IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL GENERAL REGULATORY CHAMBER UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Information Tribunal Appeal Number:	**EA/2010/0060**
Information Commissioner's Ref:	**FS50198232**
Decided on the papers on 21st September and 15th October 2010	**Promulgated 18th January 2011**

BEFORE:

FIONA HENDERSON

And

PIETER DE WAAL

And

GARETH JONES

BETWEEN:

PETER DUN

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

And

THE NATIONAL AUDIT OFFICE

Additional Party

Subject Matter:
FOIA
Absolute exemptions
- Personal data s.40

DPA
Schedule 1
Schedule 2

Cases:

DBERR v ICO & Friends of the Earth EA/2007/0072

Corporate Office of the House of Commons v Information Commissioner and Norman Baker EA2006/0015

Durant v Financial Services Authority 2004 FSR 28

Waugh v IC and Doncaster College EA/2008/0038 (followed in *Blake v IC and Wiltshire CC EA2009/0026*)

Decision

1. The Tribunal allows the appeal in part and varies the Decision Notice **FS50198232** dated 11th February 2010, finding that whilst the information was personal data:
    - Disclosure of the details of senior civil servants would not be unfair and would not breach the 1st data protection principle,
    - Redaction of the names or identifying features from the rest of the information would enable substantial further disclosure which would not be unfair and would not breach the first data protection principle.
    - Much of the disputed information should therefore have been disclosed in redacted form as set out in the confidential schedules attached.

2. The Tribunal dismisses the rest of the appeal finding that in relation to the information that it orders should remain redacted, the Commissioner was right to conclude that disclosure would be unfair and breach the first data protection principle.

3. The information to be disclosed (as defined in the Confidential Schedules[1]) should be provided to the Appellant within 28 days from the date of this Decision.

4. We direct that the Confidential Schedule 1 to our Reasons for Decision should remain confidential until the information so ordered has been disclosed by the National Audit Office. We further direct that Confidential Schedule 2 should remain confidential.

[1] For ease of reference the table in confidential Schedule 2 is complete and contains disclosable and redactable material. Confidential Schedule 1 is an edited version containing only information that the Tribunal orders should be disclosed which must remain confidential until disclosure has taken place.

SUBSTITUTED DECISION NOTICE

Public authority: **National Audit Office**

Address of Public authority: **157-197 Buckingham Palace Road**

London SW1W 9SP

Name of Complainant: **Mr Peter Dun**

The Substituted Decision

For the reasons set out in the Tribunal's determination and the closed schedules, the substituted decision is that:

1. The Names and identifying details of:
    - Junior civil servants,
    - Complainants,
    - Family members of complainants,
    - Those whose performance was referred to critically in the course of an investigation,

   amounts to personal data, the disclosure of which would breach the first data protection principle, and is therefore exempt under s40 FOIA.

2. S40 FOIA has been incorrectly applied to the remainder of the information in the disputed information.

3. In failing to disclose the redacted version of the disputed information, the National Audit Office failed to comply with its obligations under s 1(1) FOIA.

4. There were additional breaches of s1(1), 10 and 17 FOIA in that additional material which fell within the scope of the request was not identified or

disclosed by NAO and no refusal notice was issued in relation to that information.

Steps Required

5. Within 28 days of the date of this substituted decision notice NAO are ordered to disclose:
   - a redacted version of the disputed information (redacted in accordance with confidential schedule 2),

Dated this 18th day of January 2011

Fiona Henderson
Tribunal Judge

Reasons for Decision

Introduction

1. The *Public Interest Disclosure Act 1998* amended the *Employment Rights Act 1996* and created a right to redress, enforceable by Tribunal, in the event of unfair discrimination or dismissal by one's employer as a result of "whistle-blowing" (making a disclosure in the public interest). The Comptroller and Auditor General (C&AG) is a prescribed person under the 1998 Act to whom external disclosures can be made relating to *"the proper conduct of public interest, fraud, value for money and corruption in relation to the provision of centrally-funded public services"*.

2. In March 2005 the National Audit Office (NAO) began an enquiry into the handling of grievance procedures at the Foreign and Commonwealth Office (FCO) having received 3 complaints to the NAO's whistle-blowing hotline about staff grievances at the FCO.

3. The NAO sent a draft copy of its investigation report to the FCO in August 2006 asking for factual corrections and proposing a bilateral meeting. The final report was issued on 4th December 2006 upon the internal FCO intranet but still showed "track changes" showing that recommendation 5 (a recommendation proposing independent mediation in relation to some outstanding cases) had been deleted and then reinstated. From this it would appear that when they responded to the NAO's request of August 2006 the FCO had not confined themselves to factual corrections but had sought to change the conclusions of the report.

The Information Request

4. On 24th April 2007 Mr Dun requested the following information from the National Audit Office:

"all documents and/or information from the beginning of 2005 to date relating to the report on handling of staff grievances at the Foreign and Commonwealth Office".

5. After some correspondence in which the NAO indicated that they needed more time to assess the balance of public interest, they released some information on 22nd June 2007. The rest of the material was withheld relying upon s33 FOIA[2], s43 FOIA[3] and s40 FOIA[4]. A decision on one piece of information remained outstanding and on 5th July 2007 the NAO indicated that in relation to this they were also relying upon section 36 FOIA[5].

6. Mr Dun applied for an internal review on 14th August 2007. In relation to the material withheld under s40 FOIA Mr Dun invited the NAO to consider whether further disclosure could take place with redaction (as had occurred already in relation to some papers).

7. A preliminary review was conducted and the result communicated to Mr Dun in the email of 29th August 2007 in which the decision to withhold the information was upheld relying upon the same exemptions save in relation to one document formerly withheld under s40 FOIA which was disclosed with the personal information relating to an NAO correspondent redacted. The NAO observed in relation to the material still withheld that:
"to redact the personal information would effectively render the document worthless (i.e. all the relevant information they contain is exempt). These documents consist of lists of grievance cases at the FCO and individual case histories."

8. Mr Dun confirmed that he required a formal internal review. In their letter of 7th February 2008 the NAO confirmed that the decision to withhold the information was upheld relying upon the same exemptions.

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[2] Audit functions
[3] Commercial interests
[4] Personal data
[5] Prejudice to the effective conduct of public affairs

The complaint to the Information Commissioner

9. Mr Dun complained to the Commissioner on 4th April 2008 who commenced an investigation. With their letter of 7th July 2009, the NAO provided a copy of the disputed information. The information was marked to show where each exemption applied. A summary grid was also prepared indicating which documents were released to Mr Dun and which documents were released with redactions and the exemptions relied upon for those redactions.

10. In relation to the material withheld under section 40 FOIA the NAO confirmed that they believed that the data protection principles 1, 2 and 6 would be breached by disclosure of specific cases of grievance considered by the FCO. They also confirmed that they believed it would not be possible to redact information to protect the identities of the individual and in some cases redactions would render the documents worthless.

11. During the currency of the investigation Mr Dun confirmed that he did not wish to proceed with his complaint relating to the material withheld under s43 FOIA and consequently the Decision Notice does not deal with this aspect of the request.

12. The Decision Notice was issued on 11th February 2010 and found that there had been some procedural breaches of FOIA and that some material had been wrongly withheld under section 33 and 36 FOIA because the balance of public interest lay in disclosure. Disclosure of these documents was ordered. The Commissioner also held that some material had been correctly withheld under section 33 because the public interest lay in withholding the information.

13. In relation to the material withheld under sS40(2) FOIA

    - information was withheld that relates to details about personnel grievance cases at the FCO.
    - It relates to named, living individuals and it is personal data.
    - The Commissioner was satisfied it would not be possible to redact the names because of the level of detail regarding the personal grievance cases which would allow for individuals to be identified.

14. The Commissioner considered the 1st data protection principle most relevant in this case and that disclosure of this information would be "unfair" because the individuals concerned would have passed their information to the public authority in good faith and would have expected it only to be used in order to establish the basis of any report to be undertaken. Disclosure would be likely to be distressing to the individuals and their families and might hinder their careers within the FCO and in future jobs as they might be perceived as "troublemakers". The events were recent and their disclosure likely to be more distressing. There was little legitimate interest in disclosure of this information.

15. Although the NAO also relied upon s33 in relation to some of this information the Commissioner did not consider it as the material was already exempt on the basis of sec 40 FOIA.

The appeal to the Tribunal

16. Mr Dun appealed to the Tribunal on 6th March 2010 challenging the withholding of information under s33 and s40 FOIA.

17. On 19th August 2010 substantial further disclosure was made to Mr Dun:

i) During the preparation of the appeal the NAO determined that the public interest in withholding the information no longer outweighed the public interest in disclosure. Therefore all information which had been withheld under s33 was disclosed[6].

ii) Additionally, following witness statements served by Mr Dun from 2 of the whistle-blowers (Mr Evans and Mr Pearce), consenting to the disclosure of their personal data in relation to this FOIA request, the personal data relating to them was released, as disclosure would no longer breach the data protection principles and s40(2) FOIA no longer applied.

iii) Whilst preparing the Appeal the NAO also located a number of documents which fell within the scope of the Appellant's original request but which had not been located at that time and consequently were not considered by either the NAO when the request was first made or the Commissioner in his Decision Notice. These were also released to the Appellant subject to redactions under s40(2) FOIA. [7]

<u>Scope of the Appeal</u>

18. The disputed information now consists of:

- Redactions from documents 9, 10, 11, 12, 25[8], 26, 27, 34, 35, 42, 43, 44, 46, 50, 52, and 54 and A3. A6, A14, A15, A17, A20, A22, A23
- The entirety of document 48

19. In his submissions the Appellant argued that document 54 should be disclosed in its entirety. This was not the subject of the Commissioner's decision notice insofar as the redactions which have been made under s43 FOIA are concerned and therefore is not within scope for consideration by this Tribunal. The Tribunal does consider the redactions which have been made pursuant to s40 FOIA as part of this appeal.

[6] It was not made clear to the Tribunal what the change in circumstances has been that has enabled the information to be disclosed now and why it only arose during the preparation of the appeal hearing.
[7] When referred to by the Tribunal in this decision or its schedules, they are prefixed with A e.g. A6 to indicate the 6th document of the additional documents.
[8] Documents 25, 26 and 27 are duplicates of documents 42,43 and 44 respectively

20. Additionally the Appellant points to reference to a FCO/NAO meeting in October 2006 from (inter alia) document 11 in Schedule 1 of the documents released on 19th August 2010. He asks that the minute should be produced but the evidence of Gabrielle Cohen (Assistant Auditor General) is clear that no such record has been found and that all material withheld under s33 has now been disclosed.

21. The Appellant invites the Tribunal to consider whether it accepts this evidence in the context of the track changes to the NAO draft on the internal intranet. Whilst the Tribunal confirms that it has considered a copy of this document it also notes that:
    - the NAO made an additional search,
    - they disclosed the additional documents they found,
    - these documents included the information alluding to this meeting.

    The Tribunal reminds itself that its role is to consider what exists not what should exist, and is satisfied on a balance of probability that there is no basis for disputing the evidence of Ms Cohen on this point.

22. The grounds of appeal relating to s33 FOIA are therefore no longer before the Tribunal. The Tribunal did not consider argument upon s33 and made no findings in relation to s33. The only exemption that the Tribunal was asked to consider at the paper hearing was in relation to s40 FOIA. In relation to the material withheld under s40 FOIA this falls into several different categories of individual:
    - Names and Contact Details of junior civil servants,
    - Contact details of senior civil servants,
    - Commentary on the performance of individuals other than the Appellant and Mr Pearce and Mr Evans,
    - Personal data re Mr Pearce’s family members,
    - Personnel grievances other than those of the Appellant, Mr Pearce and Mr Evans.

23. The specific arguments pertinent to each category are set out in detail below, however, in summary:
    - it is not in dispute that the information is personal data,
    - the Appellant challenges the Commissioner's finding that disclosure would breach the first data protection principle,
    - In cases where the Appellant accepts that some personal data should be withheld, he argues that a way could be found of redacting/summarizing the documents so that the information could be disclosed without identifying the complainants.

Evidence

24. The Tribunal has considered all the witness statements and documentary evidence before it and deals with them in detail below. The Tribunal has seen an unredacted copy of the disputed information. A confidential folder of information from the Appellant has been disclosed to all parties and has been taken into consideration by the Tribunal but the Tribunal will not refer to it directly in an open judgment.

25. The Tribunal first considered the case at a paper hearing on 21st September 2010. On this date the Tribunal adjourned for further information relating to the way that the documents had been redacted. In her 3rd witness statement dated 17th September 2010, Ms. Cohen stated:
    "*Where the NAO has relied on the exemption under section 40(2) to redact the names and contact details, it is because of the junior status of the civil servants involved. The NAO's policy is to redact the names of civil servants below Grade 5...*"

26. The Tribunal had noted some apparent inconsistencies in the way in which the redactions had been done and provided the Commissioner and the NAO with a schedule of examples. In response to the amended adjournment directions dated 27th September 2010 the NAO provided closed evidence as to the job descriptions and roles of those civil servants whose names have been redacted from the disputed information. In light of the

inconsistencies identified by the Tribunal, the NAO indicated whether they had intended to disclose the information to enable the Tribunal to determine whether a name had been redacted or disclosed in error.

27. Upon detailed consideration of this new evidence the Tribunal determined 2 instances where they were either not sure who was being referred to, or had no information in relation to the individual. Having considered the context and significance of these documents, the surrounding disclosure and the apparent role that the individual played in the document, the Tribunal did not consider it proportionate to adjourn for further clarification and had specified in the closed schedules that this information should be disclosed if the individual was of Grade 5 equivalent or above in keeping with the Tribunal's findings at paragraph 32 et seq below. When the decision was at draft stage, the Tribunal was provided with the rank and identity of these individuals in a closed document by the NAO who had been provided with a copy of the draft under embargo. The Tribunal is satisfied that the receipt of this information did not alter its conclusions.

Legal submissions and analysis

28. There is no dispute that the disputed information is personal data in that it falls within s 1(1) of the Data Protection Act (DPA). The NAO relies upon s40(2) FOIA which provides:

"(2) Any information to which a request for information relates is also exempt information if

(a) it constitutes personal data... and

(b) either the first or the second condition below is satisfied."

Section 40(3) of FOIA provides:

"(3) The first condition [set out in section 40(2)] is—

(a) in a case where the information [is personal data], 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"...

29. Schedule 1 to the DPA 1998 sets out the data protection principles. The first principle is:

"*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, ...*[9]

Part II of Schedule 1 provides:

"*In determining for the purposes of the first principle whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed."*

30. Schedule 2 condition 6 provides

6. *(1) 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...*

31. The Tribunal has taken the law as set out above and applied it to the disputed information. For ease of reading the Tribunal has dealt with the arguments and evidence relating to each category, but the Tribunal has considered each piece of redacted information individually. As much of the Tribunal's general reasoning as is possible is given in the open decision and table, where it is necessary to apply this directly to the content of the disputed information that is done in the confidential schedules.

[9] Sensitive personal data is dealt with at paragraph 69 below

Names and Contact Details of Junior civil servants

32. Many of the documents that have been disclosed have been redacted to remove the identity and contact details of junior civil servants who:
    - Authored the documents,
    - Are referred to within the documents,
    - Were copied in to the documents.

33. The NAO's policy is to redact the names of civil servants below Grade 5. In their adjournment evidence the NAO clarified that this was based on the rank of the data subjects at the date that the document was created. This was because:
    - At the time they would not have had any expectation that their names would be publicised[10],
    - fairness of disclosure must take into account, the expectations that the data subjects **had at that time**[11].

34. They relied upon *DBERR v ICO & Friends of the Earth EA/2007/0072* as an example where individuals were judged on their responsibilities at the time which would necessarily be based on their rank and expectation at the time.

35. The NAO argued that the fact that a data subject is subsequently promoted to a more senior role at a later point logically cannot affect the expectations that they had previously formed. The Tribunal does not accept that this always follows because whilst "regard" must be had as to the expectation of the data subject it is not the only factor in assessing fairness. The Tribunal can envisage a scenario where it is fair to disclose an earlier document in order to refute protestations of ignorance from the same individual who later becomes more senior and accountable. However, on the facts of this case as applied to the disputed information the Tribunal was satisfied that this had no applicability in this case.

[10] See paragraph 39 below
[11] Emphasis added

36. The Commissioner did not dispute the appropriateness of the date for consideration of the status of the individual, but argued that the information needed to be considered on a case by case basis. The Tribunal sees no reason to depart from the approach adopted in *DBERR* and for the reasons set out above accepts that the appropriate date for the consideration of the expectation of the civil servants is the date when the document was created.

37. The Appellant argues that the decision to withhold names below a certain level of seniority is "arbitrary" and an "administrative decision" not deriving from the provisions of the Act. He argues that if someone is e.g. the author of a document they bear responsibility for it. In his assertion "*it cannot be the purpose of the rules under s40 to protect from disclosure the identity of the authors of documents which are themselves not protected from disclosure*".

38. However, the NAO argues personal data is exempt from the general rule of disclosure, individuals are no less entitled to protection simply because they authored a document. Although *Corporate Office of the House of Commons v Information Commissioner and Norman Baker EA2006/0015* makes a distinction between information relating to public life and private life, affording more protection to private life, the NAO argue that the names and contact details are not closely entwined with the NAO's or the FCO's exercise of their public functions, and thus it would be unfair to undermine the protection.

39. They argue that those responsible for creating documents:
    - Are junior civil servants and are not public facing.
    - Do not have overall responsibility for decision making, they report to someone who is ultimately responsible and accountable.
    - Do not hold elective office.

- Cannot be considered synonymous with the NAO or FCO's discharge of its public functions.

Consequently, it would not be fair to disclose their personal data in circumstances where actual responsibility for a particular decision/policy/document is properly borne by their superiors, and additionally those referred to within a document or "copied-in" had no control over the references to them in documents produced by others.

40. The Tribunal does not accept that there is a blanket level at which all junior civil servants are shielded from disclosure of their personal data. This has to be decided on a case by case basis, through consideration of the role and responsibilities of the individual and the information itself.

41. In their adjournment evidence the NAO provided the actual grade of an individual at the date that the document was created. (Neither the NAO or the FCO has the same grading structure as the Home Civil Service, so the closest correlation was given). The Tribunal was able to make its own assessment as to the level of seniority/accountability of each individual as the NAO also provided the job title/role and a summary of their responsibilities at the date that the document was created.

42. Additionally the NAO argued that no condition in schedule 2 DPA was satisfied (in particular not condition 6 which was relied upon by Mr Dun). In their argument it is not necessary to disclose the names of junior civil servants who have been involved in related correspondence in order to pursue the public interest issues surrounding the NAO's investigation of the FCO's use of public resources in its management of personnel issues.

43. Having considered the redacted names and contact details of junior civil servants the Tribunal is satisfied that disclosure would not be fair and would be unwarranted and that these names should be redacted subject to the caveats set out at paragraph 45 et seq below.

44. In coming to this conclusion the Tribunal did note that the Appellant raises the issue of the difficulty in comprehending a document with redactions. The Tribunal considers that this is less pertinent when relating to the junior civil servants than when dealing with the more substantive redactions relating to personnel complaints. However, the Tribunal was persuaded that this was a material factor in dealing with inconsistencies in redaction.

Inconsistencies

45. There are occasions when in error the name of a junior civil servant has not been redacted when it was the NAO's intention to withhold it. The Tribunal is satisfied that where the Tribunal finds that the name ought to have been redacted, if a document accidentally discloses that name and then redacts the same name elsewhere in the same document that it would not be unfair to disclose that name in the rest of the document. This is because:

- The individual's involvement with the document is already known,
- to redact it later in the document implies that the name redacted is NOT the person whose name has been disclosed elsewhere,
- consequently a reader of the document is left with a misleading impression.

The Tribunal is satisfied that in light of the error that has already been made there is no further damage or distress or unfairness caused in disclosing the name a second time in the same document and there is the benefit to the reader in being able better to follow the document and not to be misled.[12]

46. However, the Tribunal does not find that because of this error the name should be disclosed in all documents in the disputed information. This is because, for the reasons set out above, in light of their rank at the date that the document was created, the individual did not bear responsibility for the document despite their involvement, and it would be unfair if they (alone amongst their rank) were singled out as having a greater or more visible involvement just because of a mistake in redaction which was not their responsibility.

[12] This approach does not apply if the same name is redacted later in the same document in relation to sensitive personal data where the Tribunal is satisfied that no Schedule 3 condition is met, and disclosure in this context would provide additional information and be unwarranted.

47. The Tribunal notes that on occasions the redacted name of a junior civil servant is a first name only. Whilst it might be argued that use of the first name promotes ease of reading, and in organizations the size of the NAO and FCO the pool of candidates is so great that no individual will be identified, the Tribunal finds that this blanket disclosure of first names would invite readers to research and try to find likely candidates. Unless the first name has already been disclosed in the same document (in which case for consistency the Tribunal will do the same, see above) the Tribunal will redact the first name if in its view the surname would be redactable. The Tribunal considers that the disclosure of a first name, whilst helping a reader to follow a document, invites speculation and might lead either to identification or to wrong attribution both of which would be unfair.

Communication details:

48. Contact details such as room numbers, emails, telephone and fax numbers have been redacted. The Tribunal observes that public facing civil servants with responsibility can generally be contacted by reference to their name and role via a central switchboard or a letter to the department. Disclosure of this information is unwarranted as disclosure is to the world at large and provides direct access to the individual and would allow unwarranted public intrusion into the working life of the individuals. For this reason the Tribunal has generally upheld the redaction of contact details, however, there are occasions where the fact that a senior civil servant had been copied in is only apparent because of the inclusion of the email address (because the email address contains the civil servant's name). In this case the Tribunal has redacted the "operative" part of the email address so that the identity of the individual is apparent but not their contact details.

49. The Tribunal notes that some contact details have not been redacted but is satisfied that this is not inconsistent as it allows for the fact that not all numbers are direct lines and addresses may relate to departments rather than the physical location of an individual.

Disclosure of role but not name

50. There are occasions where there is reference to a junior civil servant by role and name. In this case the role of the civil servant is helpful for the comprehension of the document. Whilst no doubt the identity of the individual could be ascertained with an internal staff directory, the context in which the role is mentioned is not biographical in a significant sense in that it "*is a life event in respect of which their privacy could not be said to be compromised*"[13]. In light of this the Tribunal questions whether mention of the role is personal data at all, but is satisfied that even if it is, there would be no expectation by the individual that the fact that their job existed would be withheld in such an administrative and passing context and that consequently disclosure would not be unfair.

Personnel grievances other than those of the Appellant, Mr Pearce and Mr Evans.

51. This relates to the FCO records of personnel grievances which were reviewed as part of the investigation. There is no dispute that it would be unfair for their names to be disclosed, however, the Appellant argues that their information can be anonymized such that it would not be generally known who was involved.

52. The Commissioner and NAO argue that:
    - These individuals have not consented.
    - Were not aware their information was going to be used in this way.
    - They had no control over the use of their information in this investigation.
    - The information contains sensitive details including the impact of events on the individuals and their families.
    - It was more likely that disclosure would cause distress as the information was recent.
    - If known by colleagues to have complained this could be detrimental to their future career as they might be considered troublemakers.

[13] Durant v Financial Services Authority 2004 FSR 28

53. They rely upon Waugh v IC and Doncaster College EA/2008/0038 paragraph 40 (followed in Blake v IC and Wiltshire CC EA2009/0026) where it was held that:

    "... there is a recognised expectation that the internal disciplinary matters of an individual will be private. Even among senior members of staff there would still be a high expectation of privacy between an employee and his employer in respect of disciplinary matters."

54. The NAO rely upon the fact that the Appellant has asked for documents containing similar details to go into a confidential annex in support of their contention that there would be an expectation that this type of information would remain confidential. The Tribunal observes that the documents in the Confidential annex are more detailed and the difference is that in Mr Dun's case, by the fact of his being the appellant, the information would be directly attributable to his name and so he would not be given the same level of anonymity from the world at large that these data subjects would by virtue of their names being redacted.

55. The Tribunal accepts the above arguments but considers that these concerns can be met and additional information can be disclosed if certain identifying features are redacted. The Tribunal acknowledges that the details that remain are likely to enable:
    - Self identification by the Complainant,
    - Identification by those complained about in some circumstances,
    - Identification by those involved in processing the complaint.

    However, in concluding that this disclosure would be fair the Tribunal is satisfied that only those who already knew the details (e.g. those involved in the complaint) would be able to identify individuals. The Tribunal is satisfied that the information is sufficiently summarized that none of those involved would be likely to learn any additional information which was not already known to them.

56. Where (after the directly identifying information (e.g. name) has been removed) the remaining information risks allowing others not involved in the complaint process to identify the protagonists e.g. fellow colleagues, that information has been redacted. The Tribunal has therefore redacted complaints which appeared unusual, dates, locations or which gave details e.g. absence from work, or medical conditions which might enable the participants to be identified. In adopting this course the Tribunal has considered not only the risk of identification, but the anxiety that a complainant might have that they would be recognised through such details.

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57. The Tribunal received 2 witness statements from Richard Bacon MP for South Norfolk, as well as evidence from the Appellant and witness statements from Mr Evans and Mr Pearce. From the evidence before the Tribunal it appeared that there were concerns:

- Cases were not listed as grievances when they should have been. It appears that the FCO's method of counting complaints depended on an internal definition which would contradict the general understanding of a "complaint".
- complaints procedures were not followed,
- employees were removed from post when investigation did not warrant this,
- individuals were refused independent investigation,
- significant financial and personnel resources were being used to delay or avoid examining complaints made against senior FCO officials,
- in some cases compensation had been paid on the basis of a confidentiality agreement.
- Answers to Parliamentary Questions by FCO ministers stated there were no outstanding complaints and no compensation payments had been made. Yet other public documents indicated that this was inaccurate.

- In addition to the apparent attempt to change the conclusions of the report the FCO have chosen not to implement one of the recommendations. The information is necessary to ensure the proper scrutiny of the report and the decision not to follow one of the recommendations.
- The direct information as to the waste of resources will assist public debate and enable pressure to be brought to bear upon the FCO in the future.

58. Having considered the disputed information the Tribunal is satisfied that there is a strong legitimate interest in this information (redacted as set out above) being disclosed.

Other Whistleblowers

59. From the witness statement of Gabrielle Cohen some of the information redacted relates to information provided by individuals acting as "whistleblowers" for the purposes of the *Public Interest Disclosure Act 1998* which was provided in order for the Additional Party to consider the economy and effectiveness with which the FCO used its resources in discharging its functions. From the material already disclosed in redacted form it is clear that this relates to a survey to which there were 95 respondents out of thousands. The survey related to people having "ever" raised a grievance and had no specified time period, was service wide and will include some short and very long careers. The information does not contain any names and is redacted on the basis of the "recognisability" of the content of the comments. Having viewed the information the Tribunal finds that the majority of the comments were generic and not identifiable.

60. The NAO and Commissioner argue that disclosure would not be fair because:

- As the primary purpose of the Whistleblowing regime is to protect those who make disclosures in the public interest, there is a greater

expectation than normal that their personal data would not be disclosed.

- Individuals would legitimately expect that NAO would only use the information to examine the FCO's staff grievances.
- The information contains sensitive details including the impact of events on the individuals and their families.
- It was more likely that disclosure would cause distress as the information was recent.
- The information was used in a report which was critical of the FCO's grievance procedures and could therefore be detrimental to the future careers at the FCO or elsewhere of the individuals who might be considered troublemakers.

61. There is no evidence before the Tribunal as to what the informants were told when they gave the information and the Tribunal notes that the information was provided when FOIA was in contemplation although not necessarily in force. In light of the purpose and terms of the whistleblowing legislation the Tribunal accepts that the individuals would have had an expectation that data which identified them would not be disclosed in these circumstances. The Tribunal does not accept that this information is necessarily "recent" since it relates to whether complaints had "ever been made". Not all the comments are negative and the Tribunal does not consider that there would be any detrimental career ramifications from a positive comment.

62. The Tribunal notes that whilst, even after redaction, there is still the risk of self identification, these arguments have less force if the individual is not identifiable by others. The Tribunal accepts that there is a difference between the individuals whose records were reviewed, and these individuals who have chosen to involve themselves in this report and may therefore be perceived as "trouble makers" if they have made negative comments and are identified by those involved in e.g. the investigation of their complaint. However the Tribunal takes note of the generic nature of

the information reported and the numbers of potential respondents from which this selection has been made in support of its finding that it would not be unfair or unwarranted to disclose some additional information following the principles set out in paragraph 56 above and for the same reasons.

63. In determining that this disclosure meets a legitimate interest of the Appellant and the wider public, the Tribunal relies upon paragraph 57 above. The Tribunal is not persuaded by the Appellant's argument that these whistleblowers' concern for the public interest of the use of public resources by officials who were the subject of complaints was such that they would repudiate any expectation of privacy.

Commentary upon the performance of others.

64. The NAO and IC resist disclosure of the personal data relating to the commentary on the performance of individuals other than the Appellant and Mr Pearce and Mr Evans, because:
    - These individuals have had no chance to consent to their information being used in this way,
    - The NAO have had no chance to verify that the comments are true, and the individuals have not been able to make representations therefore disclosure would be unfair.
    - The information does not necessarily affect the wider public interests and therefore there is no necessity to disclose the information.

The Tribunal does not assert whether any of those commented upon are investigating a complaint about themselves (as alleged by the Appellant was sometimes the case) but observes that if that were the case, it would affect the wider public interest and add to the debate as to the use of resources.

65. The Tribunal is satisfied that these arguments are strong reasons to withhold the identifying information, but find that redacted information can be disclosed that meets the legitimate 3rd party interests. The Tribunal notes that disclosure in redacted form has been made of the summary of the

grievance files of Mr Pearce, and the Appellant[14], and notes that the NAO did not consider that disclosure of this information with the redaction of individuals' names (e.g those complained about or who investigated) to breach the data protection principles.

66. In ordering the disclosure of these documents with redactions, the Tribunal has adopted a similar approach to that adopted by the NAO in these documents (as detailed further in the confidential schedules).

67. Personal data re Mr Pearce's family members

Mr Pearce has consented to the disclosure of his personal data in this context, but his family has not. The Tribunal is satisfied it would not be fair to disclose their personal data:

- They did not provide the information.
- They had no say over how it was used.
- They are private individuals and this relates to their private (as opposed to work) life (see Corporate Office of the House of Commons v Information Commissioner and Norman Baker EA2006/0015).
- As private individuals they are unlikely to be aware that it is subject to request under FOIA.

68. Additionally disclosure would be unwarranted as the legitimate interest in knowing their details is very limited, as it is tangential to the core complaint, although there is some limited applicability as to waste of resources.

Sensitive Personal data:

69. "Sensitive personal data" is defined in section 2 of the DPA 1998, and includes:

"information as to—

(a) the racial or ethnic origin of the data subject,

[14] Mr Evans' summary has also been disclosed but there were no redactions.

…

(d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),

(e) his physical or mental health or condition,

(f) his sexual life…"

70. In order to comply with the first data protection principle at least one of the conditions in Schedule 3 DPA must be met before sensitive personal data can be disclosed. It is not argued and the Tribunal does not find that any of the Schedule 3 conditions are met and all sensitive personal data is therefore redacted.

<u>Conclusion and remedy</u>

71. In relation to section 33 FOIA the Tribunal has not considered this issue and makes no findings. In relation to the grounds of appeal relating to section 40 FOIA, the Tribunal allows the appeal in part, finding that whilst the information was personal data there were additional breaches of s1(1) FOIA because:
    - Disclosure of the names of senior civil servants would not be unfair and would not breach the 1st data protection principle,
    - Redaction of the names or identifying features from the rest of the information would enable substantial further disclosure which would not be unfair and would not breach the first data protection principle.
    - S40 FOIA was therefore wrongly applied to much of the disputed information which should have been disclosed in redacted form as set out in the confidential schedules attached.

72. The Tribunal dismisses the rest of the appeal finding that in relation to the information that it orders should remain redacted[15], the Commissioner was right to conclude that disclosure would be unfair and breach the first data protection principle.

73. The information to be disclosed (as defined in the Confidential Schedules) should be provided to the Appellant within 28 days from the date of this Decision

74. There were additional breaches of s1(1), 10 and 17 FOIA in that additional material which fell within the scope of the request was not identified or disclosed by NAO and neither was a refusal notice issued in relation to that information.

Dated this 18th day of January 2011

Fiona Henderson
Tribunal Judge

[15] See substituted decision notice