



Tribunals Service
Information Tribunal

Appeal Number: EA/2006/0015 and 0016

FS50072319

FS50071194

Freedom of Information Act 2000 (FOIA)

Heard at Procession House, London

Date 7th December 2006

Decision Promulgated

16th January 2007

BEFORE

INFORMATION TRIBUNAL CHAIRMAN

John Angel

And

LAY MEMBERS

Jacqueline Clarke and Roger Creedon

Between

THE CORPORATE OFFICER OF THE HOUSE OF COMMONS

Appellant

And

INFORMATION COMMISSIONER

Respondent

And

NORMAN BAKER MP

Additional Party

Representation:

For the Appellant:	Ms Eleanor Grey
For the Respondent:	Mr. Tim Pitt-Payne
For the Additional Party:	In person

Decision

The Tribunal upholds both Decision Notices dated 22nd February 2006 (the Decision Notices) and dismisses both appeals. This means that the Appellant must now comply with the Decision Notices within 30 days of the promulgation date of this decision.

Reasons for Decision

The requests for information

1. There are two consolidated appeals before the Tribunal. Both are brought by the Corporate Officer of the House of Commons (the House), and both arise out of decisions by the Information Commissioner (the Commissioner) requiring the disclosure of information relating to MPs' travel expenses. The original requests for information under FOIA were made by Norman Baker MP (Mr Baker) and by Jonathon Carr-Brown on behalf of The Sunday Times (Mr Carr-Brown).
2. Mr. Baker's request gave rise to the appeal in EA/2006/0015.
3. On 20th January 2005 Mr. Baker made a written request (addressed to a Mr. Castle of the Department of Finance and Administration, House of Commons) for a breakdown of the already published aggregate figure for travel claims by MPs, for the most recent year for which figures were available. He asked for the information "in a format which would show for each MP the amount claimed by mode of travel, and therefore giving specific figures for rail, road, air and bicycle."
4. On 15th February 2005 the request was refused on the ground that certain information as to MPs' travel expenses was already disclosed under the House's publication scheme (Publication Scheme), and disclosure of the additional information sought by Mr. Baker would breach the data protection

principles and that the information sought was exempt from disclosure, under section 40 FOIA.

5. Mr. Baker sought an internal review on 25th February 2005, but the original decision was confirmed on 24th March 2005. Mr. Baker complained to the Commissioner on 6th April 2005. Following correspondence between the Commissioner and the House, the Commissioner issued a preliminary decision notice on 24th January 2006 followed by a final decision notice on 22nd February 2006 (the Decision Notice). He upheld Mr. Baker's complaint and ordered disclosure of the information sought. The Commissioner considered that the exemption under section 40 FOIA did not apply, on the basis that the disputed information could be disclosed without contravening any of the data protection principles.
6. The House appealed to this Tribunal by notice dated 17th March 2006.
7. The Sunday Times' request gave rise to the appeal in EA/2006/0016.
8. On 4th January 2005 Mr Carr-Brown made a request for information in similar terms to that made by Mr. Baker (except that he sought figures for the previous three years, not just for the most recent year and did not request expenses relating to bicycles). The request was refused on 31st January 2005. A review was requested on 10th February 2005 but the refusal was maintained on review, by letter dated 24th March 2005. There was then a complaint to the Commissioner on 8th April 2005 and eventually a preliminary decision notice was issued on 24th January 2006. The decision notice was issued on 22nd February 2006 and the Commissioner upheld the complaint and required disclosure of the information sought, for similar reasons to those in Mr. Baker's case.
9. The House appealed to this Tribunal on 17th March 2006.
10. As will become apparent in this decision the issues raised in both appeals are similar.

Factual Background.

11. Andrew John Walker (Mr. Walker), the House of Commons' Director of Finance and Administration, in very largely uncontested evidence before the Tribunal, explained the background to and details of MPs' allowances, including travel allowances. There are various categories of travel and transport for which allowances are claimable, including rail, air, car, taxi, bicycle and motorcycle.
12. The House of Commons Commission was tasked with preparing for the introduction of FOIA and the extent to which it was appropriate to make details of allowances claimed by individual Members available on the Parliamentary website as part of the Publication Scheme under FOIA. In a letter sent to Members on 16th December 2002 the view taken was that "the House should publish the total sum for each allowance which each Member has used for each financial year. This approach meets our Freedom of Information obligation and provides transparency and accountability, whilst respecting the reasonable personal privacy of Members and their staff."
13. On 17th June 2003, the Speaker sent a second letter to all Members confirming arrangements for the publication of information in the autumn of 2004 giving Members clear notice of the nature and extent of the disclosure which is now currently made under the Publication Scheme.
14. Details of the sums paid to each MP in respect of each of the allowances claimed for the three years up to 2003/2004 were published, for the first time, on 21st October 2004. Since then, the information has formed part of the Publication Scheme, and information relating to two subsequent years has been published in October 2005 and October 2006.
15. The information requested in both cases is largely readily available. In fact each MP is provided with his or her own breakdown of travel expenses on an annual basis for, among other things, verification purposes. The breakdown is

under the following headings: car/taxi, European, bicycle, air, season, rail, extended and other. However there are three elements of travel expenses relating to the requests which require further explanation.

16. European Travel is an item of travel allowance which is recorded but which is not broken down into the categories required under the requests. We understand it also includes some subsistence costs and is collected in aggregated form and would be very difficult to provide in the form set out in the request. Also we are informed that the underlying paperwork for years 2001/02 and 2002/03 has been destroyed and is no longer held by the House.
17. Extended Travel is another item of travel allowance which is recorded but again not broken down further. Extended travel largely relates to travel undertaken by MPs in the UK which is other than travel undertaken within his or her constituency or standard travel which covers journeys between three points: the constituency, Westminster and the MP's main home. This item contains elements of the items requested by Mr Baker and Mr Carr-Brown e.g. rail and air, which we understand is available.
18. Details of the allowances that MPs can claim, including travel, are found in what is known as "The Green Book" on Parliamentary Salaries, Allowances and Pensions. The Green Book makes it clear that MPs must satisfy themselves that "any expenditure claimed from the allowances has been wholly, exclusively and necessarily incurred for the purposes of performing your Parliamentary duty."
19. Family travel is not included in any of the travel allowances. However Mr Walker explained that MPs' public and private lives are sometimes closely entwined and that the mode of travel chosen by an MP may be influenced by a family need, say to travel together by car where it would be the most suitable means of travel although not necessarily the most suitable if the MP had been travelling alone.

20. Mr Walker stated that the House had received approximately 167 requests for information about Members' allowances, since FOIA came into effect. These have covered most aspects of the travel allowance system. Each of these requests has been considered individually on a case by case basis by himself or one of his officers. The usual process is to consult with the Members Estimate Committee (MEC), which replaced the House of Commons Commission, on a request before replying. He would then consider the request in the light of the views of the MEC and any legal advice from the House's legal advisors.

21. The MEC is a representative body of Members, as described in Part IV of the Code of Practice published under section 45 FOIA, which is able to express views on behalf of MPs on issues arising under the Act. The MEC is chaired by the Speaker. It is the MEC which finally approved the extent of the disclosures of allowances generally under the Publication Scheme.

22. Mr Walker is not involved personally in internal reviews and could not recall whether the MEC was involved in any way at the review stage.

23. According to Mr Walker all of the requests for a more detailed breakdown of travel expenses so far considered by him and his team have been refused on similar grounds to the current appeals. However he made it clear that there was no blanket policy in relation to such requests and that every request was considered on an individual basis.

24. Mr Walker accepted that it was the duty of every MP to use public money carefully. Part of the objective of the annual verification exercise was to draw MPs' attention to the details of travel expenditure so they could understand how they were using allowances and if appropriate review their modes of travel in the light of this duty. Also since 2005 his department had informed those Members whose expenditure was in the top range both of overall expenditure and for individual items of travel and other allowable expenses that they were in this category, again with the purpose of bringing the duty to

Members' attention. The travel agency used by MPs also draws to MPs' attention cost effective means of travel.

25. Mr Walker said there had been a reduction in overall expenditure on MPs' travel since the publication of the annual aggregate travel figure.
26. Mr Walker was aware that the Scottish Parliament discloses more information than Westminster and that it discloses the sort of information requested by Mr Baker and Mr Carr-Brown under their publication scheme. He was also aware that some individual MPs, like Mr Baker, disclose the detailed breakdown of their own travel expenses on their own web site but that as far as he was aware this practice was not widespread and certainly not the practice of anything like a majority of MPs.

Relevant statutory provisions

27. Section 1 FOIA creates a general right of access on request to information in recorded form held by public authorities. Public authorities are under a duty to confirm or deny whether they hold the information sought (section 1(1)(a) FOIA), and to disclose the information if it is held (section 1(1)(b) FOIA). Part II of FOIA confers a number of exemptions from both duties, including the section 40 exemption claimed by the House in the present appeals. In these cases, exemption is claimed only in respect of the duty to disclose, under section 1(1)(b). So far as is relevant to these appeals section 40 reads as follows:

40. - (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

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

(a) it constitutes personal data which do not fall within subsection (1), and

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

(3) The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (e) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene:

(i) any of the data protection principles ...

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

28. Mr Pitt-Payne on behalf of the Commissioner provides a useful summary of these provisions as follows. If A makes a request under FOIA for personal data about B, and the disclosure of that personal data would breach any of the data protection principles, then the information is exempt from disclosure under the Act: this follows from section 40(2) read in conjunction with section 40(3)(a)(i), or (when applicable) section 40(3)(b) which does not apply in these appeals. This is an absolute exemption - section 2(3)(f)(ii) FOIA. Hence the Tribunal is not required to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure under section 2(2). However he says the application of the data protection principles does involve striking a balance between competing interests, similar to (though not identical with) the balancing exercise that must be carried out in applying the public interest test where a qualified exemption is being considered. We consider this application of the principles later in this decision.

29. The mention of the data protection principles in section 40(3)(a)(i) requires reference to section 4 of the Data Protection Act 1998 (DPA) as follows:

(1) References in this Act to the data protection principles are to the principles set out in Part I of Schedule 1.

- (2) *Those principles are to be interpreted in accordance with Part II of Schedule 1.*
- (3) *Schedule 2 (which applies to all personal data)... set out conditions applying for the purposes of the first principle...*
- (4) *Subject to section 27(1), it shall be the duty of a data controller to comply with the data protection principles in relation to all personal data with respect to which he is the data controller.*

30. The data protection principles are set out in Part 1 of Schedule 1 DPA. There are eight principles in all, but only the first and second are relevant to this appeal. So far as material, they read as follows.

- 1. *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 ...*
- 2. *Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.*

31. Part II of Schedule 1 to the Act contains further material as to the interpretation of the data protection principles. Paragraph 2 of Part II relates to the circumstances in which data are treated as being processed fairly for the purposes of the first data protection principle. So far as relevant to this appeal, it reads:

- (1) *Subject to paragraph 3, for the purposes of the first principle personal data are not to be treated as processed fairly unless-*
 - (a) *in the case of data obtained from the data subject, the data controller ensures so far as practicable that the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3).*
- (3) *The information referred to in sub-paragraph (1) is as follows, namely-*

- (a) *the identity of the data controller,*
- (b) *if he has nominated a representative for the purposes of this Act, the identity of that representative,*
- (c) *the purpose or purposes for which the data are intended to be processed, and*
- (d) *any further information which is necessary, having regard to the specific circumstances in which the data are or are to be processed, to enable processing in respect of the data subject to be fair.*

32. Additionally in order to satisfy the first data protection principle, it is necessary for processing to satisfy one of the conditions in Schedule 2 to the DPA. The condition that is potentially relevant in these appeals is in paragraph 6(1) of Schedule 2:

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.

The Tribunal's powers

33. The Tribunal's general powers in relation to appeals are set out in section 58 of the Act. They are in wide terms. Section 58 provides as follows.

(1) If on an appeal under section 57 the Tribunal considers-

- (a) *that the notice against which the appeal is brought is not in accordance with the law, or*

(b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

34. The question whether the exemption in section 40 applies is a question of law or (alternatively) of mixed fact and law. The Tribunal may consider the merits of the Commissioner's decision that this exemption does not apply, and may substitute its own view if it considers that the Commissioner's decision was erroneous. The Tribunal is not required to adopt the more limited approach that would be followed by the Administrative Court in carrying out a judicial review of a decision by a public authority.

Issues before the Tribunal

35. The evidence is very largely agreed and therefore the only matters at issue are interpretations of the law.

36. The Tribunal finds that the detailed travel claims the subject of these appeals, which we shall call "the disputed information", is both *data*, and *personal data*, under section 1(1) DPA for the purposes of section 40 FOIA.

37. For the purposes of these appeals it does not matter whether the information is held on computer or in manual (i.e. paper) records. Either way, it amounts to *data* within DPA and thus within section 40 FOIA. If it is held on computer then it comes within limb (a) of the definition of data in section 1 DPA. If it is held on paper, it comes within limb (e) of that definition. Although there

are various exceptions to the data protection principles in relation to data coming within limb (e) (see section 33A DPA), for the purposes of these appeals these exceptions are to be disregarded - section 40(3) (b) FOIA.

38. The information sought is also *personal data* under section 1 DPA and hence under section 40 FOIA if it relates to living individuals (the MPs to whom it relates) whose identity can be ascertained from those data. In *Durant v Financial Services Authority* [2003] EWCA Civ 1746 the Court of Appeal held that whether data is *personal data* depends on whether it has an individual as its focus, and whether it is biographically significant in relation to that individual (*Durant* at paragraphs 26-31). In our view this test is satisfied in relation to the disputed information.

39. The main issue before this Tribunal is whether disclosure of the disputed information would breach any of the data protection principles. The House contends that disclosure of the disputed information would breach those principles because it would:

- (1) contravene the fairness requirement in the first data protection principle;
- (2) constitute the processing of personal data in circumstances where no Schedule 2 condition was satisfied, contrary to the first data protection principle; and
- (3) contravene the second data protection principle, although it is accepted by Ms Grey on behalf of the House that the appeal would be unlikely to succeed on this issue alone.

40. However before considering these matters we need to consider a preliminary issue in relation to the interplay between the FOIA and the DPA.

Application of the data protection principles to section 40 FOIA

41. Ms Grey on behalf of the House submits that FOIA requires the Tribunal to consider the information requests made as if they were requests made under the DPA. This is because the information sought is *personal data* within the meaning of the DPA, and therefore section 40(2) and (3) FOIA apply. This requires the case for disclosing information to be tested with reference to the principles established by the DPA, rather than those set out under FOIA.
42. Mr Pitt-Payne agrees with this submission but with a qualification. He contends that section 40(3)(a)(i) (and section 40(3)(b)) requires a consideration of whether disclosure of the information to a member of the public *otherwise than under this Act* would contravene the data protection principles.
43. Mr Pitt-Payne submits that it does not follow that the test in section 40(3)(a)(i) must be applied as if FOIA itself simply did not exist. He continues that this would be a wholly artificial approach and one that would go beyond the requirements of the statute. The existence of FOIA in itself modifies the expectations that individuals can reasonably maintain in relation to the disclosure of information by public authorities, especially where the information relates to the performance of public duties or the expenditure of public money. This is a factor that can properly be taken into account in assessing the fairness of disclosure.
44. Ms Grey does not accept this qualification. She refers us to Guidance on section 40 from the Department for Constitutional Affairs (DCA). She contends that in determining whether disclosure to a member of the public would be fair, no regard can be had to FOIA. In effect once the section 40(2) exemption is engaged, only the DPA can be applied, and the threshold set under the DPA is not changed by FOIA.
45. Mr Pitt-Payne responds that this Guidance does not take into account the culture change of openness which FOIA introduces and this should be taken into account when assessing fairness under the DPA.

46. One of the reasons for Ms Grey's and Mr Pitt-Payne's respective submissions on this issue is to avoid what otherwise could be a loop in the internal logic of FOIA. There is a tension between DPA and FOIA because the former is about privacy whereas the latter is about openness. Unless it is clearly established under which statute a section 40 matter is considered then the loop effect could result in an absurd position or at the very least ambiguity as to which statute prevails.
47. In order to help the Tribunal with the issue Ms Grey refers us to Hansard in support of her above proposition so as to avoid an unacceptable loop in the internal logic of FOIA. The Parliamentary Under-Secretary of State at the Home of Office during a House of Commons Standing Committee debate on 1st February 2000 in relation to the words "otherwise than under this Act" in section 40(3) FOIA and in italics at paragraph 43 above, said "it would be nonsense for the Freedom of Information Bill to provide that information is exempt if release of the information would contravene the data protection principles and, at the same time, to allow the fact that disclosure is required under the...Bill, unless the information is exempt, to influence consideration of whether disclosure would contravene the data protection principles."
48. Until *Pepper v Hart* [1993] AC 593, the courts denied themselves reference to Hansard for the purposes of interpreting legislation. That case permitted reference but only subject to strictly controlled conditions which are set out in the speech of Lord Browne Wilkinson which is reported at page 634. He said:

" My Lords, I have come to the conclusion that, as a matter of law, there are sound reasons for making a limited modification to the existing rule (subject to strict safeguards) unless there are constitutional or practical reasons which outweigh them. In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be

permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised, I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria.”

49. The Tribunal finds that there is both ambiguity and absurdity in the application of the words “otherwise than under this Act” as demonstrated by the arguments of counsel set out above. As a result the Tribunal finds that it is able to consider the passages from Hansard under the doctrine in *Pepper* in order to help us interpret the way section 40(2) should be applied.
50. The Tribunal finds that once section 40(2) FOIA is engaged that Parliament intended that the request be considered under the DPA, without further consideration of FOIA. This means that information which is protected under the DPA may not be disclosed under FOIA.

Fairness of processing

The House’s arguments

51. Ms Grey contends that when assessing the requirements of the fair processing requirements under the DPA the first and paramount consideration must be given to the interests of the data subject. She refers us to paragraph 3.1.7 of the Information Commissioner’s “Legal Guidance” on the DPA, citing *CCN Systems Ltd v The Data Protection Registrar* (DA/90 25/49/8, paragraphs 48 – 51) and *Infolink Ltd v The Data Protection Registrar* (DA/90 25/49/6, paragraphs 62 - 65). In *CNN* “paramount” does not mean that the interests of the data subject are the only consideration, “but rather the most important single consideration.”(paragraph 52) As the Tribunal put it in *Infolink*, “in other words, we are to weigh the various considerations, and do so, but are entitled to give more weight to the interests of the individual about whom the credit reference enquiry is being made” (paragraph 65) or in these appeals, Ms Grey argues, the interests of MPs, details of whose travel arrangements are

being sought. She contends the reason for this focus is the purpose of the DPA and she again refers us to the decision in *CNV* which finds “It is quite clear, from the Act as a whole and in particular from the data protection principles set out in Schedule 1, that the purpose of the Act is to protect the rights of the individual about whom data is obtained, stored and processed or supplied, rather than those of the data user” (paragraph 51). In enacting section 40 FOIA, Ms Grey argues, Parliament has quite deliberately required that this approach must still be applied when dealing with requests under FOIA for personal data held by public authorities.

52. Ms Grey then argues that this required focus is missing from the decisions under challenge. She submits that this general error of approach on the part of the Commissioner flaws his consideration of these appeals generally, and is reflected in other errors she contends have been made in the Decision Notices. Ms Grey asks the Tribunal to restore this focus, and to bear in mind the “paramount interest” of MPs.
53. Moreover she contends, compliance with the first data protection principle, and fair processing, generally require that data subjects are informed of the purpose or purposes for which the data are intended to be processed. It is generally necessary to ensure that data subjects are informed of the disclosures that may be made of the data. Paragraph 2 of Part II of Schedule 1 of the DPA advises what information should be given by the data controller to the data subject at the time when information is obtained from them. The information should include “the purpose or purposes for which the data are intended to be processed.”
54. Ms Grey observes that in paragraphs 3.1.7.2 – 3.1.7.3 of the Commissioner’s “Legal Guidance” he advises that, when data is obtained directly from data subjects, this information should be provided at the time when the data is obtained (paragraph 3.1.7.7). Ms Grey argues that it is apparent from the Legal Guidance that subsequent “widening” of the anticipated disclosure is generally regarded as unfair (paragraph 3.1.7.3 at the top of page 33 of the “Legal Guidance”):

“Where the data controller already holds information obtained for a specific purpose, it can only be used for a different purpose that would not have been envisaged by the data subject at the time of the collection of the information if the data controller has the consent of the data subject.”

55. Ms Grey notes from the Legal Guidance that the Second Principle is not met simply by notification (paragraph 3.2 of the Legal Guidance pages 35 – 36).

56. Ms Grey continues that since the development of the Publication Scheme, the purposes for which the information is gathered and “processed” have included publication according to the terms of the Scheme - but no more. In these appeals, she argues, the Commissioner has failed to give any or sufficient weight to MPs’ legitimate expectations that the Scheme defined the proper limits of the use of the data supplied. MPs were advised of the scope of the Scheme in December 2002, and, since then, have been entitled to assume that the purposes for which data relating to their expenses has been provided to the House has been both to enable claims for parliamentary expenses to be verified and met, as appropriate, and to inform the public of the allowances awarded, to the extent set out in the Scheme. The Speaker’s letter of 16th December 2002 did not advise Members that wider disclosure would or might be afforded. In these circumstances, she argues, disclosure of information beyond that which is already included in the House’s Publication Scheme would be unfair.

57. Ms Grey refers to the Commissioner’s Statement of Reasons in the Decision Notices which note that no assurances were given that further disclosure would not be afforded, if individual requests were made under FOIA. However, Ms Grey argues it is plain that no such assurance could ever – lawfully – have been given, whether by the House or by any other data controller which is subject to FOIA, when setting out the uses which it anticipated making of information. In those circumstances, it is inappropriate, she contends, to rely on this fact as a reason for undermining the weight to be attached to the Scheme. Ms Grey argues that it would undermine the weight that any member of the public should be entitled to give to a statement from a

data controller (who is also a public authority) upon the uses to be made of data supplied, and fails to give weight to the prohibition on “retrospective widening” of the purposes for which data are processed.

58. Ms Grey again notes that in the Commissioner’s Statement of Reasons in the Decision Notices, it is suggested that publishing figures for different modes of transport amounts to no more than “dividing total figures for annual transport expenses into figures for four separate categories of transport”. Ms Grey contends that the House maintains that the publication of new categories of information represents significant additional disclosure of personal data. It means that information about modes of travel, as well as overall expenditure on travel, has been released into the public domain. The former are matters of personal choice on the part of an MP (and, to an extent, his or her family as explained by Mr Walker) and their publication will reveal significant information about aspects of their way of life.
59. Furthermore, Ms Grey submits, it is inappropriate to argue that, if information requested differs only a little from information already released, its disclosure is fair. If this approach is consistently applied, no boundaries can be set or defended. There would be an incremental erosion of the Publication Scheme, justified by the argument that each fresh disclosure was minor in nature - albeit that the overall effect would soon be substantial. The argument that there has been only a minor modification to the Scheme ignores the fact that the Scheme may already represent a voluntary disclosure of information that goes beyond the House’s legal obligations, rather than solely making available information which the House was legally obliged to publish. The Scheme should not, therefore, she argues, be taken as the basic “legal minimum” required to comply with FOIA, and upon which additional requirements to disclose may readily be super-imposed.
60. As a central part of his reasoning Ms Grey notes that the Commissioner distinguishes between information relating to an MP in his official capacity, and in his private capacity. However, Ms Grey argues this is not a distinction found in the DPA, which distinguishes only between information which is

outside the scope of the Act because it is not “personal data” and “sensitive personal data”. She submits that the effect of the distinction drawn is to erode the protection afforded to personal data, but is not one justified by the terms of the DPA, which covers information relating to an individual in his “personal or family life, business or professional capacity” (*Durant* at paragraph 28). Further, the argument that the disclosure of this additional information would not impinge on the personal privacy to which individual MPs are entitled in their private lives is erroneous, because MPs need to undertake travel which at times must take into account their families.

The Commissioner’s arguments

61. Mr Pitt-Payne refers us to the Commissioner’s published guidance on the interpretation of section 40 (*Freedom of Information Act Awareness Guidance No 1*).
62. The Guidance deals with the issue of fairness under the first data protection principle (page 4). It gives the following examples of questions that may need to be considered in assessing fairness.
 - Would the disclosure cause unnecessary or unjustified distress or damage to the person to whom the information relates?
 - Would that person expect that his or her information might be disclosed to others?
 - Had that person been led to believe that his or her information would be kept secret?
 - Has that person expressly refused consent to the disclosure of the information?

63. In an important passage, he says, the guidance suggests that in assessing fairness it is likely to be helpful to ask whether the information relates to the private or public life of the person to whom it relates. Information which is about the home or family life of an individual, or his or her personal finances, or which consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.
64. Mr Pitt-Payne points out that in order to meet the fairness requirement in the first data protection principle, it is necessary to comply with the specific provisions of Schedule 1 Part II paragraph 2. The data subject must be provided with or have made readily available to him certain information in relation to the processing of his data, specified in paragraph 2(3).
65. However, he continues, the provisions in paragraph 2 are not intended to be an exhaustive definition of what amounts to “fairness” for this purpose. Even where there is compliance with paragraph 2 then the processing may still be unfair on general grounds (*Johnson v Medical Defence Union* [2006] EWHC 321(Ch), paragraph 114 onwards).
66. He contends that disclosure of the disputed information in the present appeals would not breach the specific requirements of paragraph 2. There would be no change as to the identity of the data controller (compare paragraph 2(3)(a)) or his representative (compare paragraph 2(3)(b)). Nor would there be any change to the purpose for which the data was intended to be processed (paragraph 2(3)(c)). MPs have known since they were informed about the Publication Scheme on 16th December 2002 that one of the purposes for which data about their travel expenses was processed was the release of that data to the public. The release of the disputed information would involve a somewhat wider disclosure than is contemplated under the Publication Scheme, but it does not follow he contends that the release of the disputed information would involve the introduction of a fresh purpose for which MPs’ data was processed. Finally, there has been no suggestion that disclosure of

the disputed information would be unfair because it would necessitate the disclosure of further information to MPs under paragraph 2(3)(d).

67. He argues that the principal thrust of the appeals in relation to fairness appears to be that disclosure would be unfair in general terms rather than that it would be unfair for breach of Schedule 1 Part II paragraph 2.
68. Mr Pitt-Payne submits that in assessing fairness in general terms, it is helpful to consider the factors set out in the Commissioner's Guidance (referred to at paragraphs 63 above).
69. He argues that there is no evidence that MPs would or might be caused unjustified distress or damage if the disputed information were to be disclosed. No specific potential harmful consequences have been identified by Mr. Walker or elsewhere. Nor is there any evidence of a specific refusal by MPs generally or by any individual MPs to permit the disclosure of this information. It is true, he says, that the Publication Scheme does not provide for the disclosure of the disputed information; but no assurances were given that information going beyond what was included in the Publication Scheme would never be disclosed, and indeed no such assurances could lawfully have been given. In any event disclosure of the disputed information, in his view, is no more than a modest extension of what is provided for by the Publication Scheme.
70. Mr Pitt-Payne submits that the Commissioner's Guidance is correct to draw a distinction between personal data related to an individual's public and his private life. This distinction has been reflected in other decisions by the Commissioner relating to section 40 FOIA (see e.g. *Corby Borough Council* 25th August 2005 FS 50062124; *Calderdale Council* 24th November 2005, FS 50068973).
71. He argues that although this distinction is not specifically made in the DPA, it is a proper consideration to take account when making the generalised assessment of fairness that is required under the first data protection principle.

The disputed information relates to expenses which MPs are able to claim only because they hold public office and fulfil certain public functions. They cannot reasonably have the same expectation that such information will not be made public as they would have in relation to information about their personal lives.

72. Mr Pitt-Payne continues that the very existence of FOIA means that MPs must have been aware of a risk that information other than that specified in the Publication Scheme might be disclosed. However, he argues that even if the existence of FOIA is to be wholly disregarded in assessing whether disclosure would be fair, the answer is still the same: there is no unfairness in these cases.

Tribunal’s finding on fairness

73. We have recited the arguments of the parties on this issue of fairness because we believe it is the first time this Tribunal has been called upon to consider the issue in detail since acquiring its new FOIA jurisdiction.
74. We consider there are three principal matters that we need to decide at this stage in relation to fairness, namely;
- (1) Whether MPs were provided with the information specified under sub-paragraph 3 of the second paragraph of Part II to Schedule 1 of DPA?
 - (2) Whether the first and paramount consideration must be given to the interests of data subject, namely MPs in these appeals? and
 - (3) Whether it is correct to draw a distinction between personal data related to an individual’s public and his private life?
75. In relation to the first matter we accept Mr Pitt-Payne’s arguments on behalf of the Commissioner in paragraph 67 above that the requirements of paragraph 2(1) of Part II to Schedule 1 DPA have been met. We are particularly able to make this finding as the wording of paragraph 2(1)(a) only requires that the data controller “ensures so far as practicable” that data subjects are provided with the information in sub-paragraph (3), so there is no

absolute requirement. We would refer to our findings in relation to the second data protection principle below which further substantiates this finding.

76. We wish to comment on Ms Grey's contention in paragraph 57 above. Ms Grey appears to be submitting that if the draftsman of a publication scheme misunderstands the law and fails to give proper warning that disclosure to a third party might not contravene the data protection principles, that itself gives rise to a ground for not disclosing on the grounds of fairness. This seems to us to be wrong otherwise a situation could be faced whereby disclosure could be appropriate under paragraph 6 of Schedule 2, considered below, but is effectively blocked by the data controller (in this case arguably the servant of the data subjects) arranging the data collection in such a way as to render disclosure unfair processing.
77. In relation to the second and third matters we have considered the decisions of differently constituted Tribunals in the *CNN* and *Infolink* cases. These cases did not involve data controllers who were public authorities or data subjects who were public officials. We accept the approach of the Commissioner's Guidance which recognises that in determining fair processing regard can be had as to whether the personal data relates to the private or public life of the data subject to whom it relates. The purposes here are to enable allowances to be paid and to publish details of allowances in accordance with the House's compliance obligations under FOIA. These allowances are claimed by and paid to public officials in respect of the performance of their public duties. This public function is why the data is being processed and this is why we find that we can have regard to it.
78. We therefore find that the *CNN* and *Infolink* decisions, which in any case are not binding on us, can be distinguished where public officials are concerned where the purposes for which data are processed arise through the performance of a public function. As a result we find that when assessing the fair processing requirements under the DPA that the consideration given to the interests of data subjects, who are public officials where data are processed for a public function, is no longer first or paramount. Their interests are still

important, but where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives. This principle still applies even where a few aspects of their private lives are intertwined with their public lives but where the vast majority of processing of personal data relates to the data subject's public life.

79. Therefore in respect of the second and third matters in paragraph 75 above in relation to the general application of fairness under the first data protection principle we find:

(2) the interests of data subjects, namely MPs in these appeals, are not necessarily the first and paramount consideration where the personal data being processed relate to their public lives; and

(3) it is possible to draw a distinction between personal data related to an individual's public and private life, particularly in the case of MPs.

80. Having answered the questions in paragraph 75 we find that none of the general factors that might have rendered the processing unfair have been shown to be present in these appeals. We now turn to examine whether any of the particular factors in Schedule 2 DPA apply, and by common agreement between the parties it is accepted that only paragraph 6 is of relevance to these cases.

Schedule 2, paragraph 6

The House's arguments

81. Ms Grey argues that the application of this condition requires a balance to be struck between the "legitimate interests" pursued by, in these appeals, the data requestors, and "prejudice to the rights and freedoms of or legitimate interests of the data subject." The disclosure must be "necessary"; as set out at paragraph 3.1.6 of the Legal Guidance, this "requirement is an important safeguard for the rights of data subjects."

82. Ms Grey recognises on behalf of the House that public scrutiny of the use of public funds by elected office-holders is a “legitimate interest”. However, the strength of that interest has to be assessed against the background of the extensive information that has already been put in the public domain about MPs’ expenses, including their travel expenses, and requires a judgment on whether or not it is necessary to require further disclosure.
83. She argues that MPs have a legitimate interest in (a) preserving the confidentiality of information which relates to an individual’s choice of mode of travel, and (b) the maintenance of reasonable expectations as to the use to which data supplied by them would be put by the House of Commons Authorities. They are entitled to be able to regulate their affairs without ‘retrospective amendments’ being made to the scope of disclosure made; and to make such changes would amount to prejudice.
84. In these circumstances, she submits that it is not “necessary” to supplement the extensive information already placed in the public domain, with the further information about modes of travel now sought. Any legitimate public interest in this information does not outweigh the legitimate interests of the data subjects sought to be preserved, and/or the prejudice caused by such disclosure.
85. She invites the Tribunal when assessing whether the requirements of paragraph 6 of Schedule 2 have been met, to bear in mind that the “paramount consideration” is that of the data subject and refers us to paragraph 3.1.1 of the Legal Guidance -

“The Commissioner takes a wide view of the legitimate interests condition and recommends that two tests be applied to establish whether this condition may be appropriate in any particular test. The first is the establishment of the legitimacy of the interests pursued by the data controller or the third party to whom the data are to be disclosed and the second is whether the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject whose interests override those of the data controller”

- or, she argues, those of the third party to whom the data are to be disclosed.

The Commissioner's arguments

86. Mr Pitt-Payne argues that the application of Paragraph 6 of the DPA involves a balance between competing interests broadly comparable to the balance that applies under the public interest test for qualified exemptions. The balancing exercise is not however precisely identical under Paragraph 6 and under the public interest test: for instance under paragraph 6 what is for consideration is the rights and freedoms and legitimate interest of individual MPs, rather than the public interest in maintaining an exemption.
87. He further argues that paragraph 6 requires a consideration of the balance between: (i) the legitimate interests of those to whom the data would be disclosed which in this context is a member of the public (section 40 (3)(a)); and (ii) prejudice to the rights, freedoms and legitimate interests of the data subjects.
88. As to the interests of those to whom the data would be disclosed, he contends that there is clearly a legitimate interest in understanding the way in which MPs' travel expenses are used. The interest in ensuring that those who use public money are properly accountable for the way in which it is spent is an important one and can properly be taken into account under paragraph 6.
89. As to the interests of the data subjects (i.e. the MPs to whom the disputed information relates), he argues that there is no prejudice to their rights or freedoms in disclosing this information, although it is suggested by Ms Grey that they have a legitimate interest in resisting its disclosure, any such interest should be very limited.

The Tribunal's findings

90. The Tribunal finds that the application of Paragraph 6 of the DPA involves a balance between competing interests broadly comparable, but not identical, to the balance that applies under the public interest test for qualified exemptions under FOIA. Paragraph 6 requires a consideration of the balance between: (i) the legitimate interests of those to whom the data would be disclosed which in

this context are members of the public (section 40 (3)(a)); and (ii) prejudice to the rights, freedoms and legitimate interests of the data subjects which in this case are MPs . However because the processing must be ‘necessary’ for the legitimate interests of members of the public to apply we find that only where (i) outweighs or is greater than (ii) should the personal data be disclosed.

91. The main legitimate interests of the requesters or members of the public raised in these appeals can be summarised as follows:

- understanding the way in which MPs’ travel expenses are used;
- ensuring that MPs’ use of public monies is properly accountable for in the way in which it is spent by providing public scrutiny of the use of public funds by elected office holders - greater transparency helps ensure the proper use of public funds and helps guard against their misuse;
- encouraging MPs to take better value for money choices in the mode of transport used and hopefully producing savings to the public purse - the public have a right to know whether value for money is being obtained in MPs’ travel arrangements;
- being more aware of the environmental or ‘green’ choices made by MPs as demonstrated by their mode of travel;
- being aware of MPs’ choices of mode of travel in the light of their involvement in debating and legislating on transport and environmental matters.

92. The main prejudices to the rights, freedoms and legitimate interests of the MPs as data subjects raised in these appeals can be summarised as follows:

- publishing of detailed travel expenses could lead to questions in relation to an MP’s private life;
- the complexity of their lives, including travel arrangements is influenced by family/private considerations;
- such requests are a diversion from other parliamentary business;
- the House has already determined that the Publication Scheme meets the House’s obligations under FOIA;

- MPs' consent for disclosure has only been sought for aggregate figures for travel expense and not for more detailed disclosure;
- the information sought is personal data relating to personal choice and therefore should not be disclosed;
- further disclosure of a breakdown of expenses would give rise to opportunities for further invasion of the privacy of MPs from the media;
- MPs are already subjected to close scrutiny, a consequence of which is that their role has become increasingly pressurised due to increased attention from the media which detracts from them effectively carrying out their role;
- the existing rigorous scrutiny of expenses has already resulted in a reduction in expenditure, and this is reflected in the year on year comparative financial reports produced for the House;
- a breakdown of travel by mode of transport can be provided to monitor use of environmental friendly transport and therefore, it is unnecessary to provide the information for individual MPs.

93. Having considered all these interests we find that the legitimate interests of members of the public outweigh the prejudice to the rights, freedoms and legitimate interests of MPs. We consider our decision will only result in a very limited invasion of an MP's privacy considered in the context of their public role and the spending of public money. In coming to this decision we have noted that the Scottish Parliament has for some years disclosed the detailed travel claims of MSPs supporting mileage, air travel, car hire and taxis. Also we note that in the Scottish Information Commissioner's Decision 033/2005 in *Paul Hutcheon, The Sunday Herald and the Scottish Parliamentary Corporate Body* (SPCB) the Scottish Commissioner went further and ordered the release of the destination points of taxi journeys of an MSP.

The second data protection principle

94. The Tribunal notes that there is no specific reference to the second data protection principle in the grounds of appeal in either case.
95. Ms Grey however in her submissions before the Tribunal points out that the widening of the purpose to require the disclosure of details of travel expenditure could amount to a new purpose and therefore result in a breach of this data protection principle. However Ms Grey does not rely on this argument alone.
96. Mr Pitt-Payne argues that the second principle does not assist the House. Disclosure of the disputed information would not involve the processing of MPs' personal data for a novel purpose, still less for a purpose incompatible with those for which the data was obtained. Prior to the making of these requests, one of the purposes for which MPs' personal data was processed was the making of disclosures to the public, and this is the very purpose for which the information would be disclosed if the requests by Mr. Baker and the Sunday Times were answered.
97. The Tribunal finds that the specified purpose of the House was to publish data on allowances in order to comply with FOIA. The House's Publication Scheme on its web site sets out a breakdown of these allowances. We do not find that publishing the details of mode of travel or other breakdown is incompatible with this purpose and is certainly not a new purpose.
98. We note that most data controllers comply in part with this data protection principle by notifying the Commissioner of the purposes for processing personal data under broad heads, which the House has done under its registration number Z8887540.

The Tribunal's decision

99. In view of the above findings the Tribunal upholds the Commissioner's Decision Notices and dismisses the appeals. This means that the House must

now comply with the Decision Notices within 30 days of the promulgation date of this decision. In order to comply with the Decision Notices the House will need to provide details of Extended Travel – see paragraph 17 above.

Signed

John Angel
Chairman

16th January 2007