



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0037

Information Commissioner's Ref: FS50157444

Heard at Victory House, London

Decision Promulgated

On 30th and 31st March 2009

14th April 2009

BEFORE

John Angel

Chairman

And

Marion Saunders and David Wilkinson

Lay Members

Between

DR PETER KELWAY

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

CHIEF CONSTABLE OF NORTHUMBRIA POLICE

Additional Party

Representation:

For the Appellant: In person

For the Respondent: Ben Hooper

For the Additional Party: Timothy Pitt-Payne

Decision

The Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice dated 17th March 2008.

SUBSTITUTED DECISION NOTICE

Dated 14 April 2009

Public authority: Chief Constable of Northumbria Police

**Address of Public authority: Police Headquarters, Ponteland,
Newcastle upon Tyne**

Name of Complainant: Dr Peter Kelway

The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is that the two witness statements referred to in paragraphs 5 – 7 of the confidential annex redacted as specified by the Tribunal are to be disclosed to the Appellant.

Otherwise the Tribunal upholds the Decision Notice of 17th March 2008 for the other three witness statements referred to in the confidential annex.

Action Required

That the two witness statements referred to above duly redacted are disclosed to the Appellant within 28 days of this decision notice.

Dated this 14 day of April 2009

Signed:

Chairman

Information Tribunal

Reasons for Decision

Background

1. Dr Kelway was the managing director of Aptech Limited, which brought a claim against NEP Group for breach of contract in August 1998. Aptech Limited went into compulsory liquidation in February 1999. In July 2001, Aptech's claim was assigned to the Appellant in his personal capacity. In November 2002, the claim (which by this point was against Canon UK Limited, the parent company of NEP Group) was, in effect, dismissed. An unsuccessful appeal by the Appellant followed in 2003. Canon UK Limited eventually applied for a detailed assessment of its costs against the Appellant, and the matter came before a District Judge on 27 January 2004.
2. Dr Kelway claims to have objected to the hearing on the basis that no formal costs order had been made at the end of the appeal in 2003. He further claims that District Judge accepted that he lacked jurisdiction to amend the appeal judge's order. However, the District Judge subsequently made an order purporting to amend the appeal judge's order. Dr Kelway was unsuccessful in his appeal to have this order set aside. Dr Kelway informs us that costs against him amount to over £90,000.
3. The transcript of the detailed assessment hearing is said not to record any concession by the District Judge that he lacked jurisdiction to amend the appeal judge's order. Dr Kelway in his words became suspicious that the District Judge "had arranged for his remarks on jurisdiction to be removed from the tape". Dr Kelway reported the matter to Northumbria Police in October 2004.
4. Northumbria Police concluded in May 2005 that no crime had been committed. Dr Kelway challenged this finding. In September 2005, the same conclusion was reached. He then made, in his words, a "strongly worded complaint to a senior office[r] at Northumbria Police". A further investigation followed, and a report was eventually sent to the Crown Prosecution Service ("the CPS"). In September 2006, Northumbria Police informed Dr Kelway that there was insufficient evidence on which to prosecute any party.
5. Dr Kelway was still not satisfied. He made further complaints to Northumbria Police and, subsequently, to the Independent Police Complaints Commission ("the IPCC"). Neither were successful. Dr Kelway believes that the IPCC ignored material facts put forward in his appeal and has made an application for judicial review of the IPCC decision. He is awaiting a response on whether the application will be accepted.

The request for information

6. Dr Kelway's first FOIA request (dated 23 November 2006) was as follows:

“I would be grateful for the supply of reports by DS Spoor and DS Fairlamb regarding a complaint made by me against District Judge of Newcastle Combined Court. I would also be obliged for copies of all forensic reports and all correspondence between Northumbria Police and Newcastle Combined Court which relates to my complaint.”

7. On 24 November 2006, Northumbria Police refused the request in reliance on s. 40(1) of FOIA. An offer was made to process the request under the DPA upon payment of the requisite fee and submission of the necessary paperwork.
8. Dr Kelway repeated his request for information on 4 December 2006. Northumbria Police refused his request on 30 January 2008 this time relying on the exemptions under ss. 32(1)(c), 30(1) and 30(2) FOIA, rather than s.40(1) (“the Refusal Notice”). Dr Kelway complained on 31 January about the Refusal Notice. This was considered by Northumbria Police as a request for an internal review of their decision. On 2 March 2008 Northumbria Police upheld the Refusal Notice following an internal review.
9. In the course of correspondence Northumbria Police indicated that it had taken into account the following public interests in coming to its decision. In favour of disclosure was the accountability of the police for undertaking investigations into alleged crimes and public participation in terms of providing confidence in the way the police conduct investigations. Factors taken into account for maintaining the exemption were the inherent public interest in the exemption itself and the need to protect the privacy of third parties helping with an investigation. Northumbria Police concluded that the public interest in favour of maintaining the qualified exemption under s.30 outweighed the public interest in disclosure.

The complaint to the Information Commissioner (IC)

10. On 7 April 2007, the Appellant complained to the IC under s. 50 of FOIA. The IC considered the Appellant’s complaint and issued a Decision Notice on 17 March 2008. In summary the IC found that the information requested was exempt from disclosure under s.40(1) of FOIA and that Northumbria Police was not obliged under FOIA (by virtue of s.40(5)) to confirm or deny whether it held the requested information.
11. In the meantime, on 17 January 2008 Dr Kelway had sent Northumbria Police a subject access request under s.7 of the Data Protection Act 1998 (“the Subject Access Request”). Dr Kelway indicated that he was (i) a person reporting an offence or incident, (ii) a witness to an offence or incident and (iii) a victim of an offence. He further stated:

“This request relates to documents generated by the police during investigations into my allegations of a criminal action....The documents were generated between January 2005 and October 2006....The investigations were conducted by DS Spoor and DS Fairlamb and involved Court staff and judges....The documentation

concerned relates to witness statements, the reports of investigating officers and the documents passed to the CPS at the conclusion of the investigation conducted by DS Fairlamb.”

12. Dr Kelway received a bundle of documents in response to his Subject Access Request.
13. On 1 March 2008, Dr Kelway complained to the IC. The IC decided to treat this as a request for an assessment under s. 42 of the DPA. More recently, Dr Kelway has received further documents. The outcome of the IC’s assessment was communicated to Dr Kelway and Northumbria Police on 17 October 2008.

The appeal to the Tribunal

14. Dr Kelway’s appeal to the Information Tribunal was received on 14 April 2008. Northumbria Police were joined as a party on 31 July 2008. There were a number of directions hearings and pre-hearing reviews by way of telephone conferences which resulted in three sets of directions being issued by the Tribunal. These were primarily aimed at determining which documents were in dispute. The original date for the hearing was postponed because of the passing away of a close relative of Dr Kelway.
15. By the time we arrived at the full hearing there had been further disclosures under the Subject Access Request and under the FOIA request before us including some a few days before the hearing and one at the beginning of the first day. All that remained in dispute were 5 witness statements. Dr Kelway had been requesting the original tape recording of the costs’ assessment – see paragraph 3. above - to which Northumbria Police were claiming the s.32 FOIA exemption, but he had satisfied himself in the meantime that it did not now exist so he was no longer seeking its disclosure. However Dr Kelway was still concerned that not all the information that was the subject of his request had been identified and either disclosed to him or was part of the disputed information.
16. At the hearing in accordance with our usual practice as set out in practice notes it was necessary for the Tribunal to hear some evidence and submissions in closed session in order to protect the closed materials. This was explained to Dr Kelway who at all times co-operated with the Tribunal when required to leave the hearing for us to go into closed session.
17. The powers of the Tribunal are set out under s.58 FOIA. The Tribunal may consider whether a decision notice is wrong in law or that to the extent that a notice involved an exercise of discretion by the IC that he ought to have exercised it differently. In order to do this the Tribunal may undertake a merits review (s.58(2)) and can allow the appeal and/or substitute a new decision notice and in any other case dismiss the appeal.

The questions for the Tribunal

18. As the tape was no longer at issue for this Tribunal (see paragraph 15 above) and because of disclosures already made in this case the questions for the Tribunal to decide had narrowed. The issues that remained are as follows:

- a. Are there any missing documents within the scope of the Request which have not yet been disclosed or provided as part of the closed bundle?
- b. Is the disputed information Dr Kelway's personal data and exempt under s.40(1) FOIA?
- c. If the information or part of the information is not personal data is it exempt from disclosure under s.30 FOIA?

The s.32(1) exemption is no longer applicable as Dr Kelway is no longer requesting the original of the court tape and copies of the tape and transcripts have already been provided to him.

Missing documents

19. Before the hearing Dr Kelway identified various gaps in the documentary record of the investigations into his allegations. In effect, he wished the Tribunal to determine whether the following information was missing from the proceedings and were part of his Request:

- i. The "miscellaneous documents" referred to on the final page of the report of D.S. Spoor dated 23 September 2005 on page 184A of the open bundle;
- ii. A report of D.I. Buzzeo referred to in a case summary on page 227 of the open bundle;
- iii. A copy of Annex C and the notes made by the judge at the cost assessment hearing on 27 January 2004 referred to in D.S. Fairlamb's report dated 29 September 2006 following the CPS advice dated 6 September 2006;
- iv. Copies of correspondence between D.S. Fairlamb and the court as part of Northumbria Police's investigations.

He no longer was asking us to consider the original tape recording.

20. In order to help us decide these matters we heard evidence from Dr Kelway. We also heard evidence from D.I. Buzzeo who is a serving officer with Northumbria Police, Hayley Morrison of Northumbria Police Information Unit who dealt directly with Dr Kelway's FOI request and Michael Pearson who was in the Force Intelligence and Information Department at the time of the investigations into Dr Kelway's allegations but is now in an Area Command post with Northumbria Police.

21. Dr Kelway pointed out to us that the first three items were referred to in disclosed documents and therefore was surprised they had not been contained in either the open or closed bundles of documents.
22. We heard evidence from the three police witnesses as to the investigations and the passing of files between departments in relation to the investigations undertaken, and the references that were made to the CPS and Professional Standards. Ms Morrison in evidence explained that she had undertaken diligent searches during the course of these proceedings and could not find any further information covered by the Request. However she admitted she could not be absolutely sure that there were no documents missing particularly because the files had been passed between so many departments.
23. As to the first item there seemed to be some confusion as to whether the witness statements set out under the heading "Other Miscellaneous Documents" in Northumbria Police's response to the IC's request for information in relation to the Commissioner's investigation of the complaint were the documents in question. Evidence emerged that this could not be the case because they were made after the date of D.S. Spoor's report. The witnesses could shed no further light on the "miscellaneous documents".
24. Dr Kelway in his closing submissions seems to have accepted that these documents were not available. He suggested that Northumbria Police had lost, destroyed or deliberately withheld the information.
25. The Tribunal when considering evidence is only required to determine the facts on the basis of the civil test of whether on the "balance of probabilities" the information in question is lost, destroyed or deliberately withheld. It is not required to determine the matter, as in criminal cases, "beyond reasonable doubt".
26. The Tribunal has considered all the evidence and finds on the balance of probabilities that there is no evidence of deliberately withholding or destruction in the sense of the documents being deliberately destroyed to frustrate Dr Kelway's request. However the Tribunal finds that on a balance of probabilities the information may have been lost or cannot otherwise be found or has been already disclosed but cannot be identified from the description given.
27. As to the second document, namely the report of D.I. Buzzeo, he explains in evidence that he does not recall producing a report as such. He considers that his hand written note accepting D.S. Spoor's recommendation at the end of the latter's report to DCI Dawes dated 14 March 2005 is the only report to which the case summary might refer. In the absence of any other evidence to the contrary and the fact the Tribunal found D.I. Buzzeo to be a very credible witness the Tribunal finds on a balance of probabilities that this is the report and that the information has been disclosed.
28. In relation to the third item having considered the evidence, and in particular the email dated 9 November 2007 from Jo Pedder from the ICO to Hayley Morrison of Northumbria Police on page 103A in the open bundle, we find that Annex C was D.S. Fairlamb's report to D.I. Buzzeo dated 12 February 2006 in the open bundle at pages 220 - 221 and had been disclosed. As far as the judge's notes were concerned the only evidence before us is that the words amended on the court transcript at page 193 of the open bundle were possibly the notes being referred to but that no other documents of that description had been found. Again

on the balance of probabilities the Tribunal find that this is the only explanation but that if there are some notes then these are not in the possession of Northumbria Police.

29. As to the fourth item, namely correspondence between D.C. Fairlamb and the court, we heard evidence that there was no such correspondence and that he dealt with the court through oral communications whilst carrying out the investigations. As there is no evidence to the contrary the Tribunal accepts on a balance of probabilities that there is no such correspondence.
30. During the course of the evidence it emerged that Northumbria Police's record keeping was far from perfect and that is why it appeared to Dr Kelway, quite reasonably in our view, that documents might be missing. This may have occurred because of the files being moved between departments. However we are surprised that such a public authority charged with undertaking investigations does not have better systems and hope that the experience of this case will help Northumbria Police to better manage its information in the future.

Whether s.40(1) FOIA is engaged?

31. The IC concluded that all of the information requested by Dr. Kelway amounted to his own personal data. It is clear from the material put before the Tribunal that the Commissioner reached this view both in relation to the information at tab 6 in the open bundle and in relation to the 5 witness statement in the closed bundle which are the disputed information. In order to understand how the IC came to this conclusion it is necessary to set out the statutory context.
32. The DPA implements Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("the Directive").
33. Section 1(1) of the DPA provides a definition of the term "data":

"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 paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68; or
- (e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d);"

34. By s. 1(1) of FOIA, the term “public authority” means a public authority as defined by FOIA. It is not disputed in this case that Northumbria Police is a public authority for this purpose¹. It is accepted by all the parties that the requested information constitutes “data” within the meaning of the DPA, in that - even if it does not fall within paragraphs (a)-(d) - it will fall within paragraph (e).

35. S. 1(1) of the DPA also defines the terms “data subject” and “personal data”:

“‘data subject’ means an individual who is the subject of personal data;

‘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;”

36. S.7 of the DPA affords a right of access on the part of data subjects to their personal data, subject to various exemptions in Part IV of the DPA (ss. 27-39).

37. Individuals have a right to complain to the Commissioner under s. 42 of the DPA, which provides in relevant part:

“42 Request for assessment

(1) A request may be made to the Commissioner by or on behalf of any person who is, or believes himself to be, directly affected by any processing of personal data for an assessment as to whether it is likely or unlikely that the processing has been or is being carried out in compliance with the provisions of this Act.

(2) On receiving a request under this section, the Commissioner shall make an assessment in such manner as appears to him to be appropriate....”

38. Nothing in the DPA grants the Information Tribunal jurisdiction to determine either:

a. appeals or complaints from an individual regarding the extent to which any data controller has complied with its duties under s. 7 of the DPA;

¹ See s. 3(1)(a)(i) of and §59 of Part V of Sch. 1 to FOIA.

or

- b. appeals or complaints regarding any assessment made by the Commissioner under s. 42 of the DPA.

39. Art. 29(1) of the Directive established a “working party on the protection of individuals with regard to the processing of personal data” with advisory status (“the Working Party”). The Commissioner is the UK’s representative on the Working Party.

40. On 20 June 2007, the Working Party adopted Opinion 4/2007 on the concept of personal data (“the Working Party Opinion”). Philip Jones Assistant Commissioner, Director of Data Protection Practice of the IC gave evidence to us that the Commissioner’s Technical Guidance Note on personal data (“the Guidance”) is consistent with the Working Party Opinion, although this is disputed by Dr Kelway. The Guidance sets out, among other things, eight questions that are intended to help determine whether data is “personal data” within the meaning of the DPA.

41. S.40 of FOIA provides in relevant part:

“(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.

....

(5) The duty to confirm or deny—

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1),...

....

(7) In this section—

...

“data subject” has the same meaning as in section 1(1) of [the Data Protection Act 1998];

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

42. S. 40(1) is listed in s. 2(3) as conferring absolute exemption and thus both that provision and s. 40(5)(a) provide for absolute exemptions.

43. Mr Jones was a very active member of the Working Party sub group that produced the Working Party Opinion, and he was a major contributor to the drafting of the Guidance. He gave evidence that at an early stage in the

Commissioner's investigation of Dr Kelway's complaint that the possibility was identified that some or all of the requested Information might constitute Dr Kelway's personal data, not least because the correspondence included references to the impact that the judge's alleged actions had had on Dr Kelway.

44. We were provided with evidence that in line with the Commissioner's standard practice, the IC requested the requested information from Northumbria Police. Advice was sought from Mr Jones by the case worker on two occasions as to whether the requested information might constitute the Dr Kelway's personal data.

45. Mr Jones describes the second meeting as follows:

"I met the team leader and other colleagues on 9 January 2008. In that meeting the team leader asked for clarification about the criteria that should be applied when deciding whether something was [the Appellant's] personal data. During the meeting the team leader clarified that the allegation that [the Appellant] had made related to the judge's actions in a case in which he was one of the parties. [The Appellant] had himself stressed in his correspondence that the decision about the allegation being investigated, as well as the alleged actions by the judge, had had a direct and considerable impact upon him. He had also indicated that he required information to enable him to make complaints about Northumbria Police to the IPCC....The team leader also advised that the information all appeared to constitute evidence that was used to inform decisions about what to do about the judge's alleged actions. I was also advised that [the Appellant] was mentioned throughout many of the documents.

On the basis of the further clarification, I advised that the records of any investigation into the propriety of the judge's conduct were likely to constitute [the Appellant's] personal data to the extent that they concerned actions which had allegedly directly affected him."

46. The IC indicated that in reaching his decision he had considered the Guidance (§14 of the Decision Notice).

47. At §15 of the Decision Notice, the Commissioner stated:

"The requested information relates to the investigation into an allegation that the [Appellant] made against a District Judge. He alleged that the Judge had tampered with court tapes of proceedings to which the complainant was a party. The Commissioner is satisfied that the requested information is the [Appellant's] personal data because it records information about the way in which his allegations and complaints against the Judge were investigated. Further, it reflects details used to inform the final decision about the [Appellant's] allegations. The outcome of that investigation arguably affects the [Appellant] as well as the Judge."

48. The Commissioner did not conclude that the requested information was only Dr Kelway's. Thus, at §15, he continued:

“Although the Commissioner is satisfied that all of the information is the complainant's personal data he recognises that it is also the Judge's personal data. In addition, the material includes personal data about other third parties.”

49. However, the Commissioner concluded at §15:

“Nevertheless because in the Commissioner's view all of the information is the complainant's personal data section 40(1) applies.”

50. Mr Jones provided a further explanation in evidence of the Commissioner's reasoning:

“I understand that on the basis of both sets of advice that I provided, all the withheld information was found to be exempt under section 40(1). This was for a combination of reasons, primarily because the information was used as evidence to inform a decision about what, if any, action to take against the judge in relation to his alleged conduct which had directly impacted upon [the Appellant]. However, in addition, [the Appellant] was identified within much of the information and/or had supplied it himself for the purposes of the Police's investigation. I understand that on the basis of my advice, the team leader did not consider it necessary to carry out a detailed, page-by-page analysis of the information. Rather, the analysis was limited to determining whether or not the information requested appeared to relate directly to [the Appellant's] allegations and appeared to have been used to inform the decisions that were being made about the allegations against the judge, and the judge's dealings with [the Appellant's] case.”

51. On 17 January 2008 Dr Kelway sent Northumbria Police the subject access request under the DPA. Dr Kelway indicated that he was (i) a person reporting an offence or incident, (ii) a witness to an offence or incident and (iii) a victim of an offence. He further stated:

“This request relates to documents generated by the police during investigations into my allegations of a criminal action....The documents were generated between January 2005 and October 2006....The investigations were conducted by DS Spoor and DS Fairlamb and involved Court staff and judges....The documentation concerned relates to witness statements, the reports of investigating officers and the documents passed to the CPS at the conclusion of the investigation conducted by DS Fairlamb.”

52. It is apparent that the scope of the Subject Access Request is not identical to the scope of the FOIA request as set out in Dr Kelway's letters of 23 November 2006

and 4 December 2006. Thus, Mr Hooper submits, there is no reason to suppose that the Subject Access Request necessarily covers exactly the same documents as fell within the Dr Kelway's FOIA request.

53. As we have already stated above Dr Kelway received a bundle of documents in response to his Subject Access Request. On 1 March 2008, Dr Kelway complained to the Commissioner. The Commissioner decided to treat this as a request for an assessment under s. 42 of the DPA. More recently, the Appellant has received further documents. The outcome of the Commissioner's assessment was communicated to the other parties on 17 October 2008.
54. Mr Hooper on behalf of the IC submits that the Commissioner was plainly right to conclude that the requested information constituted the Dr Kelway's personal data.

The Tribunal's conclusion on whether s.40(1) is engaged

55. The leading authority on what is covered by "personal data" is the Court of Appeal's decision in *Durant v Financial Services Authority* [2003] EWCA Civ 1746. At paragraph 28 of the judgment Auld LJ found:

28 It follows from what I have said that 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 a 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.

He then goes on to provide "two notions that may be assistance" to helping decide whether or not information is personal data, namely biographical significance and focus. He continues "*In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity.*"

56. The Commissioner's Guidance includes these two notions in a step by step approach to help determine whether data is personal data under the DPA. As Mr Jones explained to us the Guidance also incorporates the guidance contained in the Working Party's Opinion.
57. Mr Pitt-Payne submits that the Guidance in effect contains, in *Durant* terms, a number of notions which may be of assistance to help determine whether information is personal data including those provided by Auld LJ and those in the Opinion.
58. In this case Mr Hooper on behalf of the IC places much reliance on the "notion" in the Opinion which assists with understanding how information "relates to" an individual. The Opinion considers that a **content** or **purpose** or **result** element should be present. Mr Hooper particularly relies on the **result** element where data can be considered to relate to an individual because their use is likely to have an impact on a certain person's rights and interests, taking into account all the circumstances surrounding the precise case. In this case Mr Hooper refers us to Mr Jones' conclusions set out above that the result of Northumbria Police's investigation into Dr Kelway's allegations could have had an impact on the cost

order against Dr Kelway and that this element helped Mr Jones' advise the case officer that all the disputed information was Dr Kelway's personal data. Also we have before us Dr Kelway's own explanation in respect of his Subject Access Request as to how the information may relate to him.

59. It is clearly difficult to decide what information is personal data in this case because the allegation being investigated, although made by a Dr Kelway, was about another person, namely a judge. Although we cannot disclose in this open judgment what is contained in the disputed information what we can say is that the 5 witness statements, which make up the disputed information, are of other persons whose references to Dr Kelway vary in extent from significant references to the mere mention of his name, if at all.
60. We are bound by the Court of Appeal's decision in *Durrant*. We are required to decide in this case where the mention of the data subject "*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.*" In order to assist in making our decision we consider we can take into account the notions provided in the Guidance which include those provided by Auld LJ and the Opinion, but we are not bound to do so if they are not of assistance. We note that in other decisions of the Information Tribunal and elsewhere that Auld LJ's notions have appeared to be given more significance than we believe that Auld LJ intended.
61. Applying the statutory provisions and judicial authority cited above to the facts in this case we find that three witness statements fall at a point in the continuum that makes them Dr Kelway's personal data but that the other two are not sufficiently proximate to Dr Kelway for them to constitute his personal data. Our finding is explained in more detail in the confidential annex.

Whether s.30 FOIA is engaged?

62. We have found that three of the witness statements are caught by s.40(1) and therefore are absolutely exempt under FOIA. The remaining two witness statements fall to be considered under the alternative exemption claimed, namely s.30.
63. S.30(1) of FOIA provides as follows:

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.

64. Northumbria Police contended that the entirety of the disputed information fell within section 30(1)(a)(i), as having been held by them for the purpose of their

investigation of Dr. Kelway's allegations. Northumbria Police had a duty to carry out that investigation with a view to it being ascertained whether any person should be charged with an offence (such as, for instance, perverting the course of justice). The contention can still apply to the remaining statements not caught by the s.40(1) exemption.

65. The Tribunal has examined the two statements involved and finds that they fall within s.30(1)(a)(i) . The reasons for this can be found in the confidential annex.
66. This is a qualified exemption and there is no prejudice or harm test. Therefore the Tribunal is required to consider under s.2(2)(b) of FOIA whether "in all the circumstance of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."
67. Northumbria Police acknowledge that there are public interests in favour of disclosure as set out in paragraph 9 above in particular there is a public interest in an informed understanding of the way in which Northumbria Police carry out their duties in investigating, preventing and detecting crime. However, Mr Pitt-Payne argues, the disclosure of the witness statements in this case will make a very limited contribution to this objective.
68. As far as the public interest in maintaining the exemption is concerned, Northumbria Police contend that disclosure of information of this nature may have the effect of: (i) deterring individuals from co-operating with the police in the course of an investigation (the "chilling effect"); and (ii) revealing information about the way in which the police investigate crime, in such a way as to hinder the performance of their duties by the police. These considerations were explained to us by Michael Pearson and D.I. Buzzeo. However there was acceptance that such information would often be disclosed if a prosecution resulted followed by a court hearing.
69. The internal ACPO manual of guidance on freedom of information, moved from the closed to the open bundle at the beginning of the hearing, differentiates (at pages 94 and 95) between information held relating to ongoing investigations as against closed investigations. It states that

"A critical issue is likely to be the timing of the disclosure. Factors favouring disclosure are likely to be weaker while an investigation is being carried out, or is unsolved and subject to Criminal Procedures and Investigations ACT (CPIA) review, for the reasons outlined above. However once an investigation is complete, the public interest in understanding why an investigation reached a particular conclusion, or in seeing that the investigation has been properly carried out, could well outweigh the public interest in maintaining the exemption."
70. We consider that this is the right approach and that in this case where the investigations were closed by the time of the Request that the strength of the public interests in favour of maintaining the exemption were less.
71. We should mention that Mr Hooper brought to our attention that one of Dr Kelway's motivations for the Request was his interest in finding some way to challenge the cost award against him of some £90,000. Although Dr Kelway denied it was the only interest, Mr Hooper points out to us that this is a private

interest and not something we should be taking into account in undertaking the balancing test under s.2(2)(b) FOIA. We agree with Mr Hooper particularly as the FOIA is motivation blind.

Conclusion and remedy

72. The Tribunal has considered these public interests and those identified in the confidential annex. This is a case involving an investigation into a serious allegation against a judge or court staff. We find there is a strong public interest in Northumbria Police being able to show that they have carried out a proper and thorough investigation of an alleged crime particularly against a member of the judiciary or court staff. This is even stronger because of the public need to be reassured that there is no collusion between authorities or the police and a judge.
73. We find the chilling effect on investigations is weaker in this case because the investigations had closed by the time of the Request. Also we find that they are weaker because the relevant witness statements are those of persons involved with technical aspects of the investigation whilst carrying out their professional duties as explained in the confidential annex.
74. Therefore in all the circumstance of this case we find that the public interest in maintaining the exemption does not outweigh the public interest in disclosure and that the two witness statements should be disclosed except for a section of one statement which again is explained in the confidential annex. Also we consider that some personal data of the persons making the statements should be redacted under s.40(2) FOIA having taken into account the Tribunal's jurisprudence in previous decisions with respect to such data.
75. Our decision is unanimous.

Signed:

John Angel

Chairman

Date: 14 April 2009

(Corrected on 16 April 2009)