner noted in his decision that in the course of his inquiry the Police had cited four exemptions to justify withholding the information in these documents (namely sections 30 and 40(2) and sections 38 ("Health and safety") and 44 ("Prohibitions on disclosure")) but his decision focussed entirely on section 30. The Commissioner found that the information was held by the Police for the purpose of an investigation which they had a duty to conduct with a view to seeing whether a person should be charged with an offence in relation to the Shefford events (and accordingly that it was exempt under section 30(1)(a)(i)). The bulk of the Commissioner's decision was addressed to the question whether the public interest in maintaining the section 30(1) exemption outweighed the public interest in the disclosure of the withheld information. The Commissioner carried out a detailed consideration of this and determined that the public interest favoured the exemption and that the information was therefore properly withheld.

11. In relation to the Hertfordshire Police, the Commissioner focussed on the information referred to as (a) to (f) at para 8 above and the exemptions relied on in relation thereto; he also stated that he was considering the redactions made from the information disclosed to Mr Digby-Cameron "outside the scope of the Act" which had been made "as being exempt by virtue of section 40(2)". The Commissioner found that the withheld information contained "personal data" relating to witnesses and those who had made or received calls or text messages to or from Andrew's phone and "sensitive personal data" relating to the lorry driver and that such data should not be disclosed by virtue of section 40(2), save for that relating to police officers who were witnesses, which the Police assured him had been disclosed in any event. The Commissioner went on to find that the information referred to as (c) to (f) in para 8 above came within section 30(1) as being information held for the purposes of the investigation "…into the lorry driver's falsification of driving records" and went on to consider the public interest arguments for and against disclosure of

such information in anonymised form (ie not identifying the driver or his employer). His conclusion was that the Hertfordshire Police were entitled to withhold all the information under sections 40(2) and 30(1) save for the correspondence with the Garda (see para 8(c)) which he ordered to be disclosed in a form which did not identify the lorry driver.

The appeals: general principles

12. Mr Digby-Cameron appeals under section 57 of the Act against both the Commissioner's decisions in so far as they support the public authorities' own decisions to withhold information. On such an appeal the Tribunal can review the facts and must itself determine whether the Commissioner's decision is in accordance with the law and, in so far as it is not in accordance with the law, allow the appeal and, if appropriate, substitute its own decision. However, as the Tribunal explained to Mr Digby-Cameron at the outset of the hearing, there are limits to the scope of this exercise: first, the facts will only be reviewed in so far as they are relevant to the question whether information should have been supplied to him under the Act in response to the requests with which we are dealing: the Tribunal is not a forum for further investigation into the circumstances of Andrew's death or the quality of the police investigations; second, the Tribunal must consider matters (as the Commissioner should have) as at the date of the relevant public authority's decision to withhold information (in particular applying the public interest test as at that date) and ignore subsequent events save in so far as they throw light on the facts existing at the relevant date.

13. In so far as relevant section 30 of the Act provides as follows:

(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-

(i) whether a person should be charged with an offence, or

(ii) whether a person charged with an offence is guilty of it,

> **(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct…**

14. The exemption provided by section 30(1) is a qualified exemption; thus, requested information which is exempt under section 30(1) can be withheld by a public authority only to the extent that "…in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information" (section 2(2)(b)). In applying section 2(2)(b) it is important to note that the relevant interest in disclosure is the ***public*** interest and that the purely private interests of the requester are irrelevant. And when it comes to the other side of the scales it is important to note that the relevant public interest is that in "maintaining the exemption" rather than any general public interest in the non-disclosure of the information; it is therefore necessary to focus on the purpose of the relevant exemption. The general public interest served by the section 30(1) exemption is the effective investigation and prosecution of crime, which itself requires in particular (a) the protection of witnesses and informers to ensure that people are not deterred from making statements or reports by the fear that they may be publicised, (b) the maintenance of the independence of the judicial and prosecution processes and (c) the preservation of the criminal court as the sole forum for determining guilt. In assessing where the public interest balance lies in a section 30(1) case relevant matters are therefore likely to include (a) the stage a particular investigation or prosecution has reached, (b) whether and to what extent the information is already in the public domain, (c) the significance or sensitivity of the information requested and (d) whether there is any evidence that an investigation or prosecution has not been carried out properly which may be disclosed by the information (see: *Toms v Information Commissioner* EA/2005/0027 19.6.06 at para 7 and *Guardian Newspapers v Information Commissioner, Chief Constable of Avon and Somerset* EA/2006/0017 5.3.07 at para 34).

15. Section 40 of the Act is a very complex provision but in summary section 40(2) provides an absolute exemption on the disclosure of information if it constitutes "personal data" for the purposes of the Data Protection Act 1998 and its disclosure "to a member of the public" would contravene any of the "data protection principles" set out in that Act (see section 40(3)). "Personal data" for the purposes of this

provision means recorded information relating to an identifiable living individual (the "data subject") which affects his privacy (see: *Durant v FSA* [2003] EWCA Civ 1746 (which continues to be binding on the Tribunal) at para 28). The data protection principles are found in Schedule 1 to the Data Protection Act; the parties were agreed that the relevant principle in this case is the first which in effect requires that any disclosure of personal data is fair and that one of the conditions in Schedule 2 is met and, in the case of "sensitive personal data" (which includes information as to the actual or alleged commission of an offence by the data subject: see section 2(g) of the Data Protection Act), that one of the conditions in Schedule 3 is also met.

16. Apart from condition 1 in Schedule 2 (that the data subject has given consent to the disclosure) the only condition likely to be relevant to a request under the Freedom of Information Act is condition 6 which provides:

> **(1) The processing is necessary for the purposes of legitimate interests pursued 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.**

There was a dispute of principle raised in this case between counsel for the Hertfordshire Police and the Information Commissioner respectively as to how this provision should be applied. Mr Welfare for Hertfordshire Police submitted that the third party whose legitimate interests were to be considered was not the actual person requesting the information but a notional member of the public whose interests were those of the public at large. Such an approach he submitted was a necessary consequence of the fact that under the Freedom of Information Act disclosure is "to the world" and the motives of the requester are irrelevant and was consistent with section 40(3) of the Freedom of Information Act which refers to disclosure to "a member of the public" contravening any of the data protection principles. Ms Kamm for the Commissioner submitted that it was the actual requester (who is the person who would have a right to receive the information under the Act) whose legitimate interests must be considered; the fact that a disclosure under the Act is a disclosure "to the world" is properly taken into account, she said, at the stage of considering the extent of the prejudice which would be caused to the data subject by the disclosure. Although the Tribunal consider it

unlikely that the resolution of this dispute will make a great deal of difference in practice (at least in this case) we would record that we prefer the approach of the Commissioner which seems to us consistent with at least some of the jurisprudence of the Tribunal to date (see eg *Corporate Officer of the House of Commons v Information Commissioner* EA/2007/0060, 26.2.08 at para 78 and *Alcock v Information Commissioner* EA/2006/0022, 3.1.07 at para 32) and with the scheme of the two Acts. Section 40(3) of the Freedom of Information Act requires a consideration of whether a data protection principle will be contravened in a specific case and condition 6, which must often be considered in deciding whether there will be such a contravention, requires a consideration of the legitimate interests of a specific party or parties rather than the legitimate interests of a notional person or the public at large. In so far as the legitimate interests for which the requester requires the information are of a public rather than purely private nature they are likely to weigh more heavily in favour of disclosure when the decision is being made as to whether the disclosure is "unwarranted" by reason of the prejudice to the interests of the data subject. We would also observe (a) that the identity and motives of the requester are not always necessarily irrelevant under the Freedom of Information Act (they are relevant for example in considering section 14 ("Vexatious or repeated requests") and section 40(1) (information of which the requester is the data subject) and (b) that disclosure under the Freedom of Information Act is described as "disclosure to the world" not because it automatically involves publication of the information to the world but rather as a kind of short-hand because there is no provision in the legislation for any restriction to be placed on the use which the recipient of the information can make of it.

17. As for the conditions in Schedule 3 of the Data Protection Act, one of which must be satisfied before "sensitive personal data" can be disclosed, the only one which might even in principle be relevant in relation to a Freedom of Information Act request is condition 1, namely that the data subject has given his "explicit consent" to the disclosure; this appears to mean that unless the data subject explicitly consents a public authority can almost never disclose information "as to" the actual or alleged commission of any offence by him, even after a public trial has taken place. We will return to consider this further in relation to the Hertfordshire Police appeal.

The Bedfordshire Police appeal

18. We have referred to the information in dispute in this appeal in para 10 above. The Tribunal was provided with copies of the statement dated 16 October 2004 and the transcript of DH's interview in confidence. We agree that the information contained in those documents was exempt under section 30(1) but, given that it was obtained at the request of the Coroner, we prefer to find that it came within section 30(1)(b) (investigations which may lead to criminal proceedings) rather than section 30(1)(a)(i) (investigations carried out with a view to it being ascertained whether a person should be charged with an offence) as found by the Commissioner. The real issue for us is whether the Commissioner was correct to find that the public interest in maintaining the exemption under section 30(1) outweighed the public interest in disclosing the information. Ms Kamm for the Commissioner accepted that in carrying out the public interest balance test the Commissioner had wrongly looked at the position as at the date of his decision in February 2008 rather than the position as at the date of the public authority's decision in November 2005, but, she said, this error worked in Mr Digby-Cameron's favour and the Commissioner had generally adopted the right approach and come to the correct conclusion.

19. There was an important factual issue which needed to be resolved before the public interest balancing exercise could be carried out but on which there was unfortunately no finding or direct evidence, namely the status of the investigation which may have led to criminal proceedings as at November 2005. Mr Bennett for Mr Digby-Cameron asked us to infer from the fact that the inquest was resumed in February 2006 that there was by November 2005 no longer any prospect of criminal proceedings being brought; Mr Ruck Keene for the Bedfordshire Police on the other hand invited us to infer that no decision would have been made at that stage precisely because the inquest had not yet come to an end. We note that the Coroner stated (as we record above at para 5) that the police had indicated to him at the inquest that the Shefford events were still open to further investigation: in view of this we find that the investigation was indeed still open and that there was still a possibility that it would lead to a decision to institute criminal proceedings as at November 2005.

20. Taking account of that finding we are of the view that at the relevant time the public interest in maintaining the exemption substantially outweighed the public interest in the disclosure of the information in question. We regard the following as the important considerations in carrying out the balancing exercise:

(1) The statement and transcript contain no information of any intrinsic public interest;

(2) The Tribunal fully accepts Mr Digby-Cameron's point that there is a public interest in the proper investigation of the cause of the death of a young person in circumstances like those in which Andrew died so that the public (and close relatives in particular) can know as much as possible about how the death happened; however, the way in which this should normally happen is through the Coroner's inquest process which was in this case still on-going at the relevant date;

(3) Mr Digby-Cameron made the point that he needed the documents in question so that he could prepare effectively for the resumed hearing of the inquest and that he was hampered by not having them; this may be correct but it seems to us that his access to such material for these purposes should be governed by any relevant procedures within the inquest process; Mr Ruck Keene for the Bedfordshire Police helpfully referred us to paras 10-43 to 10-48 in Jervis on Coroners 12th ed (2002) in relation to those procedures (such as they are) and it is evident that there is some dissatisfaction with them but in our view that is a matter, if appropriate, for law reform and not something that should weigh in the public interest balance in this case;

(4) The interview and the statement had been given voluntarily in connection with an investigation which was on-going and which might have been brought before a criminal court some time later; the normal expectation on the part of those providing

evidence to the police voluntarily in this way would have been that they would only be used for the purposes of such a criminal case in court and not disclosed to third parties (save the Coroner in this case) in advance;

(5) The independence of the prosecution process and the preservation of the position of the criminal court may have been undermined if the information was disclosed without consent in advance of a criminal case or decision not to prosecute.

21. Given that conclusion we find that the Commissioner's decision in this case was correct notwithstanding that he looked at the position as at the wrong date and we accordingly dismiss Mr Digby-Cameron's appeal.

The Hertfordshire Police appeal

22. We have set out the various categories of information withheld by the Hertfordshire Police in para 8 above and the Commissioner's decisions in relation to them in para 11 above. The Police also produced for the Tribunal on a confidential basis two copy internal police e-mails which may but do not appear to come within any of those categories and a witness statement which had been overlooked previously and not considered by the Commissioner. We should also note that the material redacted from the documents at pages 1-135 of volume 2 and 136-168 of volume 1 of the Tribunal bundle was strictly speaking information within the terms of the request which had been withheld. We will consider whether the Hertfordshire Police were entitled to withhold the information in each of these categories of document in turn.

23. ***(a) Witness list for trial of lorry driver.*** This list contained the names, addresses, telephone numbers and occupations of the witnesses to be called at the trial of the lorry driver. It was not disputed that this information constituted the personal data of those named on the list. As such it clearly came within section 40(2) of the Act and could only have been disclosed if such disclosure was fair, necessary for the purposes of Mr Digby-Cameron's legitimate interests and not unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects. Mr Digby-Cameron informed us that his purpose in wanting the list was to

help him establish that the police had failed to carry out a proper investigation and that he needed only the names on the list for this purpose and not the other details. It was also drawn to our attention (and we were able to confirm) that all the names on the list save for those of members of his own family were already contained in the Case Summary which had already been supplied to him. In those circumstances we do not think that, even assuming he was pursuing legitimate interests, it was necessary for Mr Digby-Cameron to have the list disclosed to him. Furthermore, even if we had been satisfied that he needed the list to get the names of the witnesses to be called, we do not think disclosure would have been fair to the data subjects, necessary for his legitimate interests, or warranted in the light of the possible prejudice to their interests, since we find it hard to see how the details of the witnesses to be called at the lorry driver's trial on charges not directly related to Andrew's death could have had any relevance to any issue as to the quality of the investigation carried out into that death.

24. ***(b) Details taken from Andrew's mobile phone.*** The Tribunal was provided with this information in confidence; it consists of a list showing phone numbers (and in some cases names) and dates and times of incoming and outgoing calls to Andrew's phone and similar details for text messages along with the actual content of the text, the earliest record being dated 13 July 2003. Mr Bennett on behalf of Mr Digby-Cameron accepted that this information constituted "personal data" of which the makers and recipients of the calls and text messages were the data subjects and accordingly section 40(2) of the Act made it absolutely exempt from disclosure unless such disclosure was fair, necessary for the purposes of Mr Digby-Cameron's legitimate interests and not unwarranted by reason of the prejudice to the data subjects.

25. Mr Bennett's case was that there were mysteries surrounding the mobile phone records which continue to trouble Mr Digby-Cameron and that he was particularly concerned that they were not drawn to the attention of the Coroner as he believed that they would throw light on what had happened to his son. Mr Digby-Cameron himself told us that he wanted to know who was in touch with his son and in particular whether there were any calls from DH around the time of his death. Having seen the records ourselves we can repeat the assurances already given to

Mr Digby-Cameron by the Police and the Commissioner that they do not disclose any threats or abusive messages or indeed anything else which appears likely to bear on the cause of Andrew's death. In the circumstances, although we accept that Mr Digby-Cameron had a legitimate interest in exploring the cause of Andrew's death and the adequacy of the police investigation, we find that disclosure of these records to him was not necessary for pursuing that legitimate interest and, in any event, that it would be unfair to the data subjects and unwarranted.

26. Mr Bennett suggested for the first time at the hearing that disclosure could (and presumably should) have been made simply of the time and length of the various calls recorded on the list which, he said, would not constitute personal data but would provide comfort to Mr Digby-Cameron by allowing him to have a clearer idea of what was going on at the time of Andrew's death. We were not sure that this submission was in fact consistent with Mr Digby-Cameron's own statement which we mention above to the effect that he wanted to know who had been in touch with his son but in any event we take the view that such information would have been of so little value or relevance as not even to come within the terms of the request which was for information relating to the death of Andrew.

27. ***(c) Correspondence between Hertfordshire Police and the Irish Garda.*** This material was supplied to Mr Digby-Cameron in redacted form pursuant to the Information Commissioner's decision.

28. ***(d) Court process documents relating to lorry driver.*** These documents comprised court computer print-outs [pages 55-58 of the disputed information bundle]. Apart from showing that the lorry driver was committed for trial in the Crown Court (which must be a matter of public record) they do not contain any information which goes beyond that already to be found in material which has been disclosed, in particular the case summary to which we have referred. Mr Welfare submitted that the information in the print-outs was absolutely exempt under section 40(2) because it constituted sensitive personal data about the lorry driver (namely information as to the alleged commission by him of an offence) and none of the conditions in Schedule 3 to the Data Protection Act had been met. If this is correct (and it may be) it could potentially have wide repercussions in cases like this where a request is made of the police for information arising out of the investigation of an

offence since it might be argued that provided the alleged offender can be identified all such information must come within the section 40(2) exemption: this would be rather surprising given the terms of section 30(1) and the careful balancing exercise that must be carried out when that exemption is raised. Because submissions on this point were necessarily attenuated at the end of a long day, the Tribunal would prefer to deal with this part of the case simply on the basis that there was no new information in these documents and that there was therefore no obligation to disclose them.

29. ***(e) Internal memo regarding operational directions.*** The Tribunal is unclear what the Hertfordshire Police letter dated 20 October 2006 is referring to here but we assume that it is one of the e-mails referred to below.

30. ***(f) Correspondence between Hertfordshire Police and the insurers.*** Mr Welfare accepted that he had difficulty constructing a strong argument justifying the withholding of this material [pages 64-68 of disputed information] and, although it seems most unlikely to be of any interest to Mr Digby-Cameron, he accepted that it should be supplied to him redacted so as to exclude personal details.

31. ***Internal police e-mails dated 3 March 2004 and 23 July 2004.*** These were provided to us as part of the disputed information bundle on a confidential basis [pages 60 to 63]. Mr Welfare submitted in closed session that they were both covered by the exemption in section 30(1) as they contained information held by Hertfordshire Police for the purposes of the investigation of the road traffic accident which led to the charging of the lorry driver. As far as we can see from the incomplete copy we have this is not the case in relation to the first email and we therefore reach the view that the contents of this email should have been disclosed. As to the other email we do not accept that the contents of the three communications timed at 15.18, 14.30 and 14.26 come within the terms of section 30(1). The balance, namely the communications timed at 16.40, 15.35 and 15.28, do come within section 30(1) and we must therefore consider whether the public interest in maintaining that exemption outweighed the public interest in disclosure in October 2006. The Tribunal considers that the balance comes down firmly in favour of disclosure in this case particularly bearing in mind the following considerations: (a) by October 2006 the criminal trial against the lorry driver was long finished; (b)

the witness referred to in the emails had already given evidence to the Coroner's inquest and his evidence was in fact irrelevant to the criminal case; (c) the information reveals some possible incompetence by the Police in relation to the investigation of the road traffic accident. We will therefore allow the appeal in relation to this information and order that the documents are disclosed to Mr Digby-Cameron if they have not been already, allowing the Police to redact any personal data which ought to be withheld. On the question of redaction we would say that we do not think it would be appropriate to redact the name of the new witness referred to in the e-mail of 23 July 2004 since, given all the circumstances, the information about him was either not personal data or its disclosure would not be unfair or otherwise in breach of the data protection principles.

32. ***Witness statement.*** Mr Welfare submitted in closed session that this witness statement was covered by the exemptions in section 30(1) and 40(2) of the Act but he put section 40(2) at the forefront of his argument and we consider this exemption first. Having read the statement we accept that its contents constituted personal data of the maker. We are also satisfied that the maker did not consent to its disclosure and that its disclosure would not have been fair and that, in the light of the inquest and the Coroner's verdict, its disclosure would not in any event have advanced any legitimate interest of Mr Digby-Cameron. We therefore find that, although no consideration was given to the question at the time, this statement was not discloseable to Mr Digby-Cameron under the Freedom of Information Act. We need not therefore consider the section 30(1) exemption in relation to it.

33. ***Redacted material.*** As we have indicated a great deal of material has been supplied to Mr Digby-Cameron by the Hertfordshire Police in redacted form, much of it informally without direct reference to the Act. It is not clear to us whether the Commissioner considered whether these redactions were proper and at the hearing Mr Bennett stated that Mr Digby-Cameron wished to object to some of them. Since, as Ms Kamm for the Commissioner pointed out, the information which had been redacted was likely to have been within the terms of Mr Digby-Cameron's request and the Police ought therefore to have specified any exemption relied on and stated why it applied, an undertaking was given to the effect that if Mr Digby-Cameron specified any redactions he wished to have explained the Police would comply with

his request in so far as they were able. This seemed to the Tribunal a satisfactory way of dealing with this issue and we will accept and record that undertaking.

Conclusion and remedy

34. The appeal in the Bedfordshire Police case is dismissed. The appeal in the Hertfordshire Police case is allowed in part and a revised decision notice is issued as set out above.

35. We are grateful to all parties for their hard work in preparing for and assisting the Tribunal at the hearing and for the measured and calm way in which all their cases were presented.

36. Our decision is unanimous.

Signed:

Murray Shanks
Deputy Chairman

Date: 23 January 2009