Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0084
Information Commissioner's Ref: FS50145985

Determined at an Oral Hearing at Care Standards Tribunal, Pocock Street, London, SE1 0BW
On 17 and 18 March 2009

Decision Promulgated
10 June 2009

BEFORE

CHAIRMAN

DAVID MARKS QC

and

LAY MEMBERS

MICHAEL HAKE
PIETER DE WAAL

Between

GUARDIAN NEWS & MEDIA LIMITED

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

THE MINISTRY OF JUSTICE

Additional Party

Representation:

For the Appellant: Geoffrey Robertson QC
Anthony Hudson
For the Respondent: Karen Steyn
For the Additional Party: Eleanor Grey

Subject Matter

Freedom of Information Act 2005: personal data and absolute exemption: section 40(2)(c); Data Protection Act 1998: Schedule 1, Part 1; Schedule 2, paragraph 6(1); Freedom of Information Act 2005: qualified exemption regarding administration of justice: section 31(1)(c).

Cases

Commons Services Agency v Scottish Information Commissioner [2008] 1 WLR 1550
Waugh v Information Commissioner and Doncaster College EA/2008/0038
Corporate Officer of the House of Commons v Information Commissioner EA/2007/0060
Roger Salmon v Information Commissioner and King's College Cambridge EA/2007/0135

Decision

The Tribunal dismisses the Appellant's appeal and upholds the Commissioner's Decision Notice dated 22 September 2008.

Reasons for Decision

Introduction

1. This appeal concerns the question of whether the details of what could be called serious disciplinary actions taken against members of the judiciary should be disclosed under the Freedom of Information Act 2000 (FOIA). The Information Commissioner (the Commissioner) has ruled in the relevant Decision Notice that the exemption contained in section 40 of FOIA which deals with personal data is engaged. Moreover, although it was not strictly necessary for the latter determination, the Commissioner also found that the public interest in maintaining that exemption outweighed the public interest related to the disclosure of the requested information.

2. The issues raised by the request are, as at the date of the Decision Notice in September 2008 and as at the date on which this appeal was heard in March 2009, now the subject of express statutory enactment as set out in the Constitutional Reform Act 2005 (the CRA). The relevant provisions will be referred to in further detail below. For the moment, it is enough to say that they demonstrate that Parliament has clearly determined that whether and to what extent members of the judiciary should be reprimanded as well as the question of the publication of such reprimand are matters now entirely within the gift and discretion of the Lord Chancellor and of the Lord Chief Justice who, most importantly for present purposes, alone are now responsible for the fact and content of any publication. The present request relates to facts and matters which occurred at a time prior to the coming into force of the CRA. The parties to the appeal include the Ministry of Justice as an additional party. The Tribunal is grateful for the contributions and submissions which it made with regard to this appeal.

The request for information

3. The request took the form of a letter dated 11 July 2005 sent by Mr Rob Evans, a reporter acting on behalf of The Guardian. It is appropriate to refer to the terms of his request in full. He requested the following, namely:

> "*(a) the number of times since August 1998 that the Lord Chancellor has reprimanded/taken further action against judges and other judicial office holders in response to a complaint about their personal conducts;*
>
> *(b) the names of the judges or other judicial office holders in each instance since August 1998;*
>
> *(c) the date on which the Lord Chancellor reprimanded/took further action in each instance since August 1998;*
>
> *(d) a reasonable and informative description of why the Lord Chancellor reprimanded/took further action in each case since August 1998;*
>
> *(e) the title of the court case (if applicable) to which the complaint refers in each case since August 1998;*
>
> *(f) a complete copy of the letter sent by the Lord Chancellor to the judge or other judicial office holder in each case since August 1998 (if applicable);*
>
> *(g) a complete copy of the letter sent by the Lord Chancellor to the judge or other judicial office holder asking them to a meeting of his officials to discuss the complaint in each case since August 1998 (if applicable).*"

4. In opening argument, Mr Robertson, acting on behalf of The Guardian, stated that he wished to clarify the request. He said that the Appellant was not seeking the disclosure of any confidential information regarding any reprimand and/or "further actions" where a complaint was cleared or rejected. All the Appellant was seeking, he said, was the final decision in each such case by the Lord Chancellor and what he called the findings, reasons and sanctions.

5. The Department of Constitutional Affairs (the DCA), now replaced by the Ministry of Justice (MoJ), responded by letter dated 5 December 2005. It confirmed that it held

the information requested. The DCA explained that it supported the Lord Chancellor in the exercise of his disciplinary powers. The DCA enclosed a copy of the Judicial Complaints Protocol ("the Protocol") which details the process that officials within the DCA's Judicial Correspondence Unit (the JCU) then followed at the material time in order to advise the Lord Chancellor regarding the resolution of complaints of personal misconduct by judicial office holders. The letter went on to confirm that in the event the Lord Chancellor believed that investigation was necessary, he would seek the agreement of the Lord Chief Justice, and together they would agree upon the terms of reference for that investigation and in particular upon a suitable and competent judge to carry out the judicial investigation. If no investigation were considered necessary, the Lord Chancellor might also seek the Lord Chief Justice's agreement to issue a reprimand or a warning to the judicial office holder who was the subject of the complaint.

6. In answer to request (a), the DCA confirmed that relevant minutes could be found in various Parliamentary Questions as well as in a publicised Judicial Group Annual Report provided until 2003 with regard to full time judges and to paid judicial officer holder such as Recorders. More junior judicial office holders such as tribunal members, magistrates and coroners would have such details in their personal files. The DCA claimed that the costs limits imposed under FOIA would be exceeded if such details were to be extracted. No issue on costs or on the cost limit arises in this appeal.

7. The DCA interpreted request (a) as connoting "*formal disciplinary action*" and "*further action*" as well as encompassing "*the most serious sanction of removal*" as together with "*less serious sanctions by way of reminders about the appropriate standard of conduct which the public has a right to expect*" for judges. The DCA confirmed that in the years 1998 to 2003 inclusive, a total of some 26 disciplinary actions stemming from complaints occurred. It added that in 2004 it had "*far more comprehensive information relating to all judicial office holders*" covering other issues and personal misconduct which did not arise from a complaint. In 2004, the Lord Chancellor took formal disciplinary action against 41 judicial office holders including the more junior office holders referred to above. The figure for 2005 to the date of the DCA's letter was 67.

8. In relation to request (b), the DCA sought to rely on two FOIA exceptions, namely section 31(1)(g) wrongly referred to as section 31(g), together with section 31(2)(b) which dealt with the exercise by a public authority of its functions in the former case, and in the second case, with the purpose of ascertaining whether any person is responsible for any conduct which is improper. As will be seen, these grounds effectively were abandoned during the prosecution of this appeal and reliance was ultimately placed effectively upon that subsection of section 31 dealing with the administration of justice, namely section 31(1)(c).

9. The letter then went on to set out reasons for reliance upon those exemptions. Reference will be made where appropriate to the relevant arguments below. The major contention advanced by the DCA was that as at the date of the said letter, the Lord Chancellor and the Lord Chief Justice had agreed to reveal the names of specific judges and judicial office holders who had been disciplined in certain circumstances, namely only where they believed it was consistent with the requirements of the public interest in the given case. The letter went on to allude to a matter which emerged clearly in the evidence during the appeal, namely that such cases might already be in the public domain on account of media exposure. In such cases, the Lord Chancellor and the Lord Chief Justice might regard it as necessary to make a joint public statement so as to prevent and if need be to "*mend any loss of public confidence in the judiciary*". Other cases might lead to the matter being dealt with on a confidential basis. Each case was, in other words, assessed on its specific merits. As indicated above, the enactment for the CRA has in effect crystallised that position in statutory form.

10. The DCA therefore contended that the "routine" disclosure of disciplined judges or holders of judicial office, together with disclosure of the specific nature of the complaint would "*damage public confidence in the judiciary in a way which would prejudice the effect of conduct of public affairs*" within the spirit and meaning to the two major exemptions referred to in the letter.

11. The DCA adopted the same approach to requests (c), (d), (e) and (f). With regard to request (g), the DCA pointed out that no such letter as was there described was normally provided. Insofar as such letter related to a complaint as to a judicial office holder, the exemption relied on in the letter also applied.

12. Mr Evans himself replied by letter dated 16 January 2006. He requested an internal review of the DCA's decision. The other matters he canvassed were in effect reiterated at a much greater length and with far greater detail by Mr Robertson in argument. He also asked for the name of the qualified person whose decision was required to trigger the exemption of section 36. This last issue is no longer a live one. He also took great issue with the length of time the DCA had taken to reply. For what it is worth, the Tribunal recognises the length of time that has passed, but for obvious reasons, that consideration does not bear upon the issues to be resolved in the appeal. Regrettably, there followed a further delay following upon Mr Evans' request for an internal review in which the DCA failed to follow up that request. In early October 2006, Mr Evans lodged a complaint with the Commissioner.

13. By mid-November 2006, the DCA completed its review. Reliance was again placed on sections 31 and 36 of FOIA. The DCA said that with regard to section 31(2)(b) of FOIA, (dealing with prejudice to the effective conduct of public affairs), it remained "*firmly of the opinion that disclosure of specific details where a judicial office holder has been disciplined would prejudice the exercise of these functions for the reasons outlined in our letter of 5 December*". Reliance was also placed on Regulation 40 of the Judicial Discipline Regulations 2006 (the 2006 Regulations) which will be dealt with further below. The 2006 Regulations contain similar provisions to those already referred to in relation to the Protocol to the effect that the Lord Chancellor and the Lord Chief Justice retain sole discretion as to matters of discipline with regard to the disclosure of information about disciplinary proceedings. In particular, Regulation 40(4) states that disclosure may be necessary in certain instances in order to maintain confidence in the judiciary.

14. The letter went on to note the disclosure would "*expose the sensitivities of specific investigations of cases of personal judicial misconduct to an inappropriate level of public scrutiny*". This, it was said, would lead inevitably to "*increased speculation about the correctness or otherwise of the final recommendations made to the LC*". Public confidence, it was remarked, was enhanced by confidence in the investigative process. The latter had to take place "*Independently and confidentially, away from the scrutiny of disclosure in this case and others would cause*".

15. As for section 36 and the effective conduct of public affairs, disclosure would, it was claimed, inevitably lead to members of the judiciary and the magistracy being increasingly reluctant to play an active role in such respects.

16. Mr Evans, in his earlier exchange, had drawn attention to the fact that investigations into professional misconduct in other contexts, eg, members of the Bar and solicitors, constitutes a proper analogy. This matter will be referred to in further detail below. The DCA responded by saying that such matters as were relevant to non-judicial members of the legal profession covered not only personal, but also professional misconduct unlike the present context. Judges were by definition publicly answerable for their decisions. The DCA added that members of other professions "*are not normally subject to the same kind of continuous public scrutiny and accountability for their decisions*". Moreover, even the Bar Council and the General Medical Council, it was contended, published the outcome of their respective disciplinary decisions only in cases of sufficient seriousness. The Tribunal pauses here to note that it was shown no evidence on these matters.

17. By early 2008, the MoJ had inherited these functions from the DCA. In a lengthy letter to the Commissioner in March 2008, the MoJ reiterated many points made in earlier correspondence. It also noted that the detailed description of the reasons for individuals being disciplined would prejudice the MoJ's function to ascertain improper conduct. It would also provide details of the types of cases being investigated, and it stated that release of this type of information could act as a warning to other members of the judiciary who would be able to take measures to evade detection. Reasons as to disciplinary action being taken could also disclose the specific techniques applied during an enquiry, and again, might undermine the effectiveness of the procedure. Reference was also made to the fact that release of information that highlighted the types of misconduct might well encourage members of the public to exploit those areas if they had "*a grudge against a particular member of the judiciary*".

18. The MoJ confirmed that the decision to apply section 36(2)(c) of FOIA of the information requested was made on 17 October 2005 by Lord Falconer, the then Lord Chancellor. The same letter continued by observing that the newly formed Office for Judicial Complaints (OJC), in 2007, and indeed since, has published broad

categories of the reasons why disciplinary action was taken against members of the judiciary. The letter ended with a reference to section 40 of FOIA (which deals with personal data), coupled with an apology regarding failure to have referred to that section in the early correspondence. Revelation of personal identities constituted, it was claimed, personal data and would thus be unfair to the judicial office holder and the complainant. Such data might well even constitute sensitive personal data. Both the complainant and the judiciary, it was claimed, had "*an expectation that the personal information that they provided to assist in the investigation and the personal data gathered about them in the course of an investigation would be treated in the strictest confidence*". Disclosure would breach the first principle of the Data Protection Act 1998 (DPA). The MoJ's reliance on section 40(2) was then communicated by the Commissioner to Mr Evans.

19. In the open bundle provided to the Tribunal for the purpose of the appeal, there is a subsequent letter sent by the Commissioner to the MoJ referring to whether the MoJ considered anonymising the data so as to remove at least the identity of the judicial office holders who had been reprimanded. It was duly confirmed during the appeal that no anonymisation was considered appropriate, and indeed as is clear from the decision reached by the Tribunal, this point need no longer be considered.

The Decision Notice

20. The Decision Notice is dated 22 September 2008. It is a reasonably short document. The Notice does not address the exemptions set out in, for example, sections 31 and 36. It merely deals with section 40. As will be set out in further detail below, section 40(2)(c) provides an exemption in respect of information which is the personal data of a third party. The Commissioner had first to determine whether the information including the names of all relevant office holders did constitute personal data. In the light of the appropriate definition of personal data provided in the DPA, the Commissioner was satisfied that all the required information did constitute personal data.

21. The MoJ had contended (as it did during the appeal) that disclosure of the requested information was in breach of the first data protection principle on the grounds of

unfairness. In essence such data has to be processed fairly and lawfully. At paragraph 24 the Commissioner stated that he had taken the following factors into account, namely:

(1) the individual data subjects' reasonable expectations of what would happen to their information;

(2) the seniority of the individuals;

(3) whether disclosure would cause any unnecessary or unjustified damage to the individuals; and

(4) the legitimate interests of the public in seeing the withheld information.

22. In upholding the MoJ's decision not to disclose the requested information, the Commissioner stressed the following matters, namely:

(1) the Lord Chancellor and the Lord Chief Justice were both best placed to ensure that the public interest in being reassured and satisfied of the independence, integrity and competence of the judiciary was upheld;

(2) on occasions such as those on which there had been any egregious lapse from proper standards of judicial conduct, there might have to be a public response to repair any damage that such behaviour merited;

(3) however, even in the type of case dealt with in (2) above, confidentiality might still be required, for example, when publicity over disciplinary intervention would be counter productive or disproportionate;

(4) how cases falling within (2) and (3) should be dealt with would entail a consideration of a wide range of factors, such as the nature, scale and seriousness of the particular office holder's judicial functions and the extent to which the judge's personal and private life was involved and at risk; those elements had to be balanced against the degree of intrusiveness which press coverage and public reaction inevitably entails;

(5) disclosure would undermine a judicial office holder's authority whilst carrying out its judicial functions;

(6) complaints leading to disciplinary action involved personal and not professional misconduct and therefore related directly to an intrusion upon the office holder's personal life or the risk of such happening;

(7) the facts and matters in (6) entailed a degree of expectation of privacy as reflected in certain provisions in the CRA which made allowance for confidentiality regarding information provided during the course of the judicial complaint or conduct of investigation despite the fact that such investigation would relate to an office holder's private and professional life;

(8) the element of confidentiality referred to in (7) found expression in the Judicial Protocol which specified correspondence and exchanges between the Lord Chancellor, the judiciary and the officials concerned remain confidential;

(9) in all the circumstances the legitimate interests of the public in being acquainted with the requested information was outweighed by what would otherwise be an unwarranted intrusion into the office holder's personal life and the procedures prescribed in relation to the investigation of judicial complaints as laid out in the above mentioned protocol provided the public with "some reassurance that complaints against members of the judiciary were being properly investigated."

Grounds of Appeal

23. The Appellant lodged a Notice of Appeal dated 22 September 2008. In the Tribunal's view it is not unfair to say that a major, if not the principal, plank of the Appellant's appeal as reflected in its Grounds of Appeal is reflected in paragraph 9 of the Grounds which reads as follows, namely:

"*As reflected in the fundamental principle of open justice, the administration of justice is advanced and secured by ensuring there is transparency and openness in legal proceedings. An important rationale for the open justice principle is that it serves to ensure that judge's do not engage in inappropriate behaviour".*

Reference is then made to an extract from Lord Woolf MR's judgement in *ex parte Kaim Todner* [1999] QB 966 at 977. With great respect to the importance of the

principle referred to, however, the Tribunal finds it difficult to see the correlation between the undoubtedly fundamental principle set out in the quoted passage on the one hand and on the other the particular considerations in play in the present appeal. In a passage to which reference was made from the decision quoted, Lord Woolf MR was stressing "that the public nature of proceedings [i.e. in court] deters inappropriate behaviour on the part of the court.". The Tribunal has no hesitation in saying that the conduct of a judge in court and the need for open justice raise considerations quite different from the disciplining of judges with regard to matters which may or may not take place within the court room. Admittedly the two considerations may not always be easy to separate. An intemperate outburst within the judicial process may well give rise to an appeal on the basis of a displayed bias. It may also justify an investigation and possibly a finding of judicial personal misconduct. In such cases there would certainly be an argument that any adverse finding as to the latter be disclosed given that the complaint would reflect or refer to matters heard and determined in open court including the appellate process. Nonetheless, different considerations apply to matters which cannot on any view be said to be properly the subject matter of a justicable appeal within the appellate process.

24. Greater sensitivity, however, would be required with complaints stemming from immoderate behaviour that is not directly related to the exercise of the judicial function, particularly where the facts and events occur outside the court room and which may touch upon public confidence in the standing of the judiciary. In any particular case, consideration will need to be given to the degree to which such activity, even if found worthy of reprimand, warrants any publicity either as to the fact of reprimand and/or as to its contents. This is especially so where allegations may or may not relate to the particular individuals' ability otherwise to carry out their judicial functions. In the Tribunal's view this overall critical distinction lies at the heart of the appeal and would be relevant to a number of specific considerations which relate directly to this appeal.

25. As to paragraph 13 and following in its written Grounds of Appeal, the Appellant took issue with the Commissioner's determination in the Decision Notice that the information requested was "exempt information" pursuant to section 40(2) of FOIA. In paragraph 15 the following passage appears, namely:

"*15. The Commissioner erred in concluding:*

15.1 that disclosure of <u>all</u> the information would contravene any other data protection principles;

15.2 that release of all the information would be an unwarranted intrusion into the private lives of the judiciary;

15.3 that the public interest in maintaining the exemption in respect of <u>all</u> the information outweighed the public interest in disclosure of the information." (emphasis in original)

26. Paragraph 16 therefore contended that disclosure of "some or all" of the information would not contravene any of the data protection principles.

27. Despite the submissions of the Appellant during the appeal, the Tribunal finds itself none the wiser with regard to the matters advanced in these two paragraphs. First, as will be stressed below, in his closing argument if not earlier, Mr Robertson expressly disclaimed any reliance on the proposition that the information which the Appellant requested even in the composite form referred to by him and referred to at paragraph 4 above constituted personal data within the meaning of the DPA and FOIA. At one point at least he described the data in question as not being private but as constituting "public" data. That adjective and the term "public data" do not, of course, appear in the DPA or FOIA. Secondly, the grounds of appeal articulated in paragraphs 15 and 16 fail to specify which particular elements of the information requested would not have contravened "any of the data protection principles" in the words of paragraph 16. Given the thrust of Mr Robertson's general submission that no data protection issues were involved it is not surprising that Mr Robertson could not assist in that regard. Thirdly, if the exemption in section 40(2) of FOIA applies, as the Commissioner duly found, there is simply no question of balancing any public interest in or maintaining the exemption against any public interest in relation to disclosure as in the case of a typical qualified exemption such as those otherwise relied on by the MoJ in the correspondence. As has been noted at the outset of this judgment, the Commissioner's finding in his Decision Notice refers to his "conclusions" that the public interest in maintaining the exemption in section 40

"outweighed" the public interest in disclosure of the requested information. Section 40 remains unequivocally an absolute exemption.

28. The Tribunal naturally fully accepts that in the words of the Commissioner's written Reply, the application of the data protection principles involves striking a balance between competing interests similar but by no means identical to the public interest test in play whenever a qualified exemption is being considered. A critical difference is perhaps self evident. There is no trial of strength as it were between two competing public interests. There is instead a consideration of how a legitimate public interest is to be weighed against what might otherwise be an unwarranted interference with an individual's private interest.

Judicial Complaints Protocol

29. The Tribunal was shown a copy of the Protocol published by the Lord Chancellor's department in April 2003. There is a subheading entitled "Procedures for dealing with complaints about judges in England and Wales". The Protocol which as described in the foreword by the then Lord Chancellor, Lord Irvine of Lairg, is a "revised" Protocol has been superseded by the effect of the new regime conducted under the auspices of the OJC as to which the Tribunal heard oral evidence which will be referred to below.

30. Although the formal practices and procedures with which complaints are now dealt have altered since 2003 (being a date falling within the middle of the period covered by the request), and more particularly since 2005, being the date of the request, the Tribunal is of the view that the basic tenets of the Protocol remain as true today as they were at the relevant date for the purposes of appeal, namely the date of the request, and most probably much of the period covered by it.

31. In 2005, the Lord Chancellor was head of the judiciary. As such, he was, as the Protocol puts it at 1.3, able to "*guide, advise or rebuke judges in relation to their personal conduct*". He also had the powers exercised with the agreement of the Lord Chief Justice "*to dismiss a District or Circuit Judge and other full and part time judicial*

office holders, for misbehaviour or in capacity" (see para 1.4). The same paragraph 1.4 goes on to state as follows, namely:

"*This process would in practice be initiated only in the most serious cases, following an investigation undertaken by a judge nominated by the Lord Chief Justice at the request of the Lord Chancellor. Judges at the level of a High Court and above may only be removed by The Queen, on presentation of an Address from both Houses of Parliament.*"

32. The Protocol then addresses the distinction referred to above at paragraph 23. At paragraph 3.1, it states that it is difficult to list every type of complaint about personal conduct. It adds that the Lord Chancellor's responsibility will "*normally be confined to complaints about personal behaviour within a courtroom*". It adds however that:

"*It will extend to matters outside the courtroom where the allegations concern behaviour that might tarnish the reputation of the judiciary or breach the office holder's terms and conditions of service*".

33. Paragraph 4.3 stresses that a complaint of whatever kind has to be made within a reasonable time. So, for example, tapes in criminal cases would be kept for five years, but the Lord Chancellor may consider complaints made after a longer delay, eg, where the reason for the delay has been a long running appeal. Paragraph 4.3 ends with the self-evident reminder that in deciding whether or not to investigate such a case, the Complaints Unit "*will consider whether the judge could reasonably be expected to remember the case and whether any materials exist that will enable the complaint to be investigated effectively*". As will be indicated below, the question of delay in this appeal is a matter that was stressed quite rightly by the Commissioner and by the Additional Party. Quite apart from inherent questions of unfairness, the elements referred to in paragraph 4.3 are clearly material considerations in addressing the issues raised in paragraph 28 above.

34. With regard to relaying the terms of any complaint to the judge in question, the Protocol stresses at paragraph 6.1 that the Complaints Unit would decide whether to write to the judge with a copy of the Complainant's comments, together with any background information. The letter would then explain that the comments may form part of the response to the Complainant and the same letter would also ask the judge

in question whether he or she was happy for the full response to be shown to the Complainant. The passage ended with the observation that there was "*no entitlement for a complainant to see letters from the judge, as correspondence between the Lord Chancellor, the judiciary and officials is confidential*".

35. The Protocol also stressed that the Lord Chancellor "personally" saw all serious complaints such as those alleging racial, sexual or other forms of discrimination. He also saw all complaints against judges of the High Court or above.

36. Section 12 dealt with the question of whether judges saw all complaints about their personal conduct. In general terms, complaints that resulted in no action being taken, particularly where they were rejected without further investigation, would not be placed on the judge's personal file. Nonetheless, paragraph 12.3 made the perfectly valid point that whilst most judges were never the subject of any complaints, a few might attract a disproportionate number. The paragraph noted that those judges who attracted a large number of complaints "*are a cause of some concern*". The Complaints Unit was then said to have maintained its own record of all complaints separate from the personal files of individual judges. Although the Tribunal heard nothing directly on this point, it infers from the material it has seen in and in the wake of the appeal that such a record would now be maintained by the OJC. In any event, where a judge was the subject of three or more separate complaints from different people in a period of five years or less, then that judge would be informed and sent copies of those complaints. Thereafter, any further complaints would be placed on the judge's personal file and he or she would be notified of them. It is quite clear from the way this section is drafted that this entire process would remain, and no doubt still remains, entirely confidential.

37. Paragraph 13.1 and following set out what details are kept on the judge's personal file. In effect, only complaints that were investigated would be placed on such a file. The paperwork would include a copy of the original complaint, the judge's response and the final reply to the complainant. Any other related correspondence, eg, advice from the Lord Chancellor would also be placed on the same file. The Complaints Unit would keep all electronic and paper copy details of all complaints, no doubt in the light of the matter set out in section 12. Destruction would occur with regard to rejected complaints after a three year term.

38. The Protocol also explained the role of the Presiding Judge with regard to circuit judges and below. The Presiding Judge would be closely involved in any investigation of a complaint that might merit further action. On the completion of such an investigation the Lord Chancellor might ask the Presiding Judge to speak to the judge on his behalf by way of discipline or advice. Monitoring of future conduct will also be possible. In relation to complaints made against High Court judges and above the Lord Chancellor will always notify the relevant head of division and would consult with him or her as necessary.

39. Section 15 deals with actions taken in the wake of a substantiated complaint. Paragraph 15.1 begins with the phrase "[the] Lord Chancellor will determine how best to deal with each case on its merits." Action short of dismissal, eg a rebuke or a warning would normally entail the Lord Chancellor writing to the judge concerned asking the judge to offer an apology or seeking an assurance that there would be no repetition of the events concerned. In some cases according to paragraph 15.3, the Lord Chancellor might wish to speak to the judge in person or he might ask the Presiding Judge or another judge at a suitable senior level to do so on his behalf. Paragraph 15.5 states specifically that when the Lord Chancellor "takes action in response to a complaint, he will inform the complainant, in general terms, of the action he has taken." As will be seen below, the role of the complainant is not without importance and the Protocol makes it clear that the complainant has a role to play even after the lodging of the original complaint. Paragraph 15.5 ends with the sentence "in cases which have attracted publicity, he may make a public statement." Paragraph 15.6 stresses that anonymised details of complaints might be published in Departmental Reports, answers to parliamentary questions and other public documents. Lessons learnt from complaints might also be promulgated through such organs as the Judicial Studies Board and the Council of Her Majesty's Circuit Judges.

40. Annex A prescribes the procedure relating to "formal disciplinary action and/or removal from office of full time judicial office holders". Paragraph 1 of the Annex makes it clear that should a complaint be deemed worthy of formal disciplinary action then disclosure will occur, albeit to either a head of division in the case of a High Court Judge or above or to a senior Presiding Judge. Should the Lord Chancellor

conclude that no further action was required he would duly notify the judge concerned. If he considered that the matter could be dealt with informally he would take the informal action himself or again invite the head of division or a senior Presiding judge to do so on his behalf. At this point there is the intervention of another judge of appropriate standing unless the judge in question indicates that he is content that the Lord Chancellor takes such action as he thinks fit without further investigation. Pausing here, the Tribunal is impressed by this particular safeguard since on any basis the intervention of an independent judge of similar standing quite apart from the prescribed procedures with regard to the complaint procedure as a whole, clearly provides substantial reassurance to the public that a serious case regarded as such by the judge under investigation himself has an inbuilt safeguard to ensure that a proper investigation is being carried out. Should a nominated judge be appointed he will conduct the investigation as he or she thinks fit. There will then be a report of the findings to the Lord Chancellor with a copy of his or her report to the Lord Chief Justice. Again the Tribunal pauses here to note that this level of care taken with regard to the investigation process should the judge being complained of be anxious that there be a proper scrutiny of the complaint, does not stop with the finding of the independent judge but goes on to be the subject of independent assessment by the Lord Chancellor and the Lord Chief Justice. At one point the Appellant expressed concern that there might be at least a perception that some form of cover up was being conducted at the instance of or directly or indirectly involving the Lord Chancellor. There has been no evidence placed before the Tribunal as to that contention and in the circumstances the Tribunal can only be guided by the evidence regarding the procedures prescribed by the Protocol and its access.

41. Indeed, paragraph 5 of Annex 5 makes it abundantly clear that the Lord Chancellor is, in the case of an investigating judge, to consider his or her report with such further information as is considered necessary. If he, i.e. the Lord Chancellor, considers there to have been serious misconduct then he will, if the Lord Chief Justice concurs, remove the judge from office or in the case of actions stopping short of removal, again with the concurrence of the Lord Chief Justice, take that action and invite the head of division or a senior Presiding Judge to do so on his behalf. Criminal convictions are singled out for special mention. Not surprisingly the Lord Chancellor viewed, and no doubt still views, conviction for a criminal offence potentially or

actually carrying a sentence of imprisonment as "generally incompatible with holding judicial office". The Tribunal would fully accept that in such a case the element of publicity is almost inbuilt into such circumstances.

Evidence

42. The Tribunal heard at length from Ms Dale Simon, the present Head of the Office for Judicial Complaints, i.e. the OJC. In her witness statement she explained that she has been in that position since April 2006. This is when the OJC was established as part of the implementation of the CRA. She describes the OJC as an "Associated Office of MoJ responsible for supporting the Lord Chancellor and Lord Chief Justice in carrying out their joint responsibilities for judicial conduct and discipline." The OJC is the subject of the 2006 Regulations as amended. The 2006 Regulations' full title is the Judicial Discipline (Prescribed Procedures) Regulation 2006. There are two sets of supporting Rules.

43. She confirmed that the JCU referred to in connection with the Protocol had dealt "almost exclusively" with judges in the Crown Court and County Courts and above other than Magistrates, tribunal members or coroners. She placed the numbers of reprimands and similar actions referred to above at paragraph 7 as articulated in the letter sent by the DCA in context by saying that in the years 1998 to 2005 exclusive, only a small percentage of the complaints received by the JCU constituted complaints potentially relating to personal misconduct. On average in those years only a few hundred complaints out of an average of over 1000 per year would be investigated. As has been already referred to, she confirmed only a very small number ultimately resulted in some sort of disciplinary action.

44. In paragraph 15 of her witness statement Ms Simon refers to three cases in which there had been a degree of media interest to such an extent that the Lord Chancellor decided to issue a press statement. Three incidents occurred in 1999, 2001 and 2004 respectively. They concerned cases in which a circuit judge had been convicted of drunken driving with another circuit judge falling asleep in the closing stages of a criminal trial. The third case involved the case of the coroner who had accumulated an undue backlog of cases. The Tribunal feels there is no necessity to

allude any further to these three individual cases. The relevance of these incidents is that they constitute a minute fraction of the total number of cases in which reprimands and disciplinary action of some sort were taken. There have been in addition a number of other fairly well publicised cases appearing after the period covered by the request but again the numbers are extremely small although the Tribunal had no direct evidence on similar cases occurring after the period covered by the request.

45. Ms Simon then revisited the figures of those cases in which disciplinary action had been taken as set out in the DCA's letter of December 2005 referred to above. She made some minor adjustments to the overall figures in the earlier years, namely 1998 to 2000 which are minor and not material for present purposes. She then explained the background to and effect of the changes introduced by the CRA. In her words at paragraph 26 she states:

"*The Constitutional Reform Act 2005 came into force on 3 April 2006. The Act instituted a number of significant constitutional changes. The Lord Chief Justice replaced the Lord Chancellor as Head of the judiciary with statutory responsibility for maintaining appropriate arrangements for the welfare, training and guidance of the judiciary of England and Wales. This includes a greatly enhanced role in judicial appointments and in the discipline of judicial office holders, in respect of which responsibility is shared with the Lord Chancellor. To support the Lord Chief Justice and the Lord Chancellor in relation to disciplinary work, the OJC was established in place of the JCU."*

She then continues as follows, namely:

"*27. Consistent with the Lord Chief Justice's new role as Head of Judiciary and the move towards a greater separation of functions, personal judicial records were transferred [sic] the Directorate of Judicial Offices for England and Wales ["DJO"] in April 2006.*

28. Although the DJO is an Associated Office of the Ministry of Justice, it was established solely to support the Lord Chief Justice in the exercise of his statutory functions as Head of the Judiciary. It operates at arms-length from the rest of the department, despite not having statutory independence. Most of the

information it holds belongs to the Lord Chief Justice rather than MoJ, and strict information - sharing protocol exist, further reinforcing the judicial independence enshrined in the Constitutional Reform Act. For example the Personal Judicial Records protocol states that:

The DJO should provide information/files to the OJC, for the purposes of conducting an investigation, on written request from the Head of the Office for Judicial Complaints or a nominated representative".

46. This prompted the later observation in her witness statement that any apparent actual discrepancy between figures previously given to the Appellant and to the Commissioner and those currently held by the MoJ was attributable to the fact that the relevant files were in 2009 at least and no doubt as from the date of the introduction of the CRA, "out of the control of the MoJ". She added the valid observation that insofar as Mr Evans' phrase "formal disciplinary action" was concerned, a decision made by the Lord Chancellor did not "necessarily distinguish between formal and informal action at the conclusion of a case."

47. She also noted that although the JCU had been established in an "*attempt*" (her italics) to centralize the handling of complaints against members of the judiciary, it may be the case that some matters would not have been transferred to it by other parts of the then Lord Chancellor's Department.

48. At paragraph 39 she ventured to observe that the "primary aim" of the disciplinary investigation is not to admonish the judicial office holder publicly. It is in her words "*to remind [the judicial office holder] of the expected standards of behaviour [sic] that office, and to prevent further incidents from occurring. Disclosure risks undermining a judge's authority and command whilst hearing cases. In addition release increases the risk of disruption of hearings conducted by a judge who has been disciplined; for example, in the form of an application for judges to recuse themselves even where the matters giving rise to disciplinary action are unconnected to the parties in the court case.*"

49. At paragraph 46, towards the end of her statement Ms Simon stated:

"*46. Moreover, scrutiny and debate over the process and outcome of a disciplinary investigation could inhibit the willingness of judicial office holders (and other relevant witnesses) to co-operate with such an investigation. By revealing details of investigations, in particular details referring to those who have provided evidence during an investigation could discourage others from coming forward in future investigations if they are not afforded confidentiality. Disclosure in direct opposition to the assurances of confidentiality that were given to all participants prior to their involvement would inevitably lead to members of the judiciary being increasingly reluctant to play an active role in the process. As a result, future investigations into improper conduct would be likely to be prejudiced."*

50. Mr Robertson took great exception on behalf of his client to that paragraph and in particular to the contents of the last two sentences. The Tribunal heard some evidence of cases in which Ms Simon or her colleagues had been involved in which this stated reluctance had been expressed. This matter will be revisited below but the Tribunal takes the view that it is perhaps not surprising that such evidence would not be easily forthcoming since it would be unusual to say the least for a potential judge or applicant for judicial office to express these feelings to the very office which in due course might administer a complaint relating to him or her prior to his or her appointment. As will be pointed out below the Tribunal is more influenced by the fact that were there to be an express reference in the terms and conditions of service relating to judicial office holders that all reprimands will be publicised, such would undoubtedly lead many people to feel that the confidence they might otherwise feel applied with regard to their office would not in all respects at least be fully respected. In any event the Tribunal is not totally prepared to dismiss Ms Simon's contentions even if there is a fair degree of speculation about the contents of the paragraph quoted above, given her three years' experience as head of the OJC. She had no direct experience of the relevant procedure and system prior to that date and therefore could only comment by analogy and subject to her limited knowledge on discussions and other matters that occurred prior to that date.

51. The Tribunal also had the benefit of a witness statement from Mr Evans. Mr Evans referred to a number of cases occurring since 2007, i.e. following the date of the introduction of the CRA, details of which he had obtained from the OJC website and

in which a number of judicial office holders of all ranks had been identified as being the subject of a reprimand of some nature. Mr Evans ends his witness statement echoing the thrust of the Appellant's case and taking issue with paragraph 36 of the Decision Notice. The Commissioner had stated that the procedure in place with regard to the investigation of judicial complaints provided a suitable public reassurance. Mr Evans maintains at paragraph 9:

"*The only way to show that the procedures are working properly is to open them to scrutiny and to publish details of the cases so that the public can see what is going on. Keeping these matters secret is no way to maintain public confidence. There is a strong public interest in disclosing this information."*

52. For reasons which have already been hinted at and which will be amplified below in relation to the relevant data protection principles the test is not as simple as Mr Evans apparently suggests, namely to consider merely or largely the public interest in ensuring that complaints of judicial misbehaviour remain open and transparent.

53. Mr Evans did, however, exhibit portions of the OGC's Annual Report 2006/2007. It reveals that for that period 3 "formal" warnings or advices were issued together with 13 "reprimands". There were in addition 16 removals from office. All three categories were further broken down into reasons for the relevant action. They are listed as: criminal proceedings or convictions, failure to fulfil judicial duty, failure to have regard to potential disciplinary matters, inappropriate behaviour, inappropriate comments, misuse of judicial status, motoring related offences and professional misconduct. One of the individuals referred to by Mr Evans being a magistrate also provided a witness statement. Without in any way intending any disrespect towards this individual the Tribunal notes that on this individual's own express admission the individual in question actively sought publicity about the facts concerning that individual's reprimand. It is therefore difficult to see what, if any, correlation that case has with the issues considered in the appeal.

54. In response to certain queries raised by the Tribunal in the wake of the hearing of this Appeal, the Additional Party provided an additional witness statement from Mr Jonathan Creer of the DJO and Head of the Judicial Human Resources in that office.

This is a role he has held since April 2006. His evidence will be reviewed later in connection with the relevant effect of the CRA.

The OJC Annual Report 2007/2008

55. The Tribunal was also provided with the OJC's Report for 2007/2008. Although the Tribunal obviously firmly recognises that events since the date of the request are not directly relevant to a consideration of whether the request was properly dealt with by the appropriate public authority and even though it is clear from what has already been said, that the CRA has had a significant effect on the structure and control of the judiciary, the Tribunal perceives no fundamental change in the way in which what are being called reprimands are dealt with and in particular in the manner and the extent to which they are published.

56. It appears to the Tribunal that a request for disclosure of the detail of all reprimands and of the identities of the judicial office holders is inextricably linked with the consideration of whether the entire process of investigating judicial complaints is one which can be shown to have displayed and to have continued to display and merit the necessary public confidence.

57. It is true that the 2007/2008 Report identifies the ways in which the OJC itself admits that it can be improved. Indeed Ms Simon in her foreword as head of the OJC expressly says so. The fact that the OJC continues to admit that improvements can still be made, however, is not necessarily indicative that the system it represents is in any way defective or failing in the aims encapsulated in the previous paragraph. In particular it does not in the Tribunal's view in any way indicate or suggest that a decision by those who are responsible for the procedure, to publicise on such occasions as are thought appropriate the names and identities of those who are considered to be suitable subjects of public disclosure, is in any way flawed. The CRA brought in the 2006 Regulations. The 2007/2008 Report reflects and refers to revisions and changes to the 2006 Regulations. Nonetheless the Tribunal is of the view that this in no way implies that the procedures regarding when and how disclosure should be made as to the fact and content of any reprimands is in any way deficient. In the year 2007/2008 the number of judicial office holders subject to

disciplinary action amounted to a total of 49, a figure that could be said to be more significant than the numbers apparently reprimanded for each of the years covered by the request. However, again the Tribunal fails to see how that fact alone bears upon the real issues canvassed in this appeal.

58. A news release issued by the OJC for the year 2007/2008 explains as in previous years what comprises the categories of inappropriate judicial behaviour. Twenty-one cases involved not fulfilling judicial duties, twelve for inappropriate behaviour in court, seven for motoring offences and three each for discrimination, criminal convictions and the misuse of judicial status. On any basis the figures are extremely low particularly when placed against the context of the far more substantial number of individuals occupying judicial office of whatever sort from High Court down to the lower courts and tribunals.

Guide to Judicial Conduct

59. During the appeal, the Tribunal made enquiries as to what can be called the terms and conditions of service which attach to judicial appointments. The MoJ provided a copy of the Guide to Judicial Conduct originally published it seems in October 2004, albeit in a revised edition from 2007. The Tribunal is prepared to accept that the gist of the Guide, if not the majority of its contents, was applicable during the period covered by the request. Indeed the Acknowledgment within the Guide supplied to the Tribunal refers to a November 2002 paper called "Guidelines to Judicial Ethics" stated to have provided assistance in the compilation of the Guide. The Guide apparently represents the fruits of a working party consisting of senior judges, i.e. High Court and Circuit Judges.

60. The Guide itself begins with a section dealing with the so-called Bangalore Principles of Judicial Conduct born out of a United Nations initiative in 2001. In his argument, Mr Robertson laid great stress on their application in this appeal. Admittedly, the Principles expressly purport to establish standards for the ethical conduct of judges. One of the principles, namely the fourth, addresses what is called propriety, and the appearance of propriety which are described as being "*essential to the performance of all the activities of the judge*".

61. In the Tribunal's view, however, it is clear that the main purpose of the Principles is to remind judges of their professional duties and obligations. As indicated above, personal misconduct may well involve professional misbehaviour, but to focus upon the need for the judicial office holder to be fully aware of his or her predominantly professional duties and obligations is but one element in the overall equation in play in this appeal. As indicated above, the broad issue in this appeal is in effect to balance the purpose of the legitimate interests pursued by the data controller against any unwarranted effect caused by prejudice to the rights and freedoms or legitimate interests of the data subject. If the Guide, let alone the Bangalore Principles, has any role to play it is strictly only in assessing the legitimate interest pursued by the data controller, namely the MoJ, at the relevant time.

62. The Guide gives a number of incidents or situations in which impropriety might occur such as bias, being itself an example of where personal misconduct overlaps with professional misconduct. It could be said that in such a case the Guide purports to provide a workable solution namely to seek to ensure that any perceived or possible bias is resolved before the hearing. It is difficult to see how the data controller's legitimate interests relevant to discipline, in turn leading to a reprimand, are advanced in any meaningful way by disclosing the identity of a particular office holder who exhibits serious bias resulting in a complaint during or after a hearing.

63. The same approach can be taken with regard to the question of integrity. At section 4.1, the following passage appears and is particularly instructive, namely:

"Judges have to accept that the nature of their office exposes them to considerable scrutiny and puts constraints on their behaviour which other people may not experience. Judges should avoid situations which might reasonably lower respect for their judicial office or might cast doubt upon their impartiality as judges. They must also avoid situations which might expose them to charges of hypocrisy by reason of things done in their private life. Behaviour which might be regarded as merely unfortunate if engaged in by someone who is not a judge might be seen as unacceptable if engaged in by a person who is a judge and who, by reason of that office, has to pass judgment on the behaviour of others." Again, in the Tribunal's view, it can be said with some force that the purposes of the legitimate interests of the MoJ and, indeed, of the JCU as it then was in 2005, would not have been further

served or enhanced by the disclosure of all reprimands, save in respect of personal insolvency or other financial embarrassment when such interests are amply addressed and provided for in the Guide.

Terms and conditions of judicial appointment

64. During the appeal, the Tribunal also made enquiries as to the relevant content, if any, in the terms and conditions of appointment relating to at least one level of judicial appointment at a fairly senior rank. The Tribunal has been provided with an undated copy of a Memorandum on Conditions of Appointment and Terms of Services relating to Circuit Judges issues by the Lord Chancellor's department.

65. The Tribunal is of the clear view that one factor which enters into the equation reflected in the data protection principles (and set out in general terms on more than one occasion above) and which must be taken into account in assessing the rights and legitimate interests of the judicial office holder as the data subject, is whether, and if so to what extent, the office holder is prejudiced in the way in which matters which might otherwise lead to judicial misconduct are addressed in the above Memorandum. In paragraph 44, for example, a judge is informed that if he is charged with any serious criminal offence, he should report the same at once to the Lord Chancellor's Department. Failure to do so, it is provided, could in some cases amount *prima facie* to misbehaviour. The Memorandum goes on to point out at paragraph 45 that the Lord Chancellor believes that "*the public must be entitled to expect all judges to maintain at all times the proper standards of courtesy and consideration*". It goes on to state that behaviour which could cause offence "*particularly on racial or religious grounds or amounting to sexual harassment is not consistent with the standards expected of those who hold judicial office.*" The same precept applies to severe financial difficulties, especially those where legal proceedings appear likely to be, or have already been initiated. The point has already been made above.

66. The above matters referred to in the preceding paragraph are no more than illustrative of the fact that in the case of a holder of judicial office such as a Circuit Judge, if he or she does not already know of those matters which may lead to a

reprimand or serious action being taken in connection with judicial or personal misconduct, he or she is told in no uncertain terms of what is expected of them. The Tribunal feels that the disclosure of all such reprimands and such serious actions would be disproportionate, particularly after the lapse of time when the matter in question would be regarded as dealt with and closed. As Mr Robertson himself appeared to recognise, judges assume the role of their office with the full realisation of what is expected of them.

67. The above is no more than a reflection of section 5 in the Guide. That section is headed "Propriety". Section 5 is in fact tantamount to a guide on how to be and behave as a good judge. It addresses a range of matters from having to accept a level of public scrutiny higher than that normally experienced by the average citizen, to financial probity and the need to avoid all possible potential or actual conflicts of interest. The list of matters addressed by section 5 is in effect a check list of potential activities each capable of a possible reprimand or even removal. Yet again, the Tribunal is firmly of the view that the MoJ can be seen to have amply, if not wholly, pursued its legitimate interests in setting out these matters to such an extent that disclosure of the type requested by Mr Evans' request would add nothing to the value of the overall exercise. Indeed, to attribute any meaningful degree of necessity to a subsequent publicity of any reprimanded judicial office holder itself does a disservice to the vast majority of all such office holders. It can be seen from the statistics alone as provided during this appeal that the overwhelming majority of judicial office holders have conducted and continue to conduct themselves with totally acceptable, if not perfect, propriety throughout the period complained of and indeed beyond.

68. In the Appellant's outline written submissions, it is accepted that judges "*would be aware of the <u>possibility</u> of disclosure*" (emphasis in original). This is clearly correct. But it is not permissible in the Tribunal's view then to contend that the possibility of publication must be equated with the publicity attendant upon disciplinary proceedings relating to other branches of the legal profession. For the reasons set out earlier, the judicial sphere raises separate considerations from those applicable in the arena in which solicitors and barristers operate.

69. It follows from the above, in the Tribunal's view, that the prospect of a publicised reprimand logically would have to be explicitly made clear to office holders as a term or condition of their employment. At the moment it clearly is not. It is not therefore unrealistic in the Tribunal's view to assume that were they to be told of that inevitable eventuality, many might well consider a number of options to avoid any possible reprimand ever appearing, or risking appearing, in the public domain ranging from a lack or even absence of frankness in reporting on any matter which might otherwise form the basis of or relate to a complaint, to a total reconsideration of their position as serving or prospective judges. Finally, an office holder would not in such circumstances be able properly to assess the degree of seriousness which particular forms of misconduct might entail.

The CRA

70. In addition to the witness statement referred to by Ms Simon, the Tribunal was provided with a witness statement from Jonathan Creer of the Directorate of Judicial Offices for England and Wales. He is, as indicated above, currently Head of Judicial Human Resources Services, a role he has had since April 2006. He heads a team of civil servants in charge of assisting the Lord Chief Justice in the administration and performance of his powers and duties as Head of the judiciary. The Directorate already referred to in this judgment is the DJO which was established on 3 April 2006 to reflect the coming into force of the CRA. Mr Creer did not give oral evidence before the Tribunal.

71. As Mr Creer succinctly puts it, the CRA was intended to clarify and enhance the constitutional separation of powers. Amongst other things, it reformed the role of the Lord Chancellor with respect to the matters in issue in this appeal. The CRA transferred the position of the Head of judiciary in England and Wales to the Lord Chief Justice who at the same time became President of the Courts of England and Wales. In particular, the CRA gives the Lord Chief Justice general statutory responsibility for representing the views of the judiciary to Parliament, the Lord Chancellor and to Ministers generally.

72. The DJO was created in order to assist the Lord Chief Justice in exercising his new functions. It has a sizeable staff and budget to match. Mr Creer explains that the OJC was set up at the same time as the DJO. At that time, the Department for Constitutional Affairs now divided what it called its "relevant records" amongst the new organisations. The files relating to judges were divided between the DCA or the MoJ, the Judicial Appointments Commissions (JAC), the OJC and the DJO. Current files containing complaints about judges or details of any resulting investigation were transferred to the OJC. Past complaint files treated as correspondence files were retained within the MoJ. Judges' personal files which might have included in any given case correspondence about complaints were split up. Mr Creer states "*papers relating to the appointment of particular judges, including past appointments of judges now retired*" were transferred to the JAC. It is not clear whether such transferred files might have included correspondence and documents regarding complaints. In any event, the Tribunal infers that the JAC, not being part of the DJO, is in general terms answerable to the MoJ.

73. According to Mr Creer, all remaining papers on the judges' personal files were transferred to the DJO, as he says, "*to hold on behalf of the LCJ*" who is now "owner" of these files as part of his statutory responsibility for the welfare, deployment and management both of individual judges and of the judiciary generally.

74. Mr Creer confirmed that information about complaints or disciplinary investigations are not generally kept on the judges' personal files except where such complaint, etc results in an adverse finding and some formal action is taken and a relevant letter to the judge from the Lord Chief Justice or the Lord Chancellor or both, is copied to that file.

75. Mr Creer added that staff in the MoJ, JAC or the OJC would "normally" have no need to see a judge's personal file and would have their own files in relation to, amongst other things, complaints, but in his words "*they can require sight of the personal file if they have a business need to under the terms of the protocol agreed at the time the various files were divided up*". The sum total of the above evidence appears to the Tribunal to be that the requested information would generally not be kept on a judge's personal file, except for a copy of any letter or letters of reprimand. The Tribunal also infers that the information requested has been retained by the OJC, but

if there was need to obtain documents held by the Lord Chief Justice, the Protocol could be invoked.

76. The Additional Party separately confirmed to the Tribunal that the DJO is a data controller in its own right. Through representations made by the MoJ, the DJO confirmed that any files it held were unlikely to contain information which was not available within the OJC or which had not been retained by the MoJ itself.

77. However, given the determination by the Tribunal in the present appeal, the Tribunal regards it as unnecessary to ask for further inspection of any information held by the DJO or to make any appropriate directions in that regard.

78. The CRA itself deals in Part 4 with judicial appointments and discipline. Without reciting this section in full, section 139 which is headed "Confidentiality" provides that a person who obtains confidential information or to whom confidential information is provided under *inter alia* Part 4 "*must not disclose it except with lawful authority*". Section 139(3) specifies that information is confidential "*if it relates to an identified or identifiable individual (a "subject")*". Subsection (4) provides that confidential information is to be disclosed with lawful authority only if it is done either with consent or is necessary for the exercise by any person of functions under a relevant provision, i.e. Part 4, or for other purposes which are not material to the present appeal. Subsection (5) clarifies the fact that an opinion or other information given by "*one identified or identifiable individual … about another … is information that relates to both*" and must not be disclosed to the second individual without the former's consent. Section 139(6) is a critical provision and provides in terms that:

> "*(6) This section does not prevent the disclosure with the agreement of the Lord Chancellor and the Lord Chief Justice of information as to disciplinary action taken in accordance with the relevant provision.*"

Subsection (7), not unnaturally, says that nothing in section 139 prevents the disclosure of information "*already or previously available to the public from other sources*". Contravention of any provision within section 139 constitutes an actionable breach of statutory duty at the suit of the person who was the subject of the information.

79. Reference has already been made to the 2006 Regulations. These Regulations which again need not be recited in any detail, provide comprehensive procedures for the treatment of disciplinary complaints. In effect they codify the practice which obtained in the period covered by the request. In Part 8 which deals with miscellaneous provisions and Rule 40 it is specifically provided by sub rule (1) that the Lord Chancellor and the Lord Chief Justice "*shall inform the complainant whether his complaint has been upheld or dismissed, and what if any disciplinary action they have agreed to take*". The remaining subparagraphs within this Rule read as follows, namely:

"*(2) The Lord Chancellor and the Lord Chief Justice shall agree upon the terms of any information given under paragraph (1) and the manner in which it shall be given.*

(3) The Lord Chancellor and the Lord Chief Justice may disclose information about disciplinary proceedings or the taking of disciplinary action against identified or identifiable judicial office holders to anyone to whom they agree it is necessary to give such information.

(4) The Lord Chancellor and the Lord Chief Justice may agree to the public disclosure of information about disciplinary action where they agree that the maintenance of public confidence in the judiciary requires that such information be disclosed."

The quoted sub rules again do no more than reflect and express in statutory language the practice which clearly pertained during the period covered by the request.

The issues

80. The issues in this appeal are threefold. First, the question whether section 40 of FOIA is engaged and in particular, whether the condition imposed by paragraph 6(1) to Schedule 2 to the DPA is satisfied that such a disclosure is justified. The second issue is whether the Additional Party can invoke section 31 of FOIA in the light of the

fact that section 31 did not feature in the Decision Notice. The third issue is whether the claim relying upon section 31 should be upheld. The parties seemed agreed that section 36 raised no separate issues which could not properly be considered under sections 40 and 31.

81. Section 40 provides as follows:

"*(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 second condition below is satisfied.

(3) The first condition is –

(a) in a case where the information falls within any of the 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 …

(4) The second condition is that by virtue of any provisions of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data)."

82. As a result of section 2(3)(f) of FOIA, information falling within section 40(1) and "*subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section*" is to be treated as falling within an absolute exemption. Information falling within section 40(4) is to be treated as subject to a qualified exemption.

83. A preliminary sub-issue is whether the information being requested here constitutes "personal data". The term "personal data" in section 40 has the same meaning as

that afforded to the term in section 1(1) of the 1998 Act. It is defined under the 1998 Act as meaning:

"*… data which relates to a living individual who can be identified –*

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

(i) and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual".

84. As indicated above, Mr Robertson throughout his submissions to the Tribunal contended that the information requested in this case did not constitute personal data but instead had the character of some form of public data or as he put it on one occasion, a form of indictment which again was public in nature.

85. The Tribunal has no hesitation in rejecting that contention. It has seen the essential information requested. It provides the clearest possible set of examples of personal data, not only because it relates to a living individual in the sense of directly identifying the individual judicial office holder who is involved, but also constitutes what could be called a paradigm illustration of an opinion or set of opinions about those individuals as well as the most explicit consideration of the data controller's intentions in that regard.

86. In the light of that finding, the Tribunal can turn to the relevant provisions of the 1998 Act in section 4 and Schedule 1, Part 1. Section 4 provides that references in the 1998 Act to the data protection principles are those set out in Part 1, Schedule 1. Section 4(4) makes it clear that 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. The first data protection principle is set out in Schedule 1, Part 1 at paragraph 1 as follows, namely:

"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, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

The second data protection principle is contained in paragraph 2 of Schedule 1, Part 1 and reads as follows, namely:

"*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.*"

Schedule 2 sets out various conditions at least one of which must be met in order to meet the requirements of the first data protection principle. The relevant condition has been indicated above and is the sixth condition which provides as follows, namely:

"*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 exercise which this condition engages is to balance the legitimate interests of the public on the one hand to whom the data might be released and the degree of prejudice which such disclosure would cause the data subject.

87. Although the Additional Party endorses this last formulation, the Tribunal would respectfully qualify it by saying that, in effect, what should also be taken into account given the wording of 6(1) are, in addition, the interests of the data controller itself.

88. The Tribunal is aware of a number of important authorities that bear on this first issue. In *Commons Services Agency v Scottish Information Commissioner* [2008] 1 WLR 1550, especially at paragraphs 7, 28, 67 and 68, Lords Hope and Rodger emphasised the continued primacy of the 1998 Act with this protection of personal data despite the passage and implementation of FOIA. In effect, both the learned Law Lords made it clear that the provisions of the 1998 Act were not "designed" to

facilitate the release of information and must be read in the same way even after the passage of the 2005 Act.

89. In *Waugh v Information Commissioner and Doncaster College* EA/2008/0038, the Tribunal had to deal with a refusal to provide information concerning the dismissal of the Principal of Doncaster College and upheld that refusal. In paragraph 40, the Tribunal emphasised that there is "*a recognised expectation that the internal disciplinary matter of an individual will be private*". The more senior the member of staff, the higher that expectation. At paragraph 40, the Tribunal noted:

"*Even in the public sector compromise agreements may be expected to be accorded a degree of privacy as long as there is no evidence of wrong doing or criminal activity present".*

This Tribunal fully recognises that this is by no means an immutable proposition. However, it is a factor which the Tribunal is entitled to take into account given the particular circumstances of the case.

90. In *Corporate Officer of the House of Commons v Information Commissioner* EA/2007/0060, at paragraphs 56 to 62 inclusive, the Tribunal considered the interpretation of paragraph 6 of Schedule 2 and said at paragraph 58:

"*While it is proper to recognise the public interest in the disclosure of official information as being relevant under condition 6, we think it is important not to lose sight of the principal object of the DPA, which is to protect personal data and allow it to be processed only in defined circumstances. The first part of condition 6 can only be satisfied where the disclosure is "necessary" for the purpose identified. The second part of condition 6 is an exception, even where the disclosure is necessary we must still go on to consider whether the processing is unwarranted in a particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects.*"

This Tribunal respectfully adopts the content and thrust of that passage.

Finally, in *Roger Salmon v Information Commissioner and King's College Cambridge* EA/2007/0135, particularly at paragraphs 30, 44 and 47(4), the Tribunal emphasised

that an employee had "*reasonable expectations of privacy*" with regard to employment affairs which expectations could be placed in the balance with regard to the exercise to be conducted under paragraph 6.

91. In assessing the necessity referred to within the terms of condition 6(1), this Tribunal takes into account the following additional factors. First, it is clear that the provisions of paragraph 3 of Schedule 7 ("Miscellaneous Exemptions") of the 1998 Act are relevant. They provide that personal data processed for the purposes of assessing a person's "suitability for judicial office" remain exempt from the subject information provisions. Public disclosure across the board would be, to say the least, somewhat inconsistent with the inability of the data subject himself to access subject information by virtue of this provision. The Tribunal finds no ambiguity in the terms of paragraph 3. "Assessing" someone for judicial office clearly encompasses review of that person's performance whilst in office.

92. Moreover, having seen the disputed information, the Tribunal is satisfied that despite the absence of any argument on the point, there would clearly be issues about the presence of sensitive personal data which would raise issues under section 2 and Schedule 3 of the 1998 Act. This in turn would trigger issues as to whether or not any of the conditions specified in Schedule 3 to the 1998 Act as supplemented by the provisions of The Data Processing (Processing of Sensitive Personal Data) Order 2000, SI 2000/417 were met.

93. The Tribunal is also impressed by the fact that the Protocol described at length above, sets out clear procedures for enquiries and even during the time period covered by the request, enough was placed into the public domain about the fact and scope of the reprimands or serious actions taken by virtue of the various publications referred to, eg, lessons learnt reports. The Tribunal regards these elements as together constituting at least a partial satisfaction of any public interest element which needs to be met by virtue of the condition.

94. The next factor concerns the independence of the judiciary, a point firmly contended for by Mr Robertson. This, to some extent, has been touched on already. If a judge commits any form of personal misconduct in court then it remains by definition in the public domain, albeit with not quite the publicity that media coverage might entail. In

any event, a judge's role is by definition in the public domain. The differences between judicial activity and other legal activity have already been referred to above. The Tribunal is not particularly impressed by the impact, if any, that the so-called Bangalore Principles bring to bear upon this issue. They are not technically part of English law and in any event, as indicated above, the thrust of the Principles concerns in-court behaviour and not the full range of personal misconduct covered by the request.

95. Mr Robertson also stressed that the public had a right to know by virtue of the interest that releasing the information would generate and in turn, judges themselves would learn what constituted and what did not constitute judicial misconduct. The Tribunal respectfully disagrees with this approach. Enough has been said in this judgment to show that the principles published in relation to judicial activity as well as the terms and conditions of employment with regard to senior judges make it quite clear to judicial office holders what is expected of them. Little more could be learned from these materials by dint of the publication of all reprimands to judicial office holders.

96. The Tribunal, as indicated above, is also impressed to some extent by the reasonable expectations of privacy which a judge might expect. This is touched on in paragraphs 33 and 61 of the Decision Notice. As such, the Tribunal is minded to view the matter in terms of the way it was put above in paragraph 69 with regard to the consequences were it to be made clear in the terms and conditions of employment that a reprimand would, in all circumstances, be publicised. Reference in this respect can also be made again to the *Waugh* and *Roger Salmon* decisions referred to above. In any event, as the Commissioner pointed out in argument, any reasonable expectation of privacy would go towards the overall question of unfairness which determines the operation of the first data protection principle.

97. Mr Robertson contended that any distress that might be caused by disclosure is outweighed by the overarching need to have the administration of justice conducted on a proper basis. There can be no doubt in the Tribunal's mind that were all reprimands to be publicised in the way sought for by the Appellant, there would clearly be a risk of there being great distress to at least some judicial office holders. Although each of these factors is not determinative, the Tribunal is impressed by the

fact that first, any reasonable expectation of privacy would be breached, secondly, that privacy would be invaded, perhaps intrusively so, leading to perhaps even further invasion of privacy in the form of press coverage which might or might not be accurate, a point identified by paragraph 27 of the Decision Notice, and finally, there might well be, in many cases, a degree of disproportionateness in that disclosure could cause an undermining of authority generally and thus prejudice any further employment prospects of whatever sort in the wake of a reprimand. The Tribunal is also particularly impressed by the fact that having seen the essential requested information, it would be unfair for disclosure to be made as to a reprimand that occurred in 1998, not only were the same to have been publicised in 2005, but also even now many years later, when the office holder may still be in office and have otherwise conducted his or her functions in a totally acceptable and otherwise unimpeachable manner.

98. Finally, the Tribunal reiterates the principles embodied in the provisions of section 139 of the CRA together with Regulation 40 of the 2006 Regulations. Given the proximity in time relating to the implementation of these provisions to the time covered by the request, it can be, in the Tribunal's view, properly inferred that the relevant intention behind the statutory provisions represented public interest considerations already being debated or capable of being debated during the period in question.

99. Three additional points were brought out by Ms Grey on behalf of the Additional Party. These were made in answer to specific submissions that had earlier been made by Mr Robertson. First, she contended, in the Tribunal's view quite correctly, that it is not correct to view there as being a legitimate public interest in knowing how the system worked and whether it worked effectively with regard to reprimands and sanctions. Ms Grey pointed out that such knowledge as would be gleaned from this information would be only partial: the public would not be aware of what complaints were dismissed. In this connection, she pointed out again quite correctly, in the light of the materials mentioned above that if the concern of the public was to see whether the judiciary behaved properly, statistically it was convincingly demonstrated that only a small number of reprimands occurred against the backdrop of a much larger number of judicial office holders otherwise attracting no sanction whatsoever,

Second, Ms Grey refuted the contention made by Mr Robertson that the judiciary would benefit from standards brought out and illustrated by any publication. She pointed out again quite correctly that there is no evidence that this was the case, and, given the terms of the Protocol referred to above, there were many avenues in which the relevant information was broadcast, eg, through the publication of lessons learnt. Thirdly, she rejected the contention which has already been referred to that the Lord Chancellor was in some way implicated in improperly concealing the information sought. Enough has been said already to show that even in the period covered by the request, the Lord Chancellor did not exercise his role with regard to any sanction, save in conjunction with other members of the judiciary.

100. In all the circumstances, the Tribunal is entirely satisfied that reliance upon section 40 was fully justified by the Commissioner and on this basis alone, it dismisses the appeal.

Section 30(1)

101. With regard to the second issue, the Tribunal is quite content to allow late reliance upon this exemption, even though the same did not figure in terms on the face of the Decision Notice. Reliance was placed by the Additional Party on section 31(1)(c). Section 31 provides relevantly:

"*31(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –*

(c) the administration of justice …"

Section 31 therefore deals with law enforcement and is a prejudice-based exemption.

102. The Tribunal is happy to rely upon the matters set out in the MoJ's letter of March 2008 to the Commissioner. The Tribunal duly finds that identification of the members of the judiciary who are disciplined and the reasons for that action would prejudice the administration of justice within the terms and effect of section 31(1)(c).

103. The Tribunal repeats the facts and matters set out in relation to section 40 in paragraphs 88 to 89 above but also adds that the following factors weigh heavily in the equation in favour of maintaining the qualified exemption.

104. First, there is no doubt that members of the judiciary should possess the highest standards of independence, integrity and competence. This in turn entails public trust in the judiciary, but such public trust must also be engaged with the reassurance that any complaints against judges are effectively investigated and resolved.

105. Admittedly, the Tribunal recognises that disclosure in the way sought for in this appeal would further the interests of transparency and accountability but some of the information on the handling of complaints has already been supplied to the public. The additional point has already been made that misconduct by a judge in court in his or her judicial capacity will by definition be open to public scrutiny. Professional misconduct insofar as the same overlaps with personal misconduct will be subject to the appellate process. These elements have to be weighed together to consider what the overall effect of releasing the disputed information would be in terms of its likelihood in prejudicing the administration of justice.

106. Enough has been said in the earlier part of this judgment to show that disclosure would risk undermining a judge's authority while carrying out his or her judicial function. Recently, a very senior judge was reprimanded by the Lord Chief Justice, but has continued in office carrying out his judicial functions. His earlier behaviour justifying the reprimand would by definition have been well known to members of the profession used to appearing before him thereby entailing an increase in the number of cases seeking an adjournment or in some cases an application that the judge in question not hear the particular case. This clearly has adverse implications for the public and for the administration of justice generally. The Tribunal does not think it at all far-fetched to assume that were disclosure made in the way requested, trials could be disrupted, coupled with a potential for information about disciplinary actions used to support applications for judges to recuse themselves in the way indicated above.

107. For all the above reasons, the Tribunal is satisfied that quite apart from the main ground justifying the dismissal of this appeal, the exemption under section 31(1)(c) is

engaged and that on balance, the public interest in withholding the information sought outweighs the public interest in disclosing the information sought.

Conclusion and remedy

108. For all the above reasons, the Tribunal upholds the Decision Notice and dismisses the appeal.

109. Our decision is unanimous.

Signed:

David Marks QC
Deputy Chairman Date 10 June 2009