

**Note added by CP:** This page does not appear in the document I sent to the Tribunal. It is an index to the arguments and guides you through the text. The numbers in square brackets are paragraph numbers.

As I said in the blog dated 28<sup>th</sup> October 2011, I can find no evidence in the Tribunal Decision that these arguments were considered.

#### Added text begins

The first part of the submission sets out the original request and the background to the request [Paragraphs 1-17]. Then paragraphs 18-21 argue that the Commissioner's Response (to my grounds of Appeal) and Decision Notice take the wrong approach to the handling of my FOI request.

The rest of the submission from paragraph 21 outlines the four main issues which relate to my request for "summary information". These issues are:

- i. Does the requested summary information actually exist as a summary? I suggest [paragraphs 32-39] that the requested summary could easily exist. Both the Tribunal and Commissioner appear not to consider this aspect.
- ii. If the requested summary did not actually exist, I then go on to argue that the information that would go in a summary is very likely to exist (e.g. as sentences in a variety of MoJ documentation). In paragraphs 40-54 I argue this point and provide precedent in support of this argument Both the Tribunal and Commissioner appear not to consider this aspect.
- iii. If the requested summary does not exist **AND** cannot be directly extracted from the existing information, does my request require the creation of new information? In paragraphs 56-101, I argue that my request does **not** involve the creation of **new** information because it is very limited (15 words). Because this is possibly the new angle in my request, I note that the Tribunal and Commissioner have focused on this aspect; however as indicated above, this argument is only one aspect of my case.
- iv. Finally, at the end [paragraphs 101-108] I argue that in relation to a summary, the section 27 exemption is more unlikely to apply.

#### Added text ends

#### UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

EA/2011/0116

**BETWEEN:- DR C. N. M. POUNDER                      Appellant**

**AND**

**THE INFORMATION COMMISSIONER                      Respondent**

#### **RESPONSE BY DR C. N. M. POUNDER TO THE INFORMATION COMMISSIONER'S RESPONSE (31st May 2011)**

#### INTRODUCTION

1. It is axiomatic in relation to a FOI request, that if an exemption is applied to requested information, then only the information that is exempt is redacted and other requested information, not subject to an exemption, is released. This Appeal, in essence, is a minor development of this axiomatic position.
2. Is it possible for a FOI applicant to successfully frame a request for minimal "summary" information that is not subject to an exemption, in circumstances where that minimal information is extracted from existing exempt information? Can this minimal information classified as "new" information that is not held by the public authority (the position of the Information Commissioner in his Response as outlined below)? Alternatively, is that minimal information merely the extraction of limited subset of non-exempt information from the **existing** exempt information (the position I am advocating)?
3. In the context of my particular request, I wished to obtain minimal information (e.g. 15 words or so per Article) extracted from documents exchanged between the European Commission and UK Government since 2004. These documents

explain that, following the *Durant* judgment in the Court of Appeal<sup>1</sup>, the European Commission thinks that the UK has improperly implemented Directive 95/46/EC; by contrast, the UK Government considers the European Commission's view to be incorrect. For seven years, any detail of the alleged failings in UK data protection law have been kept a secret even though the UK's Data Protection Act derived from Directive 95/46/EC affects every citizen and organisation in the land; Parliament has been equally kept in the dark. A previous unsuccessful FOI request to the information in these documents was made in 2004.

4. In this submission, I cover the following areas:
- i. The context of my earlier refused request – the Decision Notice, incorrectly in my view, does not deal with the request I made and it is important to understand why my request was framed in a particular way.
  - ii. Why the Information Commissioner's reasoning in the Decision Notice FS50290504 is incorrect and why the Information Commissioner's Response starts from a wrong position and ends up with incorrect conclusions.
  - iii. How the Commissioner should have handled my request. I include relevant case law and previous Tribunal decisions that relate to the issues in this Appeal.

## THE REQUEST

5. In my "Notice of Appeal" document I stated that my FOI request, issued on 1st October 2009, was for the following minimum information:
- i. A list of which Article(s) in Directive 95/46/EC (the Data Protection Directive) the European Commission have alleged have not been implemented properly by the UK Government.
  - ii. In relation to each Article, summary information as to why the European Commission has made this claim.

<sup>1</sup> *Durant v FSA*: Neutral Citation No: [2003] EWCA Civ 1746

- iii. In relation to each Article, summary information as to why the UK Government thinks that the European Commission is wrong in its claim.
  - iv. Summary information as to whether or not any differences in opinion about implementation have now been resolved.
6. The Decision Notice granted parts (i) and (ii) of my request; hence this Appeal concerns only parts (iii) and (iv) of the request.
7. Inadvertently, in that *Notice of Appeal*, I had omitted a key sentence. At the end of my request, accurately reproduced in paragraph 3 of the Response of the Information Commissioner dated 31st May 2011 (the "Response"), this sentence appears:
- "For the absence of doubt, summary information could be as little as 15 words".***
8. Little did I know at the time I made my request, that this sentence would become an important consideration in this Appeal.

## PART 1: MY FOI REQUEST (THE CONTEXT)

9. The reason why I asked for "summary information" is because my earlier request, subject to a Decision Notice (Reference: FS500110720, dated 18 September 2006), was refused. That FOI request, made in 2004 (and cursed with the expansive delays which afflicted the current request), stated:
- "In June (2004) the UK Government received a 20 page letter from the European Commission about alleged deficiencies in the UK's implementation of Directive 95/46/EC. Could I have a copy of that letter please and the Government's response?"*
10. This 2004 request, which related to the complete documentation (Decision Notice FS500110720), was refused on grounds that the Section 27 exemption applied; these are the same grounds set out in the refusal to release parts (iii) and (iv) of the 2009 request.
11. Although the Section 27 exemption is mentioned in the current Decision Notice (FS50290504), my Appeal is based on the notion that the form of my request has

the objective of minimising the impact of the exemption. Therefore, consideration of the Section 27 exemption is at a minimum in my Response.

12. Having been refused the **FULL** information about the infraction proceedings (see FS500110720), I fashioned a new request after a three year period had elapsed; I was thinking that the public interest arguments would have changed (and I think they have). However, to further minimise the chance of a repeat refusal and to avoid the application of an exemption and public interest issues, I decided to change the nature of the request so that it asked for the minimum of information in the form of a summary. That is why I added the important condition to the request: "***For the absence of doubt, summary information could be as little as 15 words***".
13. It is clear that both the Decision Notice (paragraph 29) and the MoJ (in the handling of its internal review) were aware of my previous request (FS500110720) as both referred to it. In addition, the MoJ and the Commissioner were both aware of the summary information released by the European Commission (see attachment letter of the Commission dated 16/12/2010). In fact, I was expecting that my FOI request would result in something like the minimal disclosure, on the lines of the very limited summary information released to me in the Commission's letter of 16<sup>th</sup> December 2010 which is attached to my submission<sup>2</sup>.
14. I should add that this letter was the culmination of a 4 year process involving the European Commission's FOI procedures and the European Ombudsman, who despite an exhausting process characterised by delays more extensive than those associated with this FOI request, ruled in my favour. This resulted in the "liberation" of similar minimal information from the European Commission (and as can be seen from the Commission's letter, that request overlaps with the subject matter of this Appeal). I spare the Tribunal the rest of the gory detail (unless asked); suffice to say that the expression that contains the words "blood" and "stone" does not do justice to the description of the processes associated with that request.

<sup>2</sup> The European Commission's letter is the last two pages of the European Ombudsman's letter dated 16<sup>th</sup> February 2011 (and is in the attached)

15. Given the history of resistance to the release of any information (e.g. the refusal in FS500110720), given that the ICO and MoJ were aware of the 15 or so words per Article provided by European Commission's response, I think it is reasonable to assume that my use of the word "summary" in my request can be interpreted as a way of saying.

*"Please provide me minimal information that is not exempt which has been extracted from (a) existing summary information, or (b) from the full information (that was previously judged to be exempt)"*.

16. When I tried to explain the above in my Notice of Appeal, the ICO's Response characterised this in paragraphs 38-40 as a "purpose" associated with a request. It isn't a purpose: – it is an invaluable explanation as an aid to understanding ***why I had to frame the request in deliberately narrow way***. I should add that the form of the request in the paragraph above is not central to my Appeal arguments set out in this submission.
17. The interesting aspects of this Appeal is now revealed. Can a requestor like myself, when faced with the application of an exemption, deliberately fashion another FOI request to obtain minimal information that might not be exempt but which is contained in the existing exempt information? I contend that such minimal information can easily be extracted from the existing information; the Information Commissioner disagrees. Hence the Appeal.

## **PART 2: WHY THE COMMISSIONER'S RESPONSE IS IN ERROR**

18. My understanding of the Commissioner's position, as implicitly outlined in the Decision Notice (at paragraphs 15-16) and explicitly in the Response (primarily in paragraphs 21-31 quoted below), has two components.

***Component 1:*** *My request relates to a summary of the information held by a public authority, and that the production of the summary is likely to require the creation of new information.*

**Component 2:** Any exemption must consider the full information and not the created information; any created summary is merely the means by which the full information is delivered to the applicant.

19. This twin component view, I suggest, is especially apparent in the Response at the following paras (Commissioner's emphasis except for my emphasis at paragraph 22 and paragraph 44):

*"21. As ss. 1(1) and 1(4) FOIA make clear, the right of access to information applies to information held at the time when the request is received. There is no requirement under FOIA for a public authority to create information (whether afresh or as a summary, synthesis or distillation of other information it holds) in response to a request....*

*22. The Commissioner therefore contends that any analysis of applicable exemptions must be applied to the information held by the public authority, rather than to any summarised information which it subsequently opts to create. This is supported by ss. 1(2) and 2(2) FOIA, which make clear that the exemptions under Part II FOIA are to be applied to that information to which the requester has a right of access under s. 1, i.e. the information held at the time of the request (my emphasis in this paragraph).*

*33. ....As submitted above, the correct approach is to consider the application of exemptions to the information held by the public authority and not to information which it may create.*

*35 The Commissioner repeats that (i) exemptions apply to information held at the time of the request and not to summaries subsequently created in response to a request, and (ii) the duty under s. 11 is separate to and arises after the determination of what information (if any) a requester is entitled to receive.*

*44 Thirdly, the Appellant appears to imply that his request for summaries should have been objectively construed as meaning something like a request for the MoJ to do something to alter, synthesise or distil the underlying information such that as much of it as possible falls outside the exemptions under Part II FOIA. That is not a legitimate objective reading of his request. Even if the Appellant had framed his request in that way, such a request would be ineffective because, as explained*

above, FOIA does not contain rights to have information created by a public authority. (my emphasis in this paragraph).

20. This twin component approach is implicit in the Decision Notice (**my emphasis**).

*"15. When supplying to the Commissioner's office the information falling within the scope of the requests, the public authority provided the complete information, rather than a list and summaries. was given as to whether the analysis in this Notice should have been based upon the list and summary specified by the complainant and so **whether the public authority should be required to collate the information into those forms.***

*16. .... it does not mean that exemptions cited should relate to anything other than the recorded information held by the public authority. In this case, therefore, the exemptions cited by the public authority relate to the recorded information from which the list and summary would be collated, **rather than to information collated into the form requested by the complainant**".*

21. It is obvious that given the emphasis in the Response to created information, that this created information has to be a reference to the collated information of the Decision Notice in the paragraphs quoted above.

#### The counter argument

22. My counter argument to the Response is as follows. If **Component 1** requires the production of **new** information, then you do not need to consider **Component 2** because the FOI regime does not apply to newly created information. It thus follows that **Component 2** is redundant where **new** information is created, and if it is redundant, then it must be the wrong analysis to apply to my request. This is why this submission does not address any other argument in the Response or Decision Notice in detail.

23. In other words, if a FOI request relates to the creation of information, then the information is simply **not held** by a public authority. The request can therefore be refused on those grounds, and the complicated extended arguments in the Response that involve the consideration an exemption are not needed.

24. If, on the other hand, my request was not requiring **new** information to be created, then the only question under consideration is whether the non-exempt information (which has to exist because it is not "**new**") (a) already exists in the form of a summary or (b) can be extracted from the exempt information (see the axiom at paragraph 1). All the Commissioner has to ask himself is whether such an extraction of non-exempt information is possible. This is something he patently did not do, as the Decision Notice makes clear.

*14 ..... "The Commissioner is not aware of whether the public authority collated the information into the form requested by the complainant, or whether it considered it reasonably practicable to do so" (paragraph 14).*

25. The view that, if there is a creation of information to satisfy the FOI request, then that request is refused is supported by a number of sources. I think this point will be common ground for all Parties so there is no need to provide detail from the references<sup>3</sup>

26. I should add that if it was the position of the MoJ or Commissioner that I was asking for **new** information, then the Section 16 of FOIA (Duty to Assist) should have been engaged. In my *Notice of Appeal* I stated that in the circumstances where a requestor has asked for information that is **not** held by a public authority (e.g. requires the creation of **new** information), I would expect a responsible public authority to contact the requestor in order to see whether they can assist him (e.g. to frame a request in terms of information held by the authority). Although this is best practice, the Response (at paragraphs 29 and 30) completely misses the point of my reference to Section 16 and the Duty to Assist.

27. In other words, if there was any doubt whatsoever as to what was meant by my request for "summary information", this problem could have been addressed when I first made my request via the duty to assist. I add that in **EA/2007/0009** the Tribunal criticized a public authority on this very point:

*56 .... "There appears to have been no real discussion by Defra with the Appellant as to what information he was seeking"....*

<sup>3</sup> See The MoJ handbook on FOI under the heading "**Procedural and Cost Limitations**", or ICO guidance on freedom of information, under the title "**Do I have to create information to answer a request?**"

28. I confirm that there has been no discussion between me and the MoJ re my request.

### **PART 3: HOW SHOULD MY REQUEST HAVE BEEN HANDLED**

29. In my view, there are only four questions before the Tribunal in relation to my request; questions that should have been the centre of the Commissioner's approach but were not. These questions are as follows:

**Q1:** "Does the information I requested exist already?"

**Q2:** If not, then: "Does my request require the creation of new information?"

**Q3:** If the answer to **Q1** is "**yes**" (or **Q2** "**no**" new information) then: "Does the requested information fall within the Section 27 exemption?"

**Q4:** If the answer at the end of **Q3** is "**yes**", then: "Where does the public interest lie?"

30. I am assuming that if the answer to **Q2** is "yes" my Appeal falls, as it would do so, if the Tribunal were to determine that the public interest assessment at **Q4** is not in favour of disclosure. As will be seen, I do not pursue **Q3** and **Q4** vigorously in this Appeal in much detail as the objective of my request is to avoid the application of an exemption.

31. I now turn to the questions that the Commissioner should have addressed.

#### **Q1: Does the requested information exist?**

32. As I have already stated, the Commissioner did not consider whether my requested information (or something like) did actually exist. The Decision Notice states:

*14 ..... "The Commissioner is not aware of whether the public authority collated the information into the form requested by the complainant, or whether it considered it reasonably practicable to do so" (at paragraph 14).*

33. Given that MoJ Ministers have had to brief Parliament on this topic, it is possible to envisage that the information I requested (or something very close) does actually exist. For instance:

*Harry Cohen: To ask the Secretary of State for Justice what the Government's response was to the European Commission's infringement letter indicating that the UK's data protection law was deficient and that data protection Directive 95/46/EC had not been implemented; and if he will make a statement. [170207]*

*Mr. Wills: The European Commission, as part of its review of the implementation of the 1995 Data Protection Directive by each member state, is in discussion with the UK Government on a number of issues. Disclosing the details of those discussions at this stage would prejudice negotiations between the UK and the Commission and so prejudice UK interests. We believe that the UK has properly implemented the Data Protection Directive via the Data Protection Act 1998 and other relevant provisions of UK law. (Hansard, 4 Dec 2007: Column 1182W)*

34. The summary referred to in my request may well have been produced by the MoJ as part of a background note to the Minister along with the proposed answer to this question.
35. It may also have appeared in a briefing (or as part of a briefing) for Ministers or for Senior Civil Service Managers in some other context. For example, the Minister's answer suggests that the issues concerned are the subject of discussions between the Commission and the UK government in the context of the review of the 1995 DP Directive. A summary of the issues may well be found in the department's internal discussions relating to this review. Additionally, whenever a long document containing detailed analysis is produced, then there is usually a management summary at the beginning. One can, therefore, easily envisage that the requested summary of the UK position exists.
36. Even if there is no formal summary, the text of the correspondence with the EU or the internal discussion relating to it, may well contain 1 or 2 sentences on each of the relevant points which in effect would provide the requested summaries (e.g. "The Commission maintains that [Article X is improperly implemented because of ...Y.], however we maintain that [this is not the case because of ....Z]").

37. I therefore submit that the Information Commissioner has failed to establish, on a balance of probabilities, that the requested information was not held in the form of existing summaries. He in effect acknowledges this himself in paragraph 14 of the Decision Notice (quoted at paragraph 32 above).
38. Naturally, if there was any doubt as to whether I would be content with an existing non-exempt summary (as opposed to one that in theory would have to be expressly created for me) that this could have been clarified using procedures in relation to section 1(3) of the Act.
39. If a summary is already held in that form, the Commissioner would be expected to consider whether that summary was exempt under section 27. In fact, the Commissioner only considered whether the exemption applies to the **FULL** documentation exchanged between the UK Government and the Commission. I submit that this is another significant flaw in his approach.

**Q2: Does my request require to new information to be created?**

40. The Commissioner maintains that as (in his view) no summary was held at the time of the request, the preparation of a summary involved the creation of new information, which the authority is not required to do. It follows, in his view, that the question of whether any exemption applies must be determined by reference to the whole of the original correspondence and not in relation to the summary.
41. I maintain that the distinction which the Commissioner makes, between the full correspondence and a summary of it, is not a legitimate distinction under the FOI Act. If a summary does not already exist and has to be created in order to respond to my request, *that does not mean that the information which would go into the summary does not exist and would have to be created*. The information that would go into the summary is merely a subset of the full information or contained in summary information that is already held.
42. My request is, I believe, analogous that featuring in the ICO's Decision Notice FS50198141. In that case, the applicant had asked for a list of FOI requests made to the Cabinet Office together with, in each case, the date of response, and whether the result was a full or partial disclosure or no disclosure. The Cabinet

Office maintained that it did not hold a consolidated list of all requests, though it held records on each of them. The Commissioner held, at paragraph 28, that:

*“the actions required to access the specified information constitute information retrieval or extraction rather than the creation of new information, because, simply, the information is held, albeit embedded within a broader resource of data. As the Act provides a right of access to recorded information, and such information is recorded, the difficulty of the retrieval or extraction process is irrelevant to the question of whether the information is held.”*

43. In my case, the Commissioner maintains not only that the production of a summary would involve the creation of **new** information but also that the question of whether exemptions apply must be considered in relation to the **full** information and not the summary. At paragraph 22 of his Response he states:

*“The Commissioner therefore contends that any analysis of applicable exemptions must be applied to the information held by the public authority, rather than to any summarised information which it subsequently opts to create.”*

44. This is in marked contrast to the Commissioner's approach in Decision Notice FS50144197 which refers to a request for a list of approaches made by the Prince of Wales to a government department. The department had refused the request on the grounds that it did not hold a list of any such approaches and that to produce one would involve the creation of new information. The Decision Notice stated at paragraph 29:

*“The Commissioner's position is that where a request is made for a schedule or list of documents, **even if no schedule has been compiled, if the information which would be in the schedule is held, the request can and should be complied with unless the contents of the schedule, once compiled, would also be exempt.**”*(my emphasis added)

45. That paragraph continued:

*“...in the circumstances of this case the Commissioner believes that, as the Department holds letters and emails from The Prince of Wales and his*

*representatives, it is in a position to provide the complainant with a list of these approaches and confirm the number of such approaches, subject of course to the application of any exemptions.”* (emphasis added)

46. In that case, and in a series of almost identical requests<sup>4</sup>, the Commissioner adopted precisely the approach which he has rejected in relation to my request. The exemptions are applied to the schedule which would have to be produced to satisfy the request – **not to the full information from which the schedule is derived.**
47. The same approach is also evidence in Decision Notice FER0081530, where the Commissioner stated at paragraph 17:

*“the Commissioner's staff told FCO that, with regard to requests for a schedule of the documents being withheld, his view was that, even if a schedule of such information did not exist, where the information which would be in the schedule was also a part of other held information, it would still be held **and should be disclosed unless exempt.**”* (emphasis added)

48. Here too the Commissioner accepted that the exemption should be applied to the schedule of information compiled from the full information, rather than to the full information itself. In this case, the requested schedule was of documents found to be exempt - ie the 'full' information was by definition exempt. Nevertheless, the Commissioner ruled that the schedule was disclosable except where *any part of the schedule itself* was exempt.
49. In Decision Notice FS50079488, the Commissioner describes a request for specified information together with a schedule of relevant documents consisting of a brief description of each, setting out the nature of the document, its date and whether or not it is being released (paragraph 3). The public authority maintained that it was not required to provide a schedule or, what it described as a “summary” of the information (paragraph 29). The Commissioner found that

<sup>4</sup> See, for example, DN FS50089369, paragraph 63; DN FS50150254, paragraph 71; DN FS50139606, paragraph 26; DN FS5013019, paragraph 31; DN FS50127519, paragraph 24; DN FS50127361, paragraph 31; DN FS50124332, paragraph 29.

*“While producing a list of the documents in which the relevant information is contained may be a new task, it is not creating new information; it is simply a re-presentation of existing information” (paragraph 30)*

50. The Commissioner then observed that to comply with the request, the authority would have to “briefly describe the contents of the documents” – a process which the authority itself had described as producing a “summary”. The Commissioner found that as he was satisfied that the full documents were exempt, the exemptions might also be applicable to the schedule (paragraph 32). But he expressed no reservation about the process of applying the exemption to the **summarised information**.

51. The Commissioner states at paragraph 22 of his Response that his approach in my case is:

*“supported by ss. 1(2) and 2(2) FOIA, which make clear that the exemptions under Part II FOIA are to be applied to that information to which the requester has a right of access under s. 1, i.e. the information held at the time of the request.”*

52. At paragraph 35 he states:

*“exemptions apply to information held at the time of the request and not to summaries subsequently created in response to a request”*

53. I maintain that the Commissioner is misdirecting himself and adopting a position which directly contradicts his approach in other cases. The summary which I have requested, even if it has to be compiled from **existing** information in order to respond to my request, still consists of information **held** at the time of the request. It is merely compiled from that information in much the same way as the lists or schedules referred to above.

54. Finally, Decision Notice FS50210350 sets out the following principles at paragraph 40:

*The Commissioner's general position is that:*

- *The fact that a public authority may not have the requested information to hand but needs to extract it from other information does not in itself mean that information is not held on the basis that the request demands the creation of “new information”.*

- *Information is held notwithstanding that it requires any level of skill to retrieve and extract the relevant information although arguments concerning section 12 under the FOIA or regulation 12(4)(b) under the EIR may apply if the cost or time taken to comply with a request would be beyond the “appropriate limit” under the FOIA or manifestly unreasonable under the EIR.*

- *Information is held where it is reasonable to expect the public authority to apply their knowledge to make a judgement to obtain the relevant information.*

- *Information is unlikely to be held where the public authority would be required to make a complex judgement which may require specialist knowledge.*

55. In my case, I do not believe that the production of a 15 word summary involves “complex judgement” of the kind referred to in the final bullet point. I submit that it is a minor editing job, easily performed by the officials likely to be involved in processing my request.

56. On the assumption that the information relating to my request does not exist, I dispute the idea that any “**new**” information that is actually created in the way that would permit a public authority to reject my request on the grounds that it was creating **new** information that was not held. This is because the information that has been requested is clearly contained in the exempt information. This view is consistent with the precedent (details from paragraph 82 of this submission) which describes several circumstances where “**new**” information is generated or extracted from existing information held by a public authority.

57. I also suggest that, because I was requesting for the extraction of as little as 15 words per Article, that my FOI request is not an extensive exercise in what might be described as “**creative writing**” which requires **new** information to be

produced; it is more an exercise in “*creative extraction and disguise*”, which requires the ability to *extract* the requested minimal information, from the exempt information that is already held, and to creatively transform it into a form which is not exempt (so to *disguise the exemption*). Indeed, I argue that this process of “*creative extraction and disguise*” is very analogous to the process of Barnardisation (which found favour in the CSA v SIC decision) and is consistent with other Tribunal Decisions.

58. The main difference between the approach of extracting information for FOI requestors from a database of information (the subject of previous Tribunal Decisions – see from paragraph 82), and the **extraction** of non-exempt information from exempt information (as in my FOI request), is merely that the intervention by the staff of the public authority is needed is applied at a different point in the extraction process.
59. For instance, consider FOI requests which require a report to be extracted from a database (e.g. **Appeal EA/2008/0027** discussed below). This requires staff to create “**new**” instructions which are then used by a computer program to **extract** the requested report from the database. Of course, the formulation of such “**new**” instructions to the computer might undergo a number of iterations and several sets of “**new**” instructions could be created by skilled programmers, before the actual set of instructions is arrived at so that the requested report can be extracted from the existing database. It is this final set of instructions that have to be “**created**” which are then input to a program that controls the database in order to **extract** the requested information.
60. I should note that whereas the database request (e.g. in **Appeal EA/2008/0027**) may need considerable skill at the **input** stage (where the **input** of **new** coding instructions which permits the extraction of the report is needed and is not a commonly available skill), any staff effort in relation to my request is needed on **output** (and requires only competence in the English language to be able to **disguise** the nature of the exempt information so that it can be released).
61. It is useful to test this proposition in relation to an example where I am confident that I have guessed the Government's position. In the summary text I have provided relating to the information released by the European Commission, I note

that the Commission states that Article 2 is not properly implemented in the Data Protection Act because “Article 2 concerns the definition of filing system and the interpretation of this definition in the judgement of *Durant* case, which appeared to be narrower than the Directive”. Note that the underlined 16 words are the key information here and this with little effort can be reduced to 5 words “*Durant* narrows Article 2(c) too much”. The response of the Government rejecting this approach could be equally limited: “Recital 27 permits Member States to define a structured filing system”. (11 words)..

62. This information, according to the Commissioner's stance, is **new** information. My contention is that this information (i.e. “*Durant* narrows Article 2(c) too much”; “Recital 27 permits Member States to define a structured filing system”. (11 words) **are contained in existing information held by the MoJ and extracted in a disguised form.**
63. In the CSA v SIC judgement, the process of Barnardisation is merely **ONE** of **many** possible expressions of the notion of “*creative extraction and disguise*” (and one that I consider has been taken much further than in my request). Not only do **new** instructions have to be generated to extract the requested information from a database, Barnardisation as described requires the recorded information in the database to be changed in order to complete the process of “extraction and disguise”.
64. As an aside, it is important to note that the MoJ (now a party to this Tribunal) submitted its view to the judges in the House of Lords that this was the creation of **new** information and therefore the information was not held. The MoJ submission (which has not been published) was rejected. I have tried to obtain a copy of the submission to the House of Lords with a separate FOI request but this has been refused by use of an absolute exemption (confirmed on Review).
65. This Barnardisation mentioned in *CSA v SIC* is useful as it illustrates details of the approach that I have designated as “*creative extraction and disguise*”. As I have already noted, “*creative extraction and disguise*” is consistent with other existing Tribunal Decisions (listed from paragraph 82).
66. Suppose a FOI requestor were to ask a public authority: “what is the value of a particular cell in a spreadsheet” (this, I argue, is equivalent the implied “what is

the issue with Article X" of my request). Suppose the cell requested contains the value **3** and suppose further the publication of that number **3** would be subject to an exemption. The request could be refused subject to the usual processes. And this is what the CSA essentially did.

67. However, in this case, the House of Lords supported the view that the public authority could transform this number into a non-exempt form, and that this non-exempt form should be released. A public authority might explain, for instance, that "we can't provide you the actual number in the requested cell but we can tell you that the recorded information lies between **0** and **1000**". This explanation (which takes 23 words – 8 more than my 15) transforms the actual exempt number **3** (which remains held by the public authority) and **disguises** it as a non-exempt range **0-1000** which can be released to the applicant. I accept, of course, that the **0-1000** cell value can still engage an exemption; for instance, if the information that the cell is non-zero were to carry an implication that itself constitutes exempt information.
68. It is clear that the actual number in the cell and held by the public authority remains **3**, but in releasing that number a public authority would have to provide the text "... the recorded information lies between **0** and **1000**". Is this 23 word explanation the creation of **new** information?
69. By contrast, I would argue that this information is **extraction** of the actual information from the cell and the **disguise** of the cell's value so that it can be released to the requestor in a non exempt form. This is exactly what the House of Lords were considering (e.g. release of statistics in a Barnardised form or an aggregated form) and it explains why the CSA v SIC judgement is so complex. The same approach is the essence of my FOI request: in relation to each Article the extraction of minimal, non-exempt information from the exempt information and **disguising** the content so the exemption does not apply.
70. However, as I said, Barnardisation of the cells goes a step further. It takes that single cell number **3** and perturbs it, so it might, for the sake of illustration, become the value **2** or **4**. However, this perturbation has to be applied to **all cells** in a spreadsheet as it is essential that the Barnardisation does not significantly disturb important statistical features such as the mean, variance or standard deviation. But clearly, in the process, the value **3** in the particular cell has been

changed to a **2** or **4**, and if the **new** value of the cell were to be released, it would not be the actual original value held by the public authority. The cell's value would be "**new**".

71. The process of **disguise** in relation to my request needs far less skill than that required for Barnardisation and can be undertaken by any person with an adequate command of English. As the staff dealing with my request are very competent Civil Servants involved with the detail of the infraction proceedings, this can be taken as granted.
72. The process of extraction would follow would involve:
- (a) *extracting information from the existing information which need be no more than 15 words*
- (b) *considering whether that summary contains exempt information and, if it does,*
- (c) *considering whether any further change to the summary can be made so as to eliminate or disguise the exempt information.*
- (d) *consider adding only what is necessary to make the shortened account grammatically coherent.*

#### What are the limits to any "creative extraction and disguise"?

73. I do **not** think that "**creative extraction and disguise**" imposes onerous requirements on public authorities, as the extent to which the notion applies is **very** limited. For instance, the Fees Regulations of 2004 defines **one** obvious boundary at which limits the range of "**creative extraction and disguise**". Note I emphasise that it is not the **only** boundary, as is explained below.
74. I do not see how a one sentence summary of each of issues that are identified in the existing information can be classified as the onerous creation of **new** information if the sense of the "summary information could be as little as 15 words" (i.e. one sentence from the information already in the text). My basic argument is that the 15 words that would satisfy the request can be extracted from the longer passages of information that already exist. All I am asking for,

is a subset of the existing information, disguised in form of words that skips over the exempt information but is still comprehensible.

75. However, I do accept that if I had asked for an expansive review of, say 1,500 words, where I have asked for say 100 words per Article (e.g. a substantial paragraph per Article) then **new** information is more likely to be created.
76. In other words, I am suggesting that the question of whether **new** information is created or whether non-exempt information is merely **extracted** from existing exempt information depends on a number of factors. These factors include the nature of the request, whether specific skills are needed, and the time taken to extract or disguise the requested non exempt information from the existing information.
77. I therefore contend that there is a kind of continuum between the extraction of the minimal, non-exempt information in a disguised form so it can be released, and the creation of **new** information that is not held by the public authority. If the extraction process requires skills to satisfy the request, then the more the process is likely to resemble the creation of **new** information. By contrast, if the extraction process is **merely disguising** a small number of words (e.g. 15 words per Article or so seems small enough, naturally), then the more that extraction process does not need **new** information to be created as that information is very likely to be a subset of existing information.
78. The same continuum goes for all criteria associated with the extraction process: the greater the skill, the more it resembles the creation of **new** information, the need for little the skill (e.g. use of the command of English), the more the request resembles the extraction of non exempt information from exempt information.
79. I note that *Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004* places a natural cap on the resources expended on the “**extraction and disguise**” process.

*4(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in—*

*(a) determining whether it holds the information,.*

*(b) locating the information, or a document which may contain the information,.*

*(c) retrieving the information, or a document which may contain the information, and.*

*(d) extracting the information from a document containing it.*

80. In anticipation of this point being made, I should stress that the total wordage required is not a reliable indicator of whether **new** information is created (arguably it is not a relevant factor at all). The fact that there is 500 or so words in the European Commission document I have provided, reflects the fact that the Commission considers that one third of the Articles in Directive 95/46/EC have not been properly implemented by the UK Government (14 Articles in total). The 500 number is also enlarged because half the text is littered with comments such as “Article 2 concerns the definition of “filing” system...” which do not reveal any information about the nature of the problem with a particular Article. For instance, if only 5 Articles had not been properly implemented by the UK, then the wordage released would be about 100 words.
81. Finally, I think the Tribunal can consider the “summary” information extracted by the European Commission document as illustrative of what I was expecting to receive (attached). I invite the Tribunal to ask a simple question: in relation to each Article, is this really the creation of “**new** information” or does it more resemble the “**extraction** of exempt information in a form that can be released”?

#### **Legal precedents supporting the above view**

82. I also contend that my approach is consistent with all the legal precedents as described below:

#### ***FOI should be constructed liberally in favour of disclosure***

83. All the precedents point to a liberal construction of FOI law to allow the public access to information. Thus if there is a construction that supports disclosure of information and a construction that is in favour of non-disclosure, and these constructions are roughly balanced, then the construction in favour of disclosure should be chosen. I contend that the position adopted by the Commissioner in the

context my request *is inconsistent* with a liberal construction of the statutory regime.

84. In *Common Services Agency v Scottish Information Commissioner* ([2008] UKHL 47 [2008] 1 WLR 1550 (CSA v SIC) the liberal construction was driving sentiment behind Lord Hope's comments at paragraphs 4 and 15.

*4. .... There is much force in Lord Marnoch's observation in the Inner House [of the Court of Session] that, as the whole purpose of FOISA is the release of information, it should be construed in as liberal a manner as possible ....*

*15 It seems to me that the position that the Agency (i.e. CSA) has adopted to the request in this case is an unduly strict response to what FOISA requires. This part of the statutory regime should, as Lord Marnoch said, be construed in as liberal a manner as possible....*

85. In relation to the MoJ, the party that has joined proceedings, Lord Hope noted at paragraph 14 of *CSA v SIC*:

*14 .... The Secretary of State for Justice, in a helpful intervention, has drawn attention to the fact that the question whether an authority holds information which does not actually exist in the form and with the contents requested but which could be created from information which it does unquestionably hold is one which very commonly arises in practice. He submits that the obligations of public authorities ought to be limited to information which is truly held by them so that they are not put into the position of having to conduct research or create new information on behalf of requesters.*

*15. .... The effect of barnardisation would be to apply a form of disguise, or camouflage, to information that was undoubtedly held by the Agency at the time of the request. It would amount to the provision of that information in a form that concealed those parts of it that have to be withheld but which would nevertheless, to some degree, convey to the recipient information that was undoubtedly held by the Agency at the time of the request. The process is similar to that of redaction, which involves doing something to information in the form in which it was held so that those parts of it which are not private or confidential can be released. It would not amount to the creation of new information, nor would it involve the*

*carrying out of any research. It would be to do no more than was reasonable in the circumstances, having regard to the need for the form in which the information was disclosed to comply with the data protection principles.*

86. It is implicit from paragraph 15 quoted above, that the MoJ arguments were in favour of the fact that Barnardisation required the **creation** of **new** information (and therefore, FOISA did not apply). **These views were rejected.** Thus it might be helpful to the Tribunal's deliberations if documents relating to that "helpful intervention" were provided to the Tribunal as it might assist the Tribunal to appreciate the extent to which the ICO's (and MoJ's) arguments in my case overlap with the arguments which the House of Lords rejected in *CSA v SIC*.

87. The view of the Court of Justice is instructive; it is relevant as the information I requested relates to infraction proceedings between the Commission and a Member State of the European Union. In *Turco v Council of the European Union* [2004] ECR II-4061 the case regarded public access to European Parliament, Council and Commission documents unless disclosure was precluded in the public interest. In *Turco* the court held:

*"60. It is true that, according to settled case-law, the exceptions to access to documents fall to be interpreted and applied restrictively so as not to frustrate application of the general principle of giving the public the widest possible access to documents held by the institutions".*

88. Both the quotations in paragraphs 85 and 87 above are qualified by reference to the application of possible exemptions. However, since the purpose of my request is to avoid exemptions, those qualifications are largely irrelevant to this Appeal. The only purpose of the quotations is to demonstrate that the purpose of FOI is to give the public as wide an access to public information as possible.

89. This intent to maximise the information available to the public is deliberate intent of Parliament. For instance, the *White Paper*, "**Your Right to Know: the Government's Proposals for a Freedom of Information Act Cm 3818**, December 1997", stated:

*"The traditional culture of secrecy will only be broken down by giving people in the United Kingdom the legal right to know. The fundamental and vital*

*change in the relationship between government and governed is at the heart of this white paper."*

90. Similarly, *Freedom of Information, Consultation on Draft Legislation presented to Parliament by the Secretary of State for the Home Department Cm 4355 May 1999* stated:

*"2. Freedom of Information is an essential component of the Government's programme to modernise British politics. This programme of constitutional reform aims to involve people more closely in the decisions which affect their lives. Giving people greater access to information is essential to that aim. The effect of Freedom of Information legislation will be that, for the first time, everyone will have the right of access to information held by bodies across the public sector. This will radically transform the relationship between government and citizen".*

#### **CSA v SIC – Other aspects that support a liberal construction of the FOI regime**

91. For completeness, in CSA v SIC, Lord Hope of Craighead held that:

*"The latitude which should be given to a request which cannot be met in the form requested is indicated by section 11(2)(b) FOISA which provides for the provision of a digest or summary of the information, and by section 11(4) which provides that information may be given by any means which are reasonable in the circumstances. (Paragraph 14)*

92. I contend that this sentiment can be applied to my request for a 15 word "summary"; it should fall within the latitude identified by Lord Hope who continued:

*"...No hard and fast rules can be laid down as to what it may be reasonable to ask a public authority to do to put the information which it holds into a form which will enable it to be released consistently with the data protection principles". (paragraph 14)*

93. For completeness, in the same judgment Lord Rodgers at paragraph 73 of CSA v SIC made the same point (albeit by reference to the personal data exemption). He said:

*"... even if the information does constitute "personal data", the Agency will still be obliged to supply it, if that can be done without contravening the data protection principles in Schedule 1 to the 1998 Act. And, if supplying the information in one form would contravene those principles, in my opinion, section 1(1) of the 2002 Act obliged ISD to consider whether it could comply with its duty by giving the information in another form." (my emphasis, para 73)*

94. These statements imply that resources are needed to extract the non-exempt statistical information from the exempt sensitive personal data. I contend that in relation to my 15 word summaries, the resources needed to be expended by the MoJ to extract the requested information are less.

#### **Appeal EA/2006/0085 – extraction of information from a database is not "new" information**

95. In Michael Johnson v IC and MoJ (EA/2006/0085) the Tribunal concluded:

*45 "... The MoJ says that to carry out this exercise amounts to creating new information, and that the purpose of the Act is to allow people to obtain existing information, not to require public authorities to undertake research to create new information. They say that the paper files should be viewed as containing within them, the "building blocks" of information that can be used to generate the information sought by the Appellant, but that the fact that they hold these "building blocks", does not mean that they actually hold the information that can be generated from the building blocks. This proposition holds true, they say, regardless of whether the exercise would be burdensome or simple. ...*

*46. The question for the Tribunal is this: if the MoJ has to do something with the building blocks, does this mean that they do not hold the information? We consider that the answer lies in the extent to which something needs to be done to the building blocks, in order to comply with the request....*

47. .... The steps involved to get from the "building blocks" to the information that the Appellant has requested, are relatively simple.....Where, as here, it is accepted that the raw data or the building blocks are held, we find that the need to undertake the very simple exercise referred to above, does not mean that the information requested is not held."

96. I contend that the production of my requested summary is a "very simple exercise" for each Article. The building blocks are equivalent to the full information about the infraction proceedings and subject to an exemption; the extraction and disguise in the form of a "summary" from that information (the building blocks) is, I contend, also "relatively simple".

**Appeal EA/2008/0027 – involvement of skill and judgement is comparable**

97. In Appeal EA/2008/0027, the Tribunal recognized that some skill and judgment is needed to extract information from a database in the form of **new** instructions given to the computer.

14 .....We accept that obtaining the information which Mr Leapman wants from the database will involve some skill and judgment on the part of Mr Venables and his team and that it is not information which the Home Office normally requires for its own business purposes but neither of these points seem to us to be of any relevance to the issue in question. ....

98. I contend the effort expended in the generating the **new** computer programming instructions on **input** is more than the skill required to **extract** my non-exempt summary from the existing exempt information on **output** (see paragraph 60 of this submission).

**Appeal EA/2008/0027 – Tribunal accepts need for the creation of "new" information**

99. I have already noted that the Tribunal in Appeal EA/2008/0027 (Home Office) has implicitly accepted the need to produce limited new information in relation to an FOI request (although perhaps it did not recognize this point when it made its conclusions):

12. ....It seems to the Tribunal that there is in reality no distinction between information held by a public authority and raw data held on a database which is itself held by the public authority, and the Tribunal considered that Mr Strachan was really forced to concede as much when he accepted that information which could be (but had not yet been) obtained by running an existing report but with different parameters was held by the Home Office. **The suggestion that running an existing report to produce information would involve the extraction of existing information but that running a new report would involve research or the creation of new information was not one that the Tribunal could accept.** In both cases information comes from the same database and no new information needs to be collected in order to obtain information by running a new report. (my emphasis):

100. To extract any report from the computer database, instructions which have to be generated have to be given to the computer. In the case of an FOI request, this could require the creation of new recorded information in the form of a computer program before the report, subject to the request, could be generated. Indeed, it is easy to see that extraction of complex information from databases could need considerable computer programming skills (e.g. 15 lines of coding rather than 15 single words) and this level of skill that far exceeds the extraction of the 15 words that would satisfy my request. The only difference is that in *EA/2008/0027* the skills are employed at the **input** stage; my request needs them on **output**.

101. So in relation to **Q2**: "Does my request require the production of new information?" I contend that the answer must be "**no**". This means that attention focuses on **Q3** and "Does the requested information fall within the s.27 exemption?", and if so, **Q4**: where does the public interest lie?

**Q3: Does the requested information fall within the section 27 exemption**

102. The objective of the approach I adopted was to test whether a valid FOI request can take the form that does not need the creation of "**new**" information: namely, whether the extraction of the minimal non exempt information (e.g. my 15 or so words minimum per Article) from existing exempt information with minimal effort on the part of a public authority constitutes a valid FOI request. If, at the end of the day, the process of "**extraction and disguise**" relating to 15 or so

words does engage an exemption, then the objective to extract minimal, non exempt information has obviously failed.

103. However, there is an important corollary that needs to be recognised. If we are considering the fact that an exemption applies to those 15 or so words, then the validity of my request format is proven.

104. I would also argue that in my case, if an exemption is applied across the board (in my case, to **all** Articles), it means that **any** 15 word summary in relation to **any** Article is exempt. In other words, in the context of my request, only 15 or so words relating to **one** exempt Article needs to be extracted to assess whether the exemption applies. **This provides additional proof that the process of satisfying a request like mine is not onerous.**

105. In other words, because of the nature of the Section 27 exemption there is **no** need to extract minimal information relating to **all** Articles, because if information relating to **one** Article would trigger the exemption, then information relating to **any** Article is likely to do so.

106. As previously stated it is useful to test this proposition in relation to the example already quoted at paragraphs 61 and 62 (i.e. the 5 words "*Durant* narrows Article 2(c) too much" and the equally limited: "Recital 27 permits Member States to define a structured filing system"; 11 words). I contend that if these 5 and 11 word "summaries" in relation to an Article 2(c) engages the S.27 exemption, then the public interest test is **unlikely to follow that of the full information** because the requested information is in a much reduced form. However, I accept the public interest test could be in favour of non-disclosure and that this point is difficult to assess in the absence of any actual wording from the MoJ.

107. Finally, I should add that if a dispute between the Commission and the UK over an Article has been settled, I cannot see why any exemption should be applied to information relating to an Article that where there is no dispute, even in the context of the **FULL** information. How can it prejudice international relations to release information when there is agreement? This is another shortcoming in the Commissioner's analysis.

108. I hope this submission has been clear – if there are any questions please ask them.