

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 August 2012

Public Authority: Information Commissioner's Office

Address: Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF

Note: This decision notice concerns a complaint made against the Information Commissioner (the Commissioner). The Commissioner is both the regulator of the FOIA and a public authority subject to the FOIA. He is therefore under a duty as regulator to make a formal determination of a complaint made against him as a public authority. It should be noted, however, that the complainant has a right of appeal against the Commissioner's decision, details of which are given at the end of this notice. In this notice the term 'ICO' is used to denote the ICO dealing with the request, and the term 'Commissioner' denotes the ICO dealing with the complaint.

Decision (including any steps ordered)

1. The complainant requested information relating to the ICO's investigation into the unlawful trade in confidential personal information which was known as Operation Motorman. This included within its scope the names of journalists, the names of publications and types of data linked to transactions identified in the *What Price Privacy Now?* report. It also included the information contained within a document seized by the ICO entitled the *Blogger Training Manual*, the Operation Motorman 'case file' and communications relating to the Operation Motorman investigation.
2. The Commissioner's decision is that the ICO was entitled to rely on section 40(2) with section 40(3)(a)(i) of the FOIA (third party personal data) to withhold the names of journalists linked to transactions identified in the *What Price Privacy Now?* report. He also considers that section 44(1)(a) of the FOIA (prohibitions on disclosure) applies to this

information by virtue of section 59 of the Data Protection Act 1998 (DPA).

3. The Commissioner considers that the ICO was entitled to rely on section 30(1)(b) of the FOIA (investigations conducted by public authorities) to withhold the information contained in the *Blogger Training Manual* that has not previously been published in the *What Price Privacy?* report, the Operation Motorman 'case file' and the communications relating to the Operation Motorman investigation. He considers that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
4. In relation to the information in the *Blogger Training Manual* which has previously been published in the *What Price Privacy?* report the Commissioner considers that section 30(1)(b) of the FOIA is engaged but that the public interest in disclosing the information is at least equal to the public interest in maintaining the exemption. He therefore considers that the ICO was incorrect to withhold this information under section 30(1)(b) of the FOIA. However, he considers that section 21(1) of the FOIA (information accessible to the applicant by other means) applies to this information.
5. The Commissioner does not require the ICO to take any steps as a result of this decision.

Request and response

6. On 20 July 2012, the complainant requested the following:

'1) Concerning prosecutions brought by the Information Commissioner (WPP, Annex A): the name of the publication and the type of data concerned (e.g. medical records, voicemails).

2) The document 'Blogger Training Manual' (WPP, Annex B), in full.

3) Concerning the table on page 9 of "What Price Privacy Now?": For each 'positively identified' transaction, the name of the journalist, the name of the publication and the type of data concerned (e.g. medical records, voicemails).

4) Documentation from Operation Motormouth, including internal and external communications (e.g. with the Police and the CPS). I wish to exclude from this request the personal data which was illegally obtained.'

7. The ICO asked for clarification of part four of the complainant's request on 26 July 2011. The complainant responded stating that he would like to be provided with information relating to the ICO's Operation Motorman investigation and that the information he would like was the 'case file' or similar. He also confirmed that he would like to be provided with any communications connected with the Operation Motorman investigation.
8. The ICO responded on 19 August 2011. It explained that it did not hold the information outlined in part one of the complainant's request. It refused to provide the information contained in the *Blogger Training Manual* under section 44(1)(a) of the FOIA. It refused to provide the names of journalists linked to the transactions identified in the *What Price Privacy Now?* report under section 40(2) with section 40(3)(a)(i) of the FOIA. It also refused to provide the name of the publication and type of data concerned for each transaction identified in the *What Price Privacy Now?* report under section 21(1) of the FOIA as the information had previously been disclosed and was publically available at the time of the request. In relation to part four of the request the ICO refused to provide the 'case file' and communications relating to the Operation Motorman investigation under section 30(1), section 30(2) and section 44(1)(a) of the FOIA.
9. The complainant requested an internal review on 19 August 2011.
10. Following an internal review the ICO wrote to the complainant on 19 September 2011. It upheld its original response to the request with one exception. In relation to the information contained within the *Blogger Training Manual* it withdrew its reliance on section 44(1)(a) of the FOIA and instead relied on section 30(1) and section 30(2) of the FOIA to withhold this information.

Scope of the case

11. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider whether:
 - the ICO was entitled to rely on section 30 of the FOIA to refuse to disclose the information contained within the *Blogger Training Manual*;
 - the ICO was entitled to withhold the names of journalists under section 40(2) with section 40(3)(a)(i) of the FOIA; and

- whether the ICO was entitled to withhold the 'case file' and communications relating to the Operation Motorman investigation under section 30 of the FOIA.
12. The Commissioner has considered all of the issues raised by the complainant. In doing so he has taken into account all of the arguments made by the complainant and the ICO including those not specifically referenced within this decision notice.

Reasons for decision

Blogger Training Manual

13. The *Blogger Training Manual* was seized by the ICO under warrant in the course of its investigation into the unlawful trade in confidential personal information which was known as Operation Motorman. Operation Motorman resulted in the ICO presenting two reports to Parliament – *What Price Privacy?* and *What Price Privacy Now?*. *What Price Privacy?* includes a section entitled 'How they operate' which describes the content of the *Blogger Training Manual* and includes extracts.¹ *What Price Privacy?* also includes a more substantial extract from the *Blogger Training Manual* in Annex B.²
14. Section 30(1) of the FOIA states:

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

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

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

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

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

(c) any criminal proceedings which the authority has power to conduct.

¹ Information Commissioner's Office, *What Price Privacy?*, May 2006, p 22-23, http://www.ico.gov.uk/about_us/research/reports_to_parliament.aspx.

² Information Commissioner's Office, *What Price Privacy? - Annex B*, May 2006, p 40-41, http://www.ico.gov.uk/about_us/research/reports_to_parliament.aspx.

15. Section 30(2) of the FOIA states:

(2) Information held by a public authority is exempt information if—
(a) it was obtained or recorded by the authority for the purposes of its functions relating to—
(i) investigations falling within subsection (1)(a) or (b),
(ii) criminal proceedings which the authority has power to conduct,
(iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
(iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
(b) it relates to the obtaining of information from confidential sources.

16. The ICO is relying on three limbs of section 30 of the FOIA to withhold the information contained within the *Blogger Training Manual* - section 30(2)(a)(i) with section 30(1)(b), section 30(2)(a)(ii) and section 30(1)(b) of the FOIA. It has explained that the information was held by the ICO for the purposes of the Operation Motorman investigation which the ICO had the power to conduct and which may have led to a decision to institute criminal proceedings. The complainant does not dispute that the exemption is engaged but considers that the public interest in the information being disclosed outweighs the public interest in maintaining the exemption.

17. The Commissioner considers that section 30(1)(b) of the FOIA is engaged in relation to the information contained within the *Blogger Training Manual* as it was obtained under warrant for the purposes of the ICO's Operation Motorman investigation. The Operation Motorman investigation may have led to a decision to institute criminal proceedings under section 55 of the DPA which the ICO has the power to conduct under section 60 of the DPA. As section 30(1)(b) of the FOIA is a qualified exemption the Commissioner will now go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

18. The complainant has argued that there is a strong public interest in disclosure of the information because the wider issues to which the information relates have been subject to parliamentary inquiries and strong and vociferous debate in the press. He also considers that the information has wider implications for the governance of the British media. The complainant has argued that individuals involved in the unlawful trade in confidential personal information are likely to have a copy of the *Blogger Training Manual* in their possession and so

withholding the information from the public only makes the public more likely to fall victim to 'blagging'. He also considers that the current nature of the issues to which the information relates increases the public interest in disclosure.

19. The ICO has argued that the public interest in favour of maintaining the exemption significantly outweighs the public interest in disclosing the information. It has stated that there is a public interest in favour of disclosure as the information might increase public awareness of 'blagging' and educate individuals about how to avoid being drawn into revealing information about themselves thereby reducing the amount of harm caused by 'blagging'. However, the ICO has argued that there is a strong public interest in favour of maintaining the exemption as the *Blogger Training Manual* describes techniques for unlawfully obtaining personal information which is an offence under section 55 of the DPA. Therefore, disclosure of the information would be at least likely to prejudice the prevention of crime. It considers that this is a clear and decisive public interest factor in favour of maintaining the exemption. It also considers that disclosing the information could hamper any current or future investigations into such activity.
20. The Commissioner considers that the following public interest factors weigh in favour of disclosure:
 - The inherent value in transparency.
 - Enhancing the quality of discussions and enabling the public to enter into more informed debate, including the wider debate about governance of the British media.
 - The value in educating the public, raising awareness of 'blagging' techniques and highlighting the risks associated with individuals being drawn into revealing information about themselves.
21. The Commissioner has afforded some weight to the value in transparency in disclosing the information. He also considers that enabling the public to enter into more informed debate and enhancing the quality of discussions weighs in favour of disclosure, particularly given the high profile nature of the wider issues to which the information relates. He has afforded appropriate weight to this factor. The Commissioner considers that there is a strong public interest in raising public awareness of 'blagging' techniques, educating individuals to raise awareness of the risks associated with disclosing their personal information and thereby reducing the amount of harm caused by 'blagging'. He has afforded particular weight to this factor.

22. Before considering the public interest factors in favour of maintaining the exemption the Commissioner has considered whether the prevention of crime, or potential increase in crime, if the information contained within the Blagger Training Manual were to be disclosed are relevant public interest factors in favour of maintaining the exemption under section 30(1)(b) of the FOIA in this particular case. He considers that the public interest served by the exemption under section 30(1)(b) of the FOIA in this case is the effective investigation and prosecution of crime. As information which is exempt under section 30 of the FOIA cannot also be exempt under section 31 of the FOIA the Commissioner considers that the public interest in the prevention of crime, or in not facilitating an increase in criminal activity, is relevant and can be taken into account in favour of maintaining the exemption under section 30(1)(b) of the FOIA where this is a relevant consideration. The Commissioner draws support from the Information Tribunal decision in *Patrick Toms v Information Commissioner* where the prevention of crime was taken into account as a relevant public interest factor under section 30(1) of the FOIA.³

23. The Commissioner considers that the following public interest factors weigh in favour of maintaining the exemption:

- the likelihood, severity, extent and frequency of harm caused by the disclosure in terms of crime prevention; and
- the likelihood, severity, extent and frequency of harm caused by the disclosure in terms of the original purpose of the ICO's Operation Motorman investigation.

24. Having reviewed the content of the *Blagger Training Manual* the Commissioner considers that the disclosure of this information would be likely to harm the prevention of crime or facilitate an increase in criminal activity by increasing instances of 'blagging'. As the ICO has stated, the manual describes techniques for unlawfully obtaining personal information which is a criminal offence under section 55 of the DPA. The information is described in the *What Price Privacy?* report as follows:

'Material seized under warrant provides valuable insights into how the blaggers go about their task⁴ and:

'The manual concluded with more than 15 pages of sample scripts to use when trying to obtain information from a telephone call, for instance, and for discovering the relationship between two people

³ Patrick Toms v Information Commissioner, EA/2005/0027, 2006, paras 7, 18 and 22.

⁴ Information Commissioner's Office, *What Price Privacy?*, May 2006, p 22, http://www.ico.gov.uk/about_us/research/reports_to_parliament.aspx.

by impersonating a public transport lost property office. All the scripts are frighteningly plausible, as can be seen from the extract contained in Annex B. Recorded telephone conversations to call centres confirm how easy it can be to circumvent security questions designed to check the caller's identity.⁵

25. The Commissioner considers that the techniques described in the manual could be used to commit offences under the DPA and the information obtained by using these techniques could be used to facilitate a range of further offences such as identity fraud or seeking to influence jurors or witnesses. The Commissioner considers that the effect of disclosing the information contained in the *Blogger Training Manual* on the prevention of crime could be significant. He has afforded significant weight to this factor. He considers that based on the content of the *Blogger Training Manual* the risk in increasing instances of 'blagging' offences significantly outweighs any resulting benefit that would be gained by educating the public to avoid revealing information about themselves. The techniques included within the *Blogger Training Manual* are sophisticated and so even if an individual had a raised awareness of 'blagging' and the content of the *Blogger Training Manual* it does not necessarily follow that they would not fall victim to some of the techniques described therein. The Commissioner also notes that a determined 'blagger' could target numerous individuals and it is likely that not all of those individuals would be aware of the content of the *Blogger Training Manual* and the need to be vigilant to avoid falling victim to 'blagging' techniques.
26. The purpose of the ICO's Operation Motorman investigation and the related reports to Parliament are summarised by the subtitle of the *What Price Privacy Now?* report "*The first six months progress in halting the unlawful trade in confidential personal information*". The Commissioner considers that by disclosing the information in the *Blogger Training Manual* the ICO would be prejudicing the purpose of the original investigation, and the ability to conduct future investigations, by making it easier for individuals to commit offences under the DPA. The Commissioner has afforded particular weight to this factor.
27. Having considered all of the arguments provided by the complainant and the ICO, in light of the content of the *Blogger Training Manual*, the Commissioner considers that the public interest in maintaining the exemption significantly outweighs the public interest in disclosing the

⁵ Information Commissioner's Office, *What Price Privacy?*, May 2006, p 23, http://www.ico.gov.uk/about_us/research/reports_to_parliament.aspx.

information which has not already been published in the *What Price Privacy?* report. He considers that there is a significant risk of harm that would be likely to result from disclosure of the information including a likely increase in criminal activity. He also considers that the harm could potentially be severe, widespread and ongoing given the sophistication of some of the techniques described within the *Blogger Training Manual*. Therefore, in relation to the information in the *Blogger Training Manual* that has not already been published in the *What Price Privacy?* report the Commissioner considers that the ICO was entitled to withhold this under section 30(1)(b) of the FOIA. However, the Commissioner draws a distinction between the information that has not previously been published and the information contained in the *Blogger Training Manual* that had already been published in the *What Price Privacy?* report.

28. In relation to the information contained in the *Blogger Training Manual* that was published in the *What Price Privacy?* report the ICO has stated that this information was disclosed in the reports to Parliament for illustrative purposes in order to bring the matter to light. As this information had been published at the time of the request there is no particular public interest value in the information being disclosed. However, in the circumstances of this case the Commissioner finds no public interest value in maintaining the exemption under section 30(1)(b) of the FOIA for information which is already in the public domain. Therefore, the Commissioner considers that the public interest in disclosing the information is at least equal to the public interest in maintaining the exemption and the ICO was not entitled to rely on section 30(1)(b) of the FOIA to withhold this information. Notwithstanding the above the Commissioner considers that section 21(1) of the FOIA applies to the information in the *Blogger Training Manual* that had been previously published in the *What Price Privacy?* report as the report was available on the ICO's website at the time of the request.⁶ Therefore, the Commissioner does not require the ICO to take any steps.
29. As the Commissioner considers that the ICO was entitled to withhold the information contained in the *Blogger Training Manual* under section 30(1)(b) and section 21(1) of the FOIA, it is not necessary to go on to consider the ICO's application of 30(2)(a)(i) with section 30(1)(b) or section 30(2)(a)(ii) of the FOIA.

⁶ Information Commissioner's Office, *What Price Privacy?*, May 2006
http://www.ico.gov.uk/about_us/research/reports_to_parliament.aspx

Names of Journalists

30. The ICO's *What Price Privacy Now?* report contains a table of transactions which were identified as part of the ICO's Operation Motorman investigation into the unlawful trade in confidential personal information.⁷ It includes details of the publications concerned, the number of transactions positively identified and the number of journalists/clients using 'blagging' services. The ICO has disclosed the names of the publications concerned and the type of data involved in each transaction in response to a previous request for information under the FOIA. The information that remains in dispute in this case is the names of the journalists linked to those transactions.

31. The ICO refused to provide the names of journalists under section 40(2) with section 40(3)(a)(i) of the FOIA, which applies to third party personal data where releasing the information would breach any of the data protection principles. It has argued that the individuals whose details were recorded in connection with Operation Motorman could not have anticipated or expected that their details would be made public by the ICO. Therefore, it considers that a disclosure of the journalists' names would be unfair and in breach of the first principle of the DPA. The first principle of the DPA states that personal data shall be processed fairly and lawfully. The ICO has stated that as the information "*might indicate potential criminal activity, this might also fall within the definition of sensitive personal data.*" The ICO has also stated the following:

'I have to bear in mind that the names of the journalists were not provided to us voluntarily. They only came into our possession as a result of material we seized when exercising a search warrant. Not all the journalists whose names are held were necessarily involved in unlawful activity. We do not know with any certainty which ones were and which ones were not and they have not had any opportunity to explain their involvement.'

32. The complainant has argued that, in circumstances where an individual has acted improperly, releasing personal information relating to that improper behaviour would be justified. He considers that an individual that had knowingly conducted themselves in an improper manner would have expected their name to be disclosed should such improper behaviour come to light. The complainant cites the First-Tier Tribunal

⁷ Information Commissioner's Office, *What Price Privacy Now?*, December 2006, p 9, http://www.ico.gov.uk/about_us/research/reports_to_parliament.aspx.

case of *William Thackeray v Information Commissioner & the General Medical Council* in support of his arguments.⁸ He also argues that the ICO's response is inconsistent as it states that the information might be sensitive personal data because it might indicate potential criminal activity whilst also stating that the ICO can not be sure which journalists, if any, were involved in criminal activity and that not all the journalists necessarily were. He refutes the ICO's argument that his point about improper behaviour does not apply due to the fact that there has been no finding of improper behaviour or convictions of journalists under the DPA.

33. The Commissioner has recently issued two decision notices concerning the same information, the names of the journalists linked to the transactions identified in the *What Price Privacy Now?* report, under case references FS50390772 and FS50422884. Whilst these decisions are relevant they are not determinative and the Commissioner has reconsidered this matter in light of the arguments made by both parties and the specific facts of this case. In the decision notices under case references FS50390772 and FS50422884 the Commissioner concluded that the ICO was entitled to withhold the names of journalists under section 40(2) with section 40(3)(a)(i) of the FOIA as releasing the information would breach the first principle of the DPA.
34. It is not in dispute that the information is personal data as defined by section 1(1) of the DPA. For the avoidance of doubt the Commissioner considers that the names of journalists linked to the transactions identified in the *What Price Privacy Now?* report clearly constitutes the personal data of the journalists. As the ICO has provided the same arguments that were relied on in relation to the previous related cases the Commissioner has focused on the arguments made by the complainant in this case. He will first consider whether the information is sensitive personal data before considering whether a disclosure of the information other than under the FOIA would meet the fairness requirement of the first principle of the DPA.
35. Where information is sensitive personal data it is less likely that its disclosure to a member of the public otherwise than under the FOIA would meet the fairness requirement of the first principle of the DPA. The Commissioner considers that the names of journalists linked to the transactions identified in the *What Price Privacy Now?* report is the

⁸ William Thackeray v IC, EA/2011/0069, 23 February 2011, [http://www.informationtribunal.gov.uk/DBFiles/Decision/i378/Thackeray_v_IC_&_GMC_\(EA-2009-0063\)_Decision_23-02-10_\(w2\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i378/Thackeray_v_IC_&_GMC_(EA-2009-0063)_Decision_23-02-10_(w2).pdf).

sensitive personal data of each journalist, falling under section 2(g) of the DPA, as it consists of information as to “the commission or alleged commission by him of any offence.” Having reached the same conclusion as in the previous related cases, that the information is sensitive personal data, the Commissioner does not consider that it is necessary to outline the full reasoning outlined in his previous decision notices. He considers that the following summarises the Commissioner’s position:

‘The DPA also provides additional safeguards for sensitive personal data which is defined in section 2 of the Act. Section 2 states that personal data relating to, amongst other things, the commission or alleged commission by an individual of any offence amounts to sensitive personal data. While the ICO did not specifically state the information was sensitive personal data to the complainant, the Commissioner considers as a matter of fact that it is. This is because information held in Operation Motorman was used to consider whether the individuals involved committed a criminal offence under section 55 of the DPA and this included the names that were identified by the ICO during the course of its investigation and those that were seized when exercising its search warrant.’⁹

36. Therefore, the Commissioner has considered whether a disclosure of the sensitive personal data of the journalists otherwise than under the FOIA would be fair for the purposes of the first principle of the DPA in light of the complainant’s arguments. In considering whether disclosure of this information would be fair the Commissioner has taken the following factors into account:

- whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned;
- the individual’s reasonable expectations of what would happen to their information; and
- whether the legitimate interests of the public are sufficient to justify any negative impact to the rights and freedoms of the data subject.

37. The Commissioner considers that at the time of the request the wider issues to which the information relates were subject to ongoing investigations and significant media attention. The ICO has argued that releasing the names of journalists linked to the transactions identified in

⁹ Decision notice under case reference FS50390772, para 11, http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50390772.ashx.

the *What Price Privacy Now?* report would be likely to lead to the information being used in a discriminatory way and is likely to be portrayed as all those named as being involved in criminal activity. The Commissioner considers that this is likely to be the case, that the disclosure of the information would be likely to have a detrimental effect on the reputations of the individuals concerned and that the damage and/or distress caused to the journalists may be unjustified if the transactions identified in the *What Price Privacy Now?* report were legitimate. For example, the journalists concerned may have had a public interest defence to a prosecution under section 55 of the DPA but have had no opportunity to explain their involvement.

38. The Commissioner has considered the complainant's argument that there should be a greater expectation that personal information will be disclosed where there has been improper behaviour. The Commissioner agrees that where there has been a finding of improper behaviour this may impact upon an individual's reasonable expectations as to how their personal data will be processed and consequently whether that processing is fair, particularly where the individual is in a public facing role. He agrees with the complainant's assertion that this principle is supported by the Tribunal's findings in the case of *William Thackeray v Information Commissioner & the General Medical Council*.¹⁰ However, he does not consider that this principle applies in this case.
39. The ICO has stated that there has been no finding of improper behaviour against the journalists linked to the positively identified transactions in the *What Price Privacy Now?* report. These individuals have not had an opportunity to explain their connection to the transactions and so it is not possible to know whether they considered they were acting improperly or not or whether they were acting improperly as a matter of fact. Therefore, it is not possible to determine whether any of the individuals would have had a lower expectation of privacy and a reasonable expectation of any information concerning wrongdoing being disclosed should any wrongdoing come to light. The Commissioner also notes the ICO's assertion that some of the journalists may be unaware that the ICO has this information. The Commissioner does not consider that the named journalists would have had a reasonable expectation that the ICO would disclose their sensitive personal data to a member of the public otherwise than under the FOIA.

¹⁰ *William Thackeray v IC*, EA/2011/0069, 23 February 2011, [http://www.informationtribunal.gov.uk/DBFiles/Decision/i378/Thackeray_v_IC_&_GMC_\(EA-2009-0063\)_Decision_23-02-10_\(w2\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i378/Thackeray_v_IC_&_GMC_(EA-2009-0063)_Decision_23-02-10_(w2).pdf), para 65.

40. The Commissioner considers that the public has a legitimate interest in knowing the identity of the journalists linked to the transactions identified in the *What Price Privacy Now?* report. At the time of the request there was widespread concern about the conduct of the British media and there had been a resurgence of interest in the *What Price Privacy?* and *What Price Privacy Now?* reports and the wider issues to which they relate. None of the journalists concerned have been prosecuted and the disclosure of the names of journalists would be likely to lead to those named attempting to justify their actions and may shed light on the extent to which the identified transactions were improper or not. However, the Commissioner is mindful that none of the journalists linked to the identified transactions have been found to have acted improperly. The Commissioner does not consider that the public's legitimate interests in this information justify the substantial negative impact on the rights and freedoms of the journalists concerned if their sensitive personal data were to be disclosed otherwise than under the FOIA.
41. The Commissioner has considered the complainant's arguments as to why the ICO disclosing the information would not breach the fairness requirement of the DPA. He has concluded that the ICO's response was not inconsistent. For the same reasons as outlined in his decision notices issued under case reference numbers FS50390772 and FS50422884 the Commissioner considers that the ICO disclosing the names of journalists otherwise than under the FOIA would breach the fairness requirement of the first principle of the DPA.¹¹ Therefore, he considers that the ICO was entitled to rely on section 40(2) with section 40(3)(a)(i) of the FOIA to withhold the names of the journalists linked to the transactions identified in the *What Price Privacy Now?* report.
42. The decision notices issued under case reference numbers FS50390772 and FS50422884 also concluded that the ICO was entitled to rely on section 44(1)(a) of the FOIA to withhold the names of journalists by virtue of section 59 of the DPA. The Commissioner has reconsidered all of the gateways that would allow the ICO to disclose this information under section 59(2) of the FOIA in the circumstances of this case. He does not consider that the position has changed and for the same reasons as outlined decision notices issued under case reference numbers FS50390772 and FS50422884 he considers that the ICO was

¹¹ Information Commissioner's Office, Decision Notice - FS50390772, para 8-32, http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50390772.ashx; Information Commissioner's Office, Decision Notice – FS50422884, para 8-34, http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50422884.ashx.

also entitled to rely on section 44(1)(a) of the FOIA to withhold the names of journalists.¹²

Operation Motorman 'case file' and communications relating to the Operation Motorman investigation

43. In response to the complainant's request the ICO confirmed that it held the following categories of information in relation to the Operation Motorman investigation:
- information obtained from third parties (individuals and other organisations);
 - internal communications; and
 - legal advice.
44. The ICO withheld this information under section 30(1), section 30(2) and section 44 of the FOIA. Section 30(1) and section 30(2) of the FOIA are outlined in paragraph 14 and 15 above.
45. The ICO has argued that information held in relation to its Operation Motorman investigation is held for the purposes of determining whether an offence has been committed under the DPA and whether to take action. It has argued that a number of different limbs of section 30 of the FOIA are engaged. The complainant does not dispute that the exemption is engaged.
46. The Commissioner has reviewed a large volume of information held by the ICO in relation to Operation Motorman, including the 'case file' and communications connected with the investigation. This includes the categories of information identified by the ICO above as well as external communications, evidence seized by the ICO, material in relation to court proceedings, meeting and telephone notes, media reports and press releases, analysis documents, witness statements, interview transcripts, notes and research documents.
47. The Commissioner considers that all of the information within the scope of the request was, at the relevant time, held for the purposes of the Operation Motorman investigation which was conducted by the ICO and

¹² Information Commissioner's Office, Decision Notice - FS50390772, para 33 to 52, http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50390772.ashx; Information Commissioner's Office, Decision Notice – FS50422884, para 35-54, http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50422884.ashx.

which in the circumstances may have led to a decision to institute criminal proceedings that the ICO has the power to conduct. He notes that for the purposes of section 30(1)(b) of the FOIA information is exempt if it 'has at any time been held by the authority' for the purposes specified within the exemption. Therefore, the Commissioner considers that section 30(1)(b) of the FOIA is engaged. As section 30(1)(b) of the FOIA is a qualified exemption the Commissioner will now go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

48. The complainant has argued that the public interest in the information being disclosed outweighs the public interest in maintaining the exemption. He has argued that there is a strong public interest in disclosure of the information because the wider issues to which the information relates have been subject to parliamentary inquiries and strong and vociferous debate in the press. He also considers that the information has wider implications for the governance of the British media and the current nature of the issues serves to increase the public interest in disclosure.
49. The ICO has argued that the public interest in maintaining the exemption clearly outweighs the public interest in disclosing the information. It considers that there is a public interest in disclosing the information as it would increase transparency concerning the way in which the ICO conducts its investigations. It has argued that the following public interest factors weigh in favour of maintaining the exemption:
 - not prejudicing ongoing investigations into possible criminal offences;
 - maintenance of independence of judicial and prosecution processes;
 - maintaining the ICO's ability to discuss and formulate views in relation to possible proceedings;
 - not prejudicing any prosecution which may arise out of the investigations; and
 - the fact that the issues remain live to some extent, with ongoing Parliamentary scrutiny and police investigations into related matters.
50. The Commissioner has considered the public interest factors in favour of disclosing the information. He considers that there is a public interest in increasing transparency concerning the way in which the ICO conducts its investigations. He has afforded weight to this factor. He also

considers that disclosure of the information would allow the public to enter into more informed debate concerning the wider issues to which the information relates, such as the regulation of the press, which were subject to increased scrutiny at the time of the request. He has afforded weight to this factor. He accepts that to some extent the live nature of the wider issues at the time of the request increases the public interest in the public being able to enter into informed debate. He has afforded weight to this factor whilst also considering below the effect that disclosing the information could have had at the time of the request due to the live nature of the wider issues to which the information relates.

51. The Commissioner has considered the public interest factors in favour of maintaining the exemption. He considers that there is a strong public interest in maintaining the exemption due to the likelihood and extent of the prejudice both to the Police investigation, which was ongoing at the time of the request, and to any prosecution which may arise from the investigation. He has afforded considerable weight to this factor particularly due to the highly sensitive nature of the information and the current nature of the investigation. The Commissioner considers that the fact that there were ongoing independent mechanisms to address the wider issues to which the information relates at the time of the request, including the Police investigation and the Leveson Inquiry, reduces the public interest in disclosing the information. He has afforded some weight to this factor.
52. Having considered all of the factors outlined above, in light of the content of the 'case file' and 'communications connected with the case', on balance, the Commissioner considers that the public interest in maintaining the exemption outweighs the public interest in the information being disclosed.
53. For the reasons outlined above, the Commissioner considers that the ICO was entitled to rely on section 30(1)(b) of the FOIA to withhold the Operation Motorman 'case file' and communications relating to the Operation Motorman investigation. Therefore, it is not necessary to go on to consider the ICO's reliance on section 44 of the FOIA.

Right of appeal

54. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,

PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

55. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
56. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Gerrard Tracey
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SK9 5AF