



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2018/0071

Hearing on 20 November 2018

Before

**JUDGE MELANIE CARTER
ROGER CREEDON
DAVID WILKINSON**

Between

STEFANIA MAURIZI

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

THE COMMISSIONER OF POLICE FOR THE METROPOLIS

Second Respondent

Introduction

1. This is an appeal under the Freedom of Information Act 2000 (“FOIA”) by Ms Maurizi (the Appellant) against decision FS50717400 issued by the First Respondent, the Information Commissioner (“the Commissioner”), on 8 March 2018. The Commissioner and the Second Respondent, the Commissioner of Police for the

Metropolis (“the Met Police”), both oppose the appeal.

2. The decision under appeal arose from a request for information under FOIA made by Ms Maurizi to the MPS on 29 June 2017. Ms Maurizi asked for:

“a copy of the correspondence between the [United States Department of Justice] and the Met Police on [three named individuals] from June 2013 to June 2017.”

3. Ms Maurizi had made an earlier FOIA request seeking information and the Met Police had refused on the basis that it would not be possible to respond to the request within the costs threshold and asked the Appellant to “specify exactly what documents you are after for us to answer this request within the costs limit.”
4. The three named individuals, all working for or in association with Wikileaks, had also been referred to in the previous FOIA request made by Ms Maurizi. That request said that those three individuals had been *“targeted by a subpoena issued by the US Justice Department which required Google to hand over all their emails”*.
5. The Met Police refused to confirm or deny whether it held information within the scope of Ms Maurizi’s request of 29 June 2017. It relied on the “neither confirm nor deny” (“NCND”) provisions under section 40(5) FOIA. This decision was upheld on internal review. Upon Ms Maurizi’s complaint, the Commissioner agreed that the Met Police had correctly relied upon that exemption.
6. Ms Maurizi put forward four grounds of appeal. At the hearing on 20 November 2018, the Tribunal considered and determined these grounds of appeal. The appeal is upheld for the reasons set out below.
7. At the hearing, the Tribunal heard from counsel for Ms Maurizi, counsel for the Commissioner and heard oral evidence from Ms Maurizi, an Italian investigative journalist and one of the three named individual. Mr Hrafnasson, the editor in chief of Wikileaks. The Met Police had provided documentary evidence including a witness statement from the relevant official and submissions, but did not attend the hearing.
8. In brief, the main issues before the Tribunal were whether the Met Police had been correct in its refusal to confirm or deny whether the requested information was held and further to that: (i) whether the information within the scope of Ms Maurizi’s request (if held) would be sensitive personal data, and (ii) whether the public confirmation that the Met Police does or does not hold such data would meet a Schedule 2 and 3 condition or a breach of the First Data Protection Principle (“DPP1”).

The Law

9. The relevant law considered in this appeal is set out below. This concerns the interface between FOIA and the Data Protection Act 1998 (“DPA”) (not the GDPR, as the decisions under appeal took place before the introduction of the GDPR and enactment of the Data Protection Act 2018).
10. Particular provision is made in FOIA for circumstances in which a public authority is not required to confirm or deny whether requested information is held, where the request would lead to disclosure of personal data, be it the personal data of the requester or third parties as here (the three named individuals). It was not disputed that confirmation or denial that any correspondence was held (further to the request) would constitute the personal data of the three named individuals within the meaning of section 1 DPA.
11. Thus the Met Police relied upon Section 40(5)(b)(i) FOIA in its refusal either to confirm or deny whether it held the information requested. This section provides insofar as relevant that:

(5) The duty to confirm or deny—

...

*(b) does not arise in relation to other information if or to the extent that either—
(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded...*

12. First, at issue was whether any personal data which would be processed in the Met Police confirming or denying that the information was held would be sensitive personal data under section 2 of the Data Protection Act 1998 (“DPA”). Section 2 definition of sensitive personal data includes:
“information as to:...
(g) the commission or alleged commission by him of any offence, or
(h) any proceedings for any offence committed or alleged to have been committed by him...”.
13. The relevant Data Protection Principle under consideration for the purposes of section 40(5)(b)(i) is the First Data Protection Principle (“DPP1”) that data must be processed “fairly and lawfully”. This requires any processing to be fair, lawful and for a condition under paragraphs 2 and if relevant 3, to be met.
14. Ms Maurizi relies upon paragraphs 1 in both Schedules 2 and 3 of the DPA, on the basis that consent had been provided.
15. Whilst not argued by Ms Maurizi, the Tribunal considered paragraph 6 of Schedule 2 to be relevant. This provides that:

“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.”

16. Counsel for Ms Maurizi argued that if the Tribunal considered that the personal data in question is sensitive personal data, and further, if it were to form the view that there is inadequate consent, she argues that condition 3 of the Processing of Sensitive Personal Data Order 2000 (“the Order”) applies to meet the requirements of DPP1. That condition applies where:

(1) The disclosure of personal data—

(a) is in the substantial public interest;

(b) is in connection with—

(i) the commission by any person of any unlawful act (whether alleged or established),

(ii) dishonesty, malpractice, or other seriously improper conduct by, or the unfitness or incompetence of, any person (whether alleged or established), or

(iii) mismanagement in the administration of, or failures in services provided by, any body or association (whether alleged or established);

(c) is for the special purposes as defined in section 3 of the Act; and

(d) is made with a view to the publication of those data by any person and the data controller reasonably believes that such publication would be in the public interest.

17. Finally, under this section of the Decision, section 16 of FOIA provides:

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.”

Ms Maurizi’s submissions and evidence

18. Ms Maurizi relied upon three letters from the three named individuals each one of which stated, in slightly varying terms, that they consented to the requested information being provided “to Ms Maurizi, the journalist”. In support of this each named individual had provided a witness statement for the appeal in which they clarified what they had meant by these letters and the circumstances in which the letters had been put together.
19. Ms Maurizi put forward the suggestion that this appeal raised a general question of law: whether a data subject can give consent to the disclosure of personal information to another person under FOIA and, if so, what form of consent is required in order to permit such disclosure. More widely it was suggested that this was of particular significance to investigative journalists seeking information that was personal data, in circumstances in

which the subjects of that information preferred the journalist to seek out and act on the story, instead of their taking any steps in this regard.

20. The evidence before the Tribunal was that Ms Maurizi is an experienced investigative journalist currently working for the leading Italian daily newspaper *La Repubblica*. She has worked on all of the WikiLeaks publications since 2010 and has extensively reported on both WikiLeaks publications and the reaction to those publications, including the ongoing criminal investigations into WikiLeaks related to those publications. This includes the US criminal investigation and the fact that WikiLeaks staff – the three named individuals – had been the subject of a search warrant served by the US Department of Justice (DOJ) on Google in March 2012, which had required Google to hand over all of their emails. Google had handed over that information, but did not inform the individuals that they had done so until 23 December 2014 (almost three years later). WikiLeaks published the warrants on 25 January 2015. Google had informed them it had not been permitted to disclose the information earlier because an order prohibiting them from doing so had been imposed. The Guardian reported that the warrant was believed to be part of an ongoing criminal investigation in the US into WikiLeaks, launched jointly by the US DOJ, Defence and State, following the publication of material obtained by army private Chelsea Manning.
21. Ms Maurizi argued that there was a strong public interest in any document clarifying the ongoing investigation in the US and whether this was a criminal investigation into the three named individuals. She stated that when her request had initially been refused under section 40 FOIA she had contacted the three individuals to notify them of this, her understanding of the rationale behind it and had obtained letters indicating consent for the purposes of the internal review.
22. Counsel for Ms Maurizi argued that the correct interpretation of section 40(5)(i)(b) was to view the disclosure as being just to the requester, Ms Maurizi, and not “to the world”. The correct question to be asked under DPP1, it was suggested, is whether disclosure to Ms Maurizi, under FOIA would be fair and lawful, given the consents made available.
23. It was argued that a distinction should be made between the so-called ‘requester blindness principle’ in general cases and the specific context of this case involving s. 40 and personal data, where the requester has the consent of the data subject to receive the information. Each of the data subjects had consented to the release of their personal data to an investigative journalist for the purposes of contributing to an ongoing public debate about their treatment by the US authorities. In those circumstances, it was argued by Ms Maurizi, the Commissioner should have found that fairness to the data subjects, taking into account their reasonable expectations, favoured disclosure.
24. The Appellant submits that the proper question to be asked for the purposes of section 40(5) is whether the disclosure of the personal data “to a member of the public”, which in this case was Ms Maurizi, would be fair and lawful. In light of the data subjects’ explicit consent to disclosure to the Appellant under FOIA, this question should have been answered in the affirmative.

25. The phrase “apart from this Act” places the consideration of the exemption squarely and wholly within the bounds of the DPA and outside of the regime of FOIA. Accordingly, it was said, that the general principle under FOIA of requester blind or disclosure “to the world” did not apply. This is not a case where, if the information in question is disclosed to the Appellant under FOIA, the information would have to be disclosed to any and every requester. The information could only be disclosed to a requester to whom the data subjects had given the requester their consent to disclosure.
26. Counsel for Ms Maurizi argued in the alternative that the consents could be construed more widely – in the sense that the wording permitted a construction that what was intended was disclosure to the world (such that in the alternative, the consents were, on this basis, sufficient compliance with the Schedules of the DPA). The Commissioner had been wrong in arguing that the fact the data subjects reasonably expected that the personal data provided to the Appellant would be widely disseminated was irrelevant to the question of consent. Counsel for Ms Maurizi argued that a wider interpretation of the consents was supported by the statements of the three named individuals. It was clear from the face of the affidavits provided by each of the data subjects, that they were consenting to the release of their personal data to a known investigative journalist for the purposes of contributing to an ongoing public debate about their treatment by the US authorities. In addition it was common knowledge that the individuals are themselves editors and journalists, working with Wikileaks. That organisation moreover is renowned for supporting widespread unrestricted publication. This context supported a wider interpretation of the consents.
27. The underlying EU Data Protection Directive 95/46/EC requires consent to be a “*freely given, specific and informed indication*” for the data to be processed (Article 2(h)). Article 7 requires consent to be “*unambiguous*”, but it is clear that the scope of consent is something that falls to be inferred from context as well as words: *Callus v IC* (EA/2013/0159). In the present circumstances, the Commissioner should have found that unambiguous, specific and informed consent was given.
28. Thus, the Tribunal’s attention was drawn to the fact that one of the individuals confirmed that s/he understood the context of the Appellant’s FOIA request and that:
- “[i]t was made abundantly clear to me that [the Appellant] would use this personal data about me in her capacity as an investigative journalist and would be publishing stories based on the information she received...I gave my consent in the full knowledge of how [the Appellant] intended to use the relevant personal data about me that would be released to her.”*
29. Similarly, another of the other individuals, Mr Hrafnasson who gave oral evidence to the Tribunal, confirmed that he was informed about the request for information made by the Appellant and, when later asked to give his consent for the information being released to her, he gave it “*without hesitation, fully aware of her intention to use the information as material in her work as a journalist*”. He clarified that what he understood that the

information would go to a journalist and he expected her to decide whether or not to publish, that was not a conflict in his mind as it was his intention and wish that, whatever she decided, there should publication of not just the confirmation or denial, but it appeared from his evidence, all correspondence that was held (if any).

30. The understanding of the context in which the request was being made, the consent provided and how the information would be used, was confirmed by the third individual:

“I understood that [the Appellant] required this to be able to prove that I was supportive of these documents being released to her from the police. I fully understood that [the Appellant] would use the personal data about me that was released to her in her work and would be publishing stories based on the information she received. In fact, this purpose – to journalistically publish based on these documents – was one of the reasons I so readily gave my full consent”.

31. It was argued that the MPS had asserted no basis for saying that a subject access request is “more appropriate” when both routes require the data protection principles to be complied with and ensure the requisite protection of individuals’ personal data. From a practical point of view, if an individual wishes a journalist to be able to report a story about an individual which requires obtaining their personal data, why should that individual be required to apply for it themselves (or instruct lawyers to do so, at cost, on their behalf) instead of simply authorising a journalist to obtain that information?
32. On the Met Police’s suggestion that a lack of fairness also led to a breach of DPP1, regardless of consent, it is argued that the sort of circumstances in which that could arise were where, for instance there had been deception on the part of the person obtaining the consent or that the relevant fair processing information had not been given. That was not the case here.
33. As to whether the personal data is question is sensitive personal data, Ms Maurizi submits it is wrong to assert that all information held by the Met Police must in some way relate to the commission or alleged commission of offences or proceedings. It was argued that it was not at all clear whether the data subjects are themselves the target of the US criminal investigation or whether the subpoenas for information from Google from their email accounts were merely for evidence gathering purposes to substantiate a case against, for example, Mr Assange, editor in chief of WikiLeaks, or against alleged sources of WikiLeaks material who are alleged to have provided information to WikiLeaks in breach of their legal obligations as employees of the US Government. The fact that the individual data subjects in this case may have their personal data used as evidence in a criminal trial does not make the information sensitive personal information unless they are also directly accused of a crime (see definition of the sensitive personal data above). There is no evidence they have been indicted or accused of a crime.
34. Insofar as any personal data was sensitive personal data, Ms Maurizi relied upon explicit consent. In the alternative, it was asserted that condition 3 of the Order applied. It was

argued that the reference to reasonable belief means this is not a purely subjective question. As set out in *Brett v Information Commissioner & Foreign and Commonwealth Office* (EA/2008/0098) this requires considering whether the hypothetical data controller, i.e. a reasonable data controller, would consider the disclosure had “substantial public interest”. There were said to be underlying issues of substantial public interest on account of:

- (1) “As set out in a *Guardian* report, the subpoena of information from Google from the accounts of journalists working with any publication, including *WikiLeaks*, in the context of an *Espionage Act* investigation raises significant public interest concerns about the reach of government warrants, privacy and free speech;
- (2) The subpoena of information from Google in the US related to the activities of journalists and editors, which include British citizens, who were working in the UK for *WikiLeaks* (recognised by the First-Tier Tribunal as a media organisation), and related to personal data which originated in the UK;
- (3) It is a matter of substantial public interest to understand whether or not the UK authorities are communicating with and/or cooperating with the US in an investigation of this nature into individuals who are British citizens and/or are working as journalists in the UK and Europe.”

35. Finally and with regard to section 16 FOIA, the duty to advise and assist, Ms Maurizi argued that it was “reasonable” to expect the Met Police to make enquiries with the individual data subjects. It was not sufficient for the Met Police simply to refuse to accept the consents in this matter without indicating to the requester or the individuals what type of consent is sufficient and to verify identity or to suggest to Ms Maurizi that she take steps so to do. Thus they were at the very least under an obligation to engage in a dialogue with Ms Maurizi to tell her what form of consent the MPS considered necessary and what further steps were needed to verify the identity of the individuals.
36. The Section 45 *Code of Practice on the Discharge of Public Authorities’ Functions under Part 1 of the Freedom of Information Act 2000* emphasises that it may sometimes be good practice or necessary to consult third parties when considering a FOI request. The Commissioner is also clear in her own *Section 16 Guidance* that the section 16 duty is “extensive” and that its purpose is “to ensure that a public authority communicates with an applicant to find out what information they want”.

The Met Police’s submissions and evidence

37. Insofar as Ms Maurizi stated that the Tribunal is unable to determine the appeal without sight of the requested information itself, the Tribunal’s attention was drawn to *Savic v Information Commissioner, Attorney General’s Office and Cabinet Office* [2016] UKUT 535 (AAC) in which the Upper Tribunal made clear that it was inappropriate for the Commissioner or the Tribunal to assess an NCND exemption by reference to the substantive information.

38. Disclosure under FOIA was argued by the Met Police to indeed be disclosure to the world, in the sense that disclosure under FOIA cannot be made subject to any conditions in relation to future use. This had to be taken into account in considering whether the Met Police was properly able to determine that the three named individuals had explicitly, freely and on a “materially informed basis” consented to the disclosure of their personal data (if held) . The three letters could not on the Met Police’s submission provide such a basis. The Met Police could not be sure of the identity of the letters’ authors and there was no indication, in light of the way they were phrased as disclosure to Ms Maurizi, of an understanding that disclosure under FOIA request meant disclosure to the world. They also asserted that it was not clear that the three individuals were aware of the possibility of using a “more appropriate and specific statutory scheme”, subject access rights under the DPA, for accessing their own personal data. The letters did not, in the Met Police’s view when refused and now, amount to consent for condition 1 of Schedule 2, still less explicit consent for condition 1 of Schedule 3.
39. The Met Police argued that the Tribunal should not take into account the witness statements of the three individuals as it was settled law that the application of exemptions under FOIA is to be determined at the time of the response to the request.
40. The request concerned the police holding correspondence from the DoJ (i.e. a law enforcement body). The Appellant’s own documents, it was said, emphasise that the context of the request was allegations of criminal activity being made by the DoJ against the three data subjects.
41. Applying the analysis in *Information Commissioner v Colenso-Dunne* [2015] UKUT 471 (AAC) at §45, it is apparent from the immediate context that confirming or denying correspondence from the DoJ about any of the three data subjects was held by the MPS would be information as to the alleged commission of criminal offence(s). Paragraph 45 provided:
- “45. Mr Tomlinson made a further and powerful policy argument. The DPA imposes particular obligations on data controllers in processing personal data, and especially onerous obligations when it comes to processing sensitive personal data. Data controllers cannot reasonably be expected to conduct a search of the entire public domain to check that there is nothing else “out there” which, when combined with the personal data being processed, changes its nature into sensitive personal data. The data must essentially speak for itself in its immediate context. Information which on the face of it is ‘ordinary’ personal data cannot suddenly transmute into sensitive personal data because of other information which is out in the public domain.”*
42. The Met Police further argued that paragraph 3 of the Schedule to the Order, operating as a Schedule 3 condition, did not apply. Confirming or denying whether the information is held is not in the “*substantial public interest*” as considered objectively.

The public interest will not be substantially aided by the confirmation or denial of correspondence between the DoJ and the MPS, in circumstances where the DoJ's seeking of information about the three data subjects, including from Google, is the subject of reporting in the public domain. The Met Police argued that a general interest on the part of some in relation to Wikileaks is not sufficient.

43. There had been no direct consideration of paragraph 3 of the 2000 Order. It was further argued that there was no basis to conclude that the Commissioner reasonably believed at the time of responding to the request that publication would be in the public interest – in fact he was of the opposite view. A hypothetical data controller in the position of the Met Police would not reasonably believe that NCND about the three individuals being the subject of law enforcement correspondence from the US DoJ would be in the public interest, let alone the substantial public interest. Indeed disclosure would be contrary to the ordinary approaches and practice of confidentiality both of data subjects and foreign law enforcement agencies.
44. In addition to there being non-compliance with a Schedule 2 and 3 condition of the DPA, it was further argued by the Met Police that confirming or denying would be unfair and therefore a breach of DPP1 (fairness being a separate requirement on top of meeting a condition under the Schedules). The named individuals should, as noted above, have availed themselves of the more appropriate route of a subject access request under section 7 DPA. That the right of subject access is intended to be exercised under the DPA and not by the “backdoor of FOIA” is made clear, it was argued, by the absolute exemption under sections 40(1) (relating to where the personal data requested was that of the requester) and (5)(a) (where the personal data related to third parties, as here).
45. The Met Police pointed out that a subject access request cannot be made by a third party, unless they are acting with proof of authority, on behalf the data subject, whose identity would also need to be checked. It was argued that Ms Maurizi's approach “circumvents the proper statutory scheme” and to the potential, disadvantage of the three named individuals. They would have no right to change their mind if after disclosure they did not wish the personal data to be disclosed. This loss of control meant that the purported consent was given on an uninformed basis and without any reference to their own right of access.
46. Moreover, it was said that it was not fair to the data controller, the Met Police, for the correct statutory scheme to be circumvented in this way, “limiting the ability and propriety” of the Met Police being able to contact the data subjects about issues which might arise about their rights.
47. Finally, the Met Police submitted that section 16 imposes a duty to advise and assist the requestor, not third parties. It would be an inappropriate burden to place on a FOIA public authority to require it to verify identity and clarify consent with third parties where the requestor has failed so to do. The only proper advice and assistance a public authority can give in these circumstances, it was argued, is to remind the requestor that the data

subjects are entitled to make subject access requests, which was in fact, the advice the MPS had given Ms Maurizi.

The Commissioner's submissions

48. The Commissioner submitted that by confirming that it held such information, the Met Police would confirm that it had corresponded with the US Department of Justice about one or more of the individuals named in the request. There was no disclosure or processing of personal data beyond that limited description – in particular no disclosure of any underlying correspondence.
49. It was said that this would nevertheless constitute the sensitive personal data within the meaning of sections 2(g) and (h) DPA. The personal data would be information as to the commission or alleged commission of offences by those individuals and as to any proceedings for such alleged offences. The reasonable inference would be that any correspondence the Met Police held within the terms of Ms Maurizi's request would relate to the subpoenas or warrants referred to in her previous request and in articles in the media. By the time of Ms Maurizi's request, Wikileaks had itself published online a copy of those warrants, which stated inter alia that *"the property... to be searched... is believed to conceal fruits, evidence and instrumentalities of violations of 18 USC"*. Google's own notifications of the warrants (also published online) said that *"the warrant was issued to seize 'evidence' related to the alleged violation of US federal laws, including violation of the Computer Fraud and Abuse Act... and 18 US Code para 793, also known as the United States Espionage Act"*.
50. Disclosure under FOIA is to be treated as disclosure to the public at large, not just to Ms Maurizi. This means that, when assessing compliance with the DPA, the Commissioner cannot focus on the Appellant alone. She must consider whether the public disclosure of the personal data in question – here, whether or not the requested information was held – would comply with the DPA. Ms Maurizi is wrong to argue that a disclosure under FOIA can be treated as applying only to specified individual recipients as approved by the three data subjects.
51. The case law supporting this proposition includes *OGC v IC* [2008] EWHC 737 at paragraph 72, which provides that:

"72. Disclosure under FOIA is always to the person making the request under section 1. However, once such a request has been complied with by disclosure to the applicant, the information is in the public domain. It ceases to be protected by any confidentiality it had prior to disclosure. This underlines the need for exemptions from disclosure."
52. The public disclosure of that sensitive personal data would only comply with the DPA if (among other requirements) a condition from Schedule 3 DPA was met in respect of that public disclosure. The Commissioner was satisfied that no condition from Schedule 3 DPA would be met in this case.

53. The reasons for non-compliance therefore with the Schedules to the DPA, was said to be that the consents do not extend to disclosures to the public at large, referring as they do only to Ms Maurizi. Therefore, as regards disclosure to the public, they do not meet the definition of consent applicable under the Directive and therefore the DPA, namely “unambiguous” and “any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed”.
54. The Commissioner had said at paragraph 25 of her Decision Notice, that the Order could not be relied upon in the context of FOIA disclosures. As indicated in her response to the grounds of appeal, the Commissioner now accepts that this was an error. The Commissioner does not however agree that Condition 3 of the Order applies in the circumstances of this particular case. First, as the Met Police has made clear, as the data controller, it did not believe that the publication of this personal data (i.e. confirmation or denial of whether it holds information within the scope of Ms Maurizi’s request) would be in the public interest. The Commissioner also argued that disclosure would not be in the substantial public interest, because there is an alternative and more suitable mechanism by which the three data subjects could obtain any non-exempt personal data about themselves and then make informed decisions about the further processing (including by way of publication) of their personal data.
55. Finally, with regard to the Met Police’s duty under section 16 FOIA to advise and assist the Commissioner did not agree that they were obliged under section 16 to make contact with the data subjects who provided the consents to verify their identities and ascertain the scope of their consent. This duty only applies “so far as it would be reasonable to expect the public authority to do so”. In the Commissioner’s view, it is not reasonable to expect a public authority in circumstances such as this to make enquiries with individuals with whom it has no relationship and who are apparently the subject of warrants in the context of criminal investigations by authorities in the US.

The Tribunal’s analysis

56. First, the Tribunal was of the view that it did not need to see any underlying material, if such existed, on a closed basis in order to decide the appeal. An NCND response must be made by reference to the public interest in generating a ‘yes’ or ‘no’ answer to the request, and not to the underlying content of any information which is held.
57. The Tribunal found that much of the argument was confused by the introduction of considerations that only arose if the Tribunal had been considering the underlying correspondence, if any. In an NCND case, the focus was strictly on what personal data would be disclosed by confirming or denying. In this case this was no more than confirmation or denial whether the Met Police held correspondence between it and the DoJ in relation to the three named individuals between the specified dates. Suffice to say, the Tribunal could see that even a confirmation or denial would be of interest to Ms

Maurizi and indeed the public (see below) in the context of the subpoenas served in the US and the wider issues as to press freedom.

58. Starting first with whether the personal data to be disclosed would be sensitive personal data, the Tribunal was of the view that the way in which the request was framed was sufficiently blandly drawn that a response in terms of whether or not held, in and of itself, would not give any positive or negative indication as to an alleged or actual investigation/prosecution. Moreover, given the other alternatives for any correspondence held, that is that the three named individuals were sources of evidence, possible witnesses, victims even, it could not reasonably be concluded with any degree of confidence that this would amount to information “as to...” alleged crimes or legal proceedings against those individuals.
59. In light of the conclusions that the data in question is not sensitive personal data, the consent that Ms Maurizi relies upon in order to satisfy a condition in Schedule 2 DPA does not, of course, need to be at the higher level of “explicit consent”. Nevertheless, in accordance with the Data Protection Directive this does still have to be freely given, informed and unambiguous. The Tribunal interpreted the three letters such that taken together with the witness statements, what had been consented to was indeed disclosure to the world. The Tribunal was able to take into account relevant contextual information, even where obtained post-refusal provided that it related to facts that existed pre-refusal and was no more than a clarification of the position at the time. Thus, it took into account not just the contents of the witness statements, but also that Ms Maurizi was a journalist well known to the three named individuals, who were also journalists. The witness had specifically been asked whether there was any contradiction in his wish for the data to be given to a trusted journalist and that his wish was for the data to be released publically (to the world). His answer was that he saw no conflict in this. The Tribunal was mindful that the context for the request moreover was Wikileaks’ apparent normal publication practice, with its emphasis on openness and publishing everything. It was Ms Maurizi’s evidence moreover that there was no question but that she would publish a confirmation or denial. The situation might be different, but was not a matter for this Tribunal, with regard to the content of any underlying correspondence (there being a likely journalist filter as to relevance, whether or not of interest to the public, any local data protection obligations etc.).
60. Thus, the Tribunal was satisfied that the consent condition for processing was met for the purposes of Schedule 2 DPA. With regard to the Met Police’s arguments as to a lack of fairness in any event (which separately from compliance with the Schedules would have led to a breach of DPP1) the Tribunal was not persuaded. The central argument seemed to be that the three named individuals might be disadvantaged by not having obtained the personal data by the section 7 DPA, subject access route (in which they alone would have custody of the information and could then decide having informed themselves as to the content, whether they really would wish for the world to have knowledge of this). This however did not relate to the personal data in question in this NCND case – whether the correspondence was or was not held. There was to be no disclosure of any underlying correspondence at this stage. Thus, it was surreal to suggest that the individuals needed to

know whether any correspondence was held or not before deciding whether the fact of whether held or not could itself be released to the world.

61. It was important moreover, in the Tribunal's view, not to elevate subject access rights over rights to information under FOIA. Individuals should in principle be free, with appropriate consent provided, to rely upon an investigative journalist to seek to obtain their personal data and not be put to the bother of having to make a subject access request. This was not seeking to "circumvent the statutory scheme" as suggested by the Met Police. Both routes were equally valid and there was no suggestion in section 40(5)(b) that subject access data protection rights took precedence where the data involved third party personal data (as opposed to the situation in which the requester was the subject to the personal data, when FOIA makes it clear that the DPA and subject access rights do indeed take precedence – see section 40(1)).
62. Beyond that point, the Met Police also seemed to be arguing that somehow it was fairer to the data controller, the Met Police, and relevant in terms of proportionality for subject access rights to take precedence. This was a novel submission not aided by the fact that the Met Police had not attended the hearing and were not therefore available to explain this further. Counsel for the Commissioner did not feel able to pursue this line of argument without their assistance. In light of this, the Tribunal did not consider this submission to be substantiated.
63. Having found that the personal data was not sensitive personal data, that there was sufficient consent (in the sense that it was consent to disclosure to the world), it was not strictly necessary for it to form a view as to Ms Maurizi's alternative line of argument that section 40(5)(b)(i), properly construed, meant that consent to Ms Maurizi (as opposed to consent to disclosure to the world) was sufficient to avoid a breach of DPP1. Whilst not necessary to decide this point, the Tribunal was nevertheless of the view that these submissions were not substantiated. That line of argument was based upon a particular statutory construction of the two phrases in section 40(5)(b), "apart from this Act" and "member of the public".
64. With regard to "apart from this Act", the Tribunal interpreted this as meaning no more than for the purposes of section 40(5)(b), public authorities could not, in seeking to satisfy a condition under the Schedules and thereby meet the requirements of DPP1, rely upon an argument that FOIA requires the particular disclosure, ie: compliance with a legal obligation – paragraph 3, Schedule 2 FOIA). Given to "a member of the public", further to the plain English meaning of this phrase, meant given to the public. Whilst the use of the singular here (a member of the public as opposed to members of the public) was curious, it did not, in the Tribunal's view, indicate that disclosure to a specific identified person was in play, in this case, Ms Maurizi. In section 40 and indeed throughout the Act, an express distinction is made between the applicant and the public (a member or members), such that it was highly unlikely that section 40 would properly allow Ms Maurizi to in effect be both, and within the same statutory provision.
65. This view was not contrary to those of Judge Jacobs at paragraph 30 of the Upper Tier case of *GR-N v Information Commissioner* [2015] UKUT 0449 (AAC) (referenced in the useful First Tier Tribunal analysis to be found in *Naulls v Information Commissioner &*

NMC EA/2018/0022). The Judge there had been warning against a blanket application of the ‘disclosure to the world’ principle and used the entirely appropriate example of paragraph 6, Schedule 2 DPA and the part that played in the FOIA regime. Thus, in this context, the application of section 40(5)(b)(i) was indeed to be construed in accordance with the general principle of disclosure to the world, made clear by the specific language of the section and its reference to information being given to “a member of the public”.

66. This did mean, in this case, that further requesters would likely enjoy the same access regardless of whether there was a consent to disclosure to them. That would not be necessary as there was already in place a consent, at least for the time being, for disclosure to the world.
67. In light of the Tribunal’s decision that this was not sensitive personal data, it was not necessary for it to consider the Order for compliance with Schedule 3 DPA.
68. It was of the view, moreover, that even if it were wrong on the question of the adequacy of consent for the purposes of compliance with a condition in Schedule 2 (ie: it had been wrong to interpret it widely and it should properly be seen on the narrow basis of disclosure just to Ms Maurizi and not the world), it took the view that paragraph 6 of that Schedule would apply. It was abundantly clear that the three named individuals not only wished her to know whether or not the requested information was held, but also that they did not perceive there to be any particular disadvantage to themselves in that being the case. It was necessary for Ms Maurizi to seek this information as, from her evidence, little progress was otherwise being made on whether or not the three named individuals were under criminal investigation. Getting past the NCND stage of this request, was necessary in order to have the application of FOIA made to any information held at the next stage, that is, the application of any applicable exemptions. Thus, carrying out the balancing exercise in paragraph 6, the Tribunal was satisfied that that condition would apply, even if the consent requirement did not.
69. Finally, with regard to section 16 and the duty to advise and assist, the Tribunal took the view that there had been a breach on the part of the Met Police. Whilst it did not consider that it would be appropriate for public authorities to have to carry out the verification or clarification as to consent themselves, in circumstances such as these, it was difficult to see why the Met Police could not simply have indicated that this needed to happen to Ms Maurizi before finalising the refusal on internal review. This would hardly have been resource intensive and would have likely found a way through this difficulty and indeed have likely avoided the need for this Tribunal hearing at all. Whilst it had not been necessary, by the time of the Tribunal, for verification of identity or clarification of the consents, allowing for a genuine doubt on the part of the Met Police at the time, it should accordingly have given Ms Maurizi the opportunity to address these under its section 16 duty.

Conclusion

70. In conclusion, the Tribunal unanimously found that the Met Police had been incorrect in relying on section 40(5)(b)(i) and refusing to confirm or deny whether the requested information was held. So to do would not have been a breach of DPP1 for the reasons given above. In the Tribunal's view there had been a breach by the Met Police of their section 16 FOIA duty to advise and assist.
71. The Commissioner's Decision Notice had therefore in turn been incorrect in law.
72. Futher to the decision in the Upper Tribunal in *IC v Malnick and ACOBA* (GIA/447/2017) the Tribunal has no power to remit the matter to the Commissioner for her to issue a second decision on the same issue. This means that, in light of its decision above, it must order the Met Police to confirm or deny whether it holds information within the scope of the request and then, if it holds any such information, either to disclose it or to issue a refusal notice in accordance with section 17 FOIA.
73. The Tribunal substitutes a Decision Notice in this matter ordering the Met Police to so confirm or deny within 28 days of this Decision.

Judge Carter

17 December 2018