IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2011/ 0104
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:
The Information Commissioner's
Decision Notice No: FS50354196
Dated: 17th.March, 2011

Appellant: **Joe McGonagle**

Respondent: **The Information Commissioner**

Additional Party: **The Ministry of Defence**

Hearing: **12th. October, 2011**

Date of Decision: **4th November, 2011:**

Before

David Farrer Q.C. (Judge)

and

Jacqueline Blake

Anne Chafer

Attendances:

The Appellant appeared in person.
For the Respondent: Laura John
For the Additional Party: Oliver Sanders

Subject matter: **Disclosure of identity: FOIA S.40(2)**

Cases: **Common Services Agency v Scottish Information Commissioner [2008] 1 WLR 1550:**
Corporate Officer of the House of Commons v Information Commissioner and Norman Baker (EA/2006/0015 and 0016)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 17th. March, 2011 and dismisses the appeal.

No Action Required

Signed:

David Farrer Q.C.

Judge

Dated this 4th day of November 2011

Introduction

1. The Appellant, like many others, has a keen, well – informed and longstanding interest in sightings of what are commonly referred to as UFOs, unidentified flying objects or unidentified aerial phenomena, as they are now officially designated.

2. The Additional Party ("the MOD") is the government department which deals with inquiries from the public as to such sightings and their possible significance to national security. Its departmental stance, until recently was agnostic or open - minded as to the existence of flying objects from other planets. Its interest was confined to the possible security implications of reported incidents. That stance changed in about 2009 from agnostic to wholly sceptical.

3. For many years inquiries were handled by a desk officer holding an Air Secretariat post identified as Secretariat (Air Staff) 2A (Sec (AS) 2A). The undisputed evidence established that that officer applied the policy described above. Where an inquiry required it, he/she referred it to more senior authority with greater expertise. He/she enjoyed a certain latitude, within the limits of the

general policy, as to the precise response to a particular report. This post was quite recently abolished and its responsibilities were transferred to Air Command.

4. The names of some of these Sec (AS) 2As were known to those with UFO interests. They appeared, we were told, in the many publications devoted to these matters and on the Internet. In one case a Sec (AS) 2A positively courted publicity in the course of and after his service in the post. Some others were probably not greatly concerned at the disclosure of their names.

5. The MOD routinely transfers records to the National Archive ("TNA") in accordance with the provisions of the Public Records Act, 1967. Before transfer, the names and other identifying features of Sec (AS) 2As have been redacted from the record. Despite the disappearance of the post, there are evidently many more similar records which will be transferred to TNA in the future, given the substantial delay before they are considered for transfer.

6. <u>The request for information</u>

On 16th. September, 2010 the Appellant made the following request to the MOD:

"Documents recently released by the Air Secretariat to individuals and via the National Archives routinely redact the name of the desk officers who corresponded with members of the public from Sec (AS)2a. It is my view that the post is unquestionably public-facing, since letters from Sec(AS)2a written by for example [names redacted] have been widely published in UFO journals, books and on the Internet.
I would like to point out at this stage that I am not suggesting that all of the material so far released should be revisited and the redactions removed, but that future releases should not be so redacted and that requests to remove those redactions from specific correspondence should be acceded.
In order to test this case, I request the removal of the redaction of:
(a) the signature block on page 24 of TNA file reference DEFE24-1955 which equates to page 23 (enclosure 98) of file Sec(AS)/12/3/H; and
(b) a review of all the redactions other than the member of the publics personal details from pages 1423-145 of TNA file DEFE24-19778 which I

think corresponds to pages 142-144 of file Sec(AS)/64/3/B (enclosure 56).review which was sent to the Appellant on 1 October 2010 (DN 2-3)."

7. Subsequent discussion greatly simplified the request. Although it focussed on specific redactions of names in transferred records, it was accepted on all sides that the issue was the disclosure of the identities of Sec AS 2As generally. This accurately reflects the essence of the above request contained in its opening sentence. That was the approach adopted at the hearing and that is the issue which the Tribunal has determined.

The complaint to the Information Commissioner

8. It is unnecessary to recite the history of this request from September 2010 to the appeal to the Tribunal. The complaint to the Commissioner resulted in a concise Decision Notice in which he identified the issue as the application of s.40(2) of FOIA to this request. He concluded that disclosure would not be fair and lawful and did not proceed to consider whether it met any of the conditions specified in Schedule 2 to DPA.

The appeal to the Tribunal

9. That is the issue for the Tribunal. It received full and careful written submissions from all parties. That the identity of these officers was personal data was not in dispute.

10. S.40 provides, so far as material:

"(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 (d) 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,"

The data protection principles are found at Part 1 of Schedule 1 to DPA 1999. The first principle, so far as relevant, reads:

"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..."

Condition 6 is the only condition that could arguably be met. It reads:

" (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."

The exemption under s.40(2) is an absolute exemption. No question of the public interest arises, therefore.

11. The Tribunal heard evidence from the Appellant and from Katherine de Bourcier, Head of Corporate Information at the MOD, dealing with the role of the Sec (AS) 2A and the expectations of publicity of those who performed it. She acknowledged that some were untroubled, one enthusiastic but suggested that many would find identification, even, or perhaps especially, after they had moved to other posts, unwelcome. They might not wish to be confronted by inquiries from those concerned with UFOs. She referred to the MOD Access to Information Guidance Note, in particular to the section on "personal data" which would influence the expectations of ministry staff. That note reflects the general approach of central government departments and indeed of the Tribunal to the question of anonymity for civil servants. It is far from absolute. Senior civil servants involved in policy - making, whose names are often in the public domain and who deal with the media can have no such expectation. Even those of a lower civil service grade who occupy posts with a prominent external role ("outward – facing") – such as speaking to outside bodies or the media or

representing their department at outside functions may expect to be identified. Indeed, secrecy would be absurd where their identification is essential to doing their job. The position is different, however, for more junior officers, whose job is not "outward – facing" and who do not routinely expect to be identified. That applies even to junior staff whose daily routine may bring them into contact with the public, for example, across the counter at a job centre or those who sign routine letters on behalf of their office. They are not representing the Department in respect of its policies or business practices nor supplying high – level information. The MOD`s case was that a Sec (AS) 2A came into this category.

12. The Appellant relied on the large number of such officers who had been identified by enthusiasts and those contributing to UFO literature. He relied especially on the example, already quoted, of one who had made much of his role in that post, apparently for some time after he had left it. He emphasised the contact of a Sec (AS) 2A with the public. He/she *"interacts directly with the public on a regular basis"* All these features, he said, showed that there must be an expectation in anyone holding the post or its contemporary equivalent that his/ her name could be made known, hence that disclosure was fair and lawful.

13. The Tribunal heard some argument on condition 6 of Schedule 2. The Appellant described the "legitimate interests" as

"dispelling confusion and removing some of the causes of conspiracy theories" and
"providing a reason for some apparent changes in MoD procedures or policy when a desk officer was replaced".

He further relied on widespread public interest in UFOs, which is undeniable.

The Reasons for the Tribunal`s decision

14. Whilst respecting the Appellant`s sincerity and unwavering interest in this issue, these may be shortly stated.

15. On balance, the Tribunal accepts the MOD case that disclosure would be unfair because the holder of the Sec (AS) 2A post would not necessarily expect to be

identified. That some do not mind and one or more rejoice in such publicity does not alter the nature of the post in question. This exemption derives from DPA 1999, a statute designed to protect the privacy of personal data, the other side, one might say, of the FOIA coin. We note the approach which is, in consequence, to be adopted, namely that there is no presumption in favour of disclosure in this context – see Lord Hope at $7 of *Common Services Agency v Scottish Information Commissioner [2008] 1 WLR 1550.*

16. Still more compelling is the ICO and MOD case on fulfilment of condition 6 of Schedule 2. Without the need for any reference to authority, it is plain that the identity of a Sec (AS) 2A can be of little value to either the support or the destruction of conspiracy theories as to the MOD and UFOs. Nor is it relevant to the one change of MOD policy which emerged from the evidence, namely the ultimate rejection of the existence of UFOs, however designated. It does not approach the requirement of being "necessary" to the pursuit of such interests. To be "necessary" disclosure must be more than merely desirable, must perhaps do even more than "serve a greater public interest than non – disclosure". It surely requires a finding that the pursuit of the legitimate interest will be thwarted unless the data are disclosed. With great respect, it may be that the test proposed in *Corporate Officer of the House of Commons v Information*

Commissioner and Norman Baker (EA/2006/0015 and 0016) at $90[1] rather understates the hurdle that the requester must surmount, proceeding immediately to consider the balance between benefit to the public and prejudice to the data subject and using "necessary" as a guide to the balancing of those interests. No balancing of interests is required unless disclosure is first shown to be <u>necessary</u> to the pursuit of a legitimate interest. Even if it is, that pursuit may still be stopped

[1] *"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.*

in its tracks, by the exception - if disclosure cannot be justified in the light of the damage to the rights, freedoms and legitimate interests of the data subject. That will depend in part on the importance as well as the legitimacy of the interest pursued.

17. Such considerations are, however, not critical to the Tribunal`s decision here. The Appellant, who, we wish to record, presented his case with the greatest good humour, patience and restraint, clearly failed to show that disclosure of these officers` identities by removal of redaction would be fair, lawful or meet any condition of DPA Schedule 2.

18. For these reasons we dismiss this appeal.

19. That decision is unanimous.

Signed:

David Farrer Q.C.

Judge

4th. November, 2011