IN THE FIRST TIER TRIBUNAL Appeal No: EA/2015/0237

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

On appeal from the Information Commissioner's Decision Notice No FS50572129 dated 17 September 2015

Before

Andrew Bartlett QC (Judge)

John Randall

Steve Shaw

Heard at 10 Alfred Place, London WC1

Date of hearing 3 March 2016

Date of decision 11 April 2016

Promulgation Date 12th April 2016

APPELLANT:	**JOHN PRING**
FIRST RESPONDENT:	**INFORMATION COMMISSIONER**
SECOND RESPONDENT:	**DEPARTMENT OF WORK AND PENSIONS**

Attendances:

For the appellant Elizabeth Kelsey

For the 2nd respondent Tim Buley

The 1st respondent did not appear.

Subject matter: Freedom of Information Act 2000 – absolute exemption – prohibitions on disclosure – Social Security Administration Act 1992 s123

Cases:

All Party Group on Extraordinary Rendition v IC and FCO EA/2011/0049-0051, 3 May 2012

All Party Group on Extraordinary Rendition v IC and FCO [2013] UKUT 560 (AAC)

Clucas v Information Commissioner EA/2014/0006, 2 June 2014

Department of Health v IC EA/2013/0087, 17 March 2014

Department of Health v IC [2015] UKUT 0159 (AAC)

Home Office v Information Commissioner and Cobain [2015] UKUT 27 (AAC)

Information Commissioner v Bell [2014] UKUT 106 (AAC)

R v Smith [1975] QB 531

Vijayakumar v IC EA/2014/0235, 31 March 2015

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal. The Decision Notice is set aside, because it proceeded on an incorrect construction of Social Security Administration Act 1992 s123(1) as explained in our reasons below.

The Tribunal reserves for further argument any further relief which it would be appropriate for it to grant.

If the parties are not able to resolve what ought to have been disclosed in response to Mr Pring's information request by agreement within 5 weeks after the date of this decision, the Tribunal invites them to make further submissions as to what, if any, further order or orders the Tribunal ought to make, consequent upon its decision to allow the appeal and set aside the Decision Notice.

REASONS FOR DECISION

Introduction

1. The appellant is the founder and editor of the Disability News Service. He wishes to obtain information about reviews carried out by the Department of Work and Pensions ('DWP') after the deaths of benefit claimants. This appeal is concerned with the interpretation and

application of a statutory provision which prevents unauthorised disclosure of information relating to particular persons, held by DWP.

The request, DWP's response, and the complaint to the Information Commissioner

2. On 13 October 2014 Mr Pring emailed DWP with an information request, which was made under Freedom of Information Act ('FOIA') s1. He referred to what he had been told by the DWP press office ('We take the death of any claimant seriously. Where it is appropriate, we undertake reviews into individual cases but we do not accept the argument of those who seek to politicise people's death by linking them inaccurately to welfare policy. We keep guidance on dealing with vulnerable claimants under constant review.'). He asked:

> 1 How many such reviews of individual cases involving deaths have taken place in each of the last 10 years?
>
> 2 Please give me as many details as possible for each review ie circumstances of death, date and location of death, which benefits were involved, and conclusion of review.
>
> 3 Please provide me with copies of each of these reviews.

3. We will refer to these as requests 1, 2 and 3 respectively.

4. DWP replied on 10 November 2014 to the three requests:

> 1 National records of 'peer reviews' had 'only been compiled since February 2012'; since that time there had been 60 peer reviews 'following the death of a customer'. DWP declined to make a wider search, to see what information was held at a local or district level, on the ground that to do so would cost more than the cost limit set by FOIA s12.
>
> 2 'Peer reviews contain a significant amount of sensitive personal information, relating to the person. They are internal documents, produced for internal purposes and not generally released to third parties. Section 123 of the Social Security Administration Act 1992 provides that it is an offence to disclose any information relating to a particular person without lawful authority. This is not changed by the fact that a person has died. Accordingly, it is not possible to provide the information requested.'
>
> 3 'Please see answer to question 1 and 2.'

3. Mr Pring responded the next day, asking DWP to redact personal information as necessary and to provide to him as many of the most recent reviews as it could within the £600 limit.

4. After internal review, DWP replied on 19 February 2015, declining to provide any further information, in reliance on FOIA s44. This section provides an absolute exemption where the disclosure of the requested information by the public authority which holds it is prohibited by or under any enactment, the applicable enactment in this case being s123 of the Social Security Administration Act 1992 ('SSAA').

5. On 21 February 2015 Mr Pring referred the matter to the Information Commissioner. He did not dispute the application of the costs limit, so the Commissioner's investigation was limited to requests 2 and 3.

6. During the investigation DWP stated that at the time of Mr Pring's request the Department had carried out 49 peer reviews in circumstances where the claimant had died (22 in 2012/13, 16 in 2013/14, and 11 in 2014/15 up to the date of the request). DWP also provided information about the purpose, conduct, and contents of reviews, and stressed the breadth and importance of SSAA s123 in protecting information about individuals, whether living or deceased. DWP provided to the Commissioner in confidence a selection of seven reviews to show the kind of information contained within them, for the purpose of substantiating its view that the whole of the reviews were prohibited from disclosure.

7. In his Decision Notice of 17 September 2015 the Commissioner upheld DWP's refusal. The key points in his decision were:

    a. All the information in the reviews, whether obtained from DWP's records or generated by the writer of the review, was covered by SSAA s123.

    b. The information withheld was not in the public domain, and no lawful authority had been given for it to be disclosed.

    c. It was not possible to redact or summarise the reviews, such that s123 would no longer apply.

<u>The appeal to the Tribunal</u>

8. Mr Pring pursues four grounds of appeal, each of which we consider below. The Commissioner maintains (in writing) his previous position. DWP supports the Commissioner's reasoning and has presented more detailed arguments. The focus of the appeal is the interpretation and application of SSAA s123. So far as material to the appeal, this reads as follows:

123 - Unauthorised disclosure of information relating to particular persons

(1) A person who is or has been employed in social security administration or adjudication[1] is guilty of an offence if he discloses without lawful authority any information which he acquired in the course of his employment and which relates to a particular person.

… …

(3) It is not an offence under this section—

[1] The expression 'employed in social security administration or adjudication' receives an extended definition in s123(6).

(a) to disclose information in the form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it; or

(b) to disclose information which has previously been disclosed to the public with lawful authority.

(4) It is a defence for a person charged with an offence under this section to prove that at the time of the alleged offence—

(a) he believed that he was making the disclosure in question with lawful authority and had no reasonable cause to believe otherwise; or

(b) he believed that the information in question had previously been disclosed to the public with lawful authority and had no reasonable cause to believe otherwise.

… …

(9) For the purposes of this section a disclosure is to be regarded as made with lawful authority if, and only if, it is made—

(a) in accordance with his official duty—

(i) by a civil servant; … …

(b) by any other person … …

(ii) to, or in accordance with an authorisation duly given by, the person responsible; … …

(c) in accordance with any enactment or order of a court; … …

or … …

(e) with the consent of the appropriate person;

and in this subsection "*the person responsible*" means the Secretary of State … …

(10) For the purposes of subsection (9)(e) above, "*the appropriate person*" means the person to whom the information in question relates, except that … … [various exceptions are then set out, concerning attorneys and mental health appointees].

9. After the open part of the hearing we held a closed session. We afterwards gave the appellant and the Information Commissioner the following information about it:

Note concerning Closed Session held on 3 March 2016, 1.30pm

The participants in the session were the Tribunal and the DWP, via its representatives.

The Tribunal gave an indication to counsel for DWP that, having considered the parties' arguments, it did not accept the widest interpretation of s123 for which he had argued in open session on behalf of DWP.

On the basis of the above indication, the Tribunal discussed with counsel for DWP the application of s123 of the Social Security Administration Act 1992 to the seven sample peer review documents contained in the closed bundle. This was done on a page by page and paragraph by paragraph basis, for each of the seven documents. Where a paragraph was not plainly either all protected or all unprotected by s123, the discussion was by reference to individual phrases.

In light of the above indication and the contents of the reviews considered, the Tribunal found no ground for inferring that Ground 1 of the appeal had any practical impact.

The Tribunal directed that, by no later than 11 March 2016, DWP carry out the following further steps for the purposes of the appeal:

(1) provide to the Tribunal (copied to the other parties) the meanings of the acronyms 'LMS' and 'HOTT';

(2) for the purposes of the Tribunal's further consideration of Ground 4 of the appeal, ascertain whether disclosure of some of the same information as in the 49 reviews referred to on p89 of the Open Bundle has been made by DWP at Coroners' Inquests and, if so, inform the Tribunal and the other parties as appropriate;

(3) review what is contained in the annexes to the first sample review in the closed bundle, notify the Tribunal and the other parties of the outcome of that review in general terms and, if the annexes arguably contain some information not protected by s123, provide the annexes to the Commissioner and the Tribunal.

In regard to (2) above, the Tribunal did not direct that any wider search be made for authorised disclosures of parts of the information contained in the 49 reviews.

The Closed Session was completed just before 2.45pm.

10. The outcome from the directions made at the closed session was:

    a. The meanings of the acronyms used in some reviews were provided.

    b. The DWP found three cases, out of the 49, where it had provided information to a Coroner. It stated that the information was requested by the Coroner under s32 and Sched 5 of the Coroners and Justice Act 2009 and was provided pursuant to SSAA s123(9)(c).

    c. DWP confirmed that the Annexes related entirely to the individual who was the subject of the first sample review.

11. On 24 March 2016 the appellant, through Ms Kelsey, made a further brief written submission in response, to which DWP briefly responded in a submission from Mr Buley dated 1 April 2016.

Ground 1 – 'failure to consider all parts of the Appellant's requests'[2]

12. The appellant argues that some or all of the information sought by request 2 might be held by the DWP in documents other than the reviews sought by request 3. In particular:

    a. Even if request 3 has to be denied, general conclusions and recommendations may be held separately, which do not relate to a particular person, and are therefore disclosable under request 2.

    b. Where those conclusions are the conclusions of the author of the review, they cannot be said to have been 'acquired by' the DWP employee, such as to engage SSAA s123.

13. We have read the information in the open bundle for the appeal, which describes the purpose, conduct, and contents of reviews. We have also read the seven selected reviews. We are not able to conclude that this ground of appeal has any practical impact. There is nothing in the materials before us which would support an inference that there is information, falling within the scope of Mr Pring's request, which is held by the DWP in some other document without also being contained in a review.

14. Moreover, if some of the same information as is contained in reviews is repeated in other DWP documents, and it relates to a particular person, it will be protected by s123 just as much as anything in the reviews. Conversely, if the information does not relate to a particular person, it is not protected by s123 merely by being contained in a review document.

15. The most appropriate place for us to examine the argument about the meaning of 'acquired' is under Ground 3, where we set out our views. On any view we do not consider that a focus on this word assists the appellant specifically under Ground 1; if there were a relevant distinction to be made between information generated within the DWP and information obtained from outside the Department, the distinction would fall to be applied to information contained in a review document irrespective of whether the same information was also contained in a different DWP document.

16. There is an argument between the parties concerning whether the scope of request 2 is by its terms necessarily limited to information contained within reviews. The appellant argues that the expression 'details … for each review' is potentially wider, and not necessarily limited to information contained within reviews. We accept the appellant's argument as hypothetically correct, based on the words of the information request, but do not consider that on the facts it makes any practical difference. The nature and contents of the reviews are such that it is difficult to envisage what other details there might be, which fall within the scope of request 2 but which are not contained in the reviews themselves. Certainly the matters listed in request 2 ('circumstances of death, date and location of death, which

[2] The quoted summaries of the Grounds are taken from the headings in the appellant's Grounds of Appeal.

benefits were involved, and conclusion of review') are all contained in the reviews themselves. The explicit basis for the appellant's concern, as expressed in Ms Kelsey's skeleton argument, is that it seems entirely possible to the appellant that, while the reviews may contain conclusions specific to individual cases, general, systematic conclusions may be addressed separately. Since the reviews which we have seen contain a standard heading 'Recommendations for National Customer Journeys', we conclude on the balance of probabilities that the appellant's concern does not reflect the actual facts.

17. For the above reasons we reject Ground 1.

Ground 2 – 'no basis to conclude s.123 SSAA applied to the entirety of the information sought'

18. The nub of this ground is that the Commissioner considered only selected reviews.

19. We were informed at the open hearing that DWP made the selection of the seven samples with the object of providing a representative range. Having seen the selected reviews ourselves, and conscious that they are written by following (subject to some variations and individual interpretation) a standard template, we have no reason to believe that the other reviews within the scope of the request will raise any different issues from those which are apparent from study of the selected sample.

20. Even if the Commissioner were correct to say that everything in the sample reviews was caught by s123, the appellant argues that other reviews may nonetheless contain conclusions and recommendations which are generic, and which therefore are not caught by s123. We recognise that we have not seen the reviews which were not included in the selection. But in our judgment the argument concerning generic conclusions and recommendations can be appropriately tested by consideration of the selected reviews. While it is true that the application of s123 must be considered in relation to all of the relevant reviews, we are not persuaded that Ground 2 adds anything material to the appellant's arguments on this appeal.

21. Accordingly we reject Ground 2.

Ground 3 – 'errors of law in application of s.123 SSAA'

22. The appellant contends that the Commissioner erred in his application of s123(1) because he-

    a. interpreted the expression 'relates to a particular person' too widely;

    b. did not take the correct approach to the question whether information was 'acquired' by an employee; and

    c. failed to consider that disclosure could be made with lawful authority from the Secretary of State.

23. DWP supports the Commissioner's broad interpretation of s123(1) and develops additional arguments.

24. In oral argument Ms Kelsey for the appellant and Mr Buley for DWP agreed:

    a. There is no binding authority on the interpretation of 'relates to' or 'acquired' in SSAA s123(1).

    b. While cases on similar expressions used elsewhere may be of some assistance, the more important step in construing the meaning of s123(1) is to consider the context and the statutory purpose.

'Relates to a particular person'

25. As regards purpose and context, Ms Kelsey gave particular emphasis to two points:

    a. The purpose of s123 is to protect the interests of the individual to whom the information relates. This explains why s123(9)(e) enables the person to whom the information relates (or certain persons acting on that person's behalf) to give consent to its disclosure, which constitutes lawful authority for the purposes of s123(1). If 'relates to a particular person' is interpreted as covering generic conclusions about how DWP should do its work, arising from consideration of how that person was dealt with, s123(9) would lead to the odd consequence that the dissemination of those conclusions could depend on the say-so of that person.

    b. The section creates a criminal offence. The doctrine of 'doubtful penalisation' applies. In other words, a Court will normally assume that Parliament intended to create a clearly defined criminal offence. A wide and vague interpretation of 'relates to' would offend this principle, and would put employees in jeopardy of committing a criminal offence when the connection between the information and a particular person was a loose one.

26. In our view both of these points have considerable force.

27. Ms Kelsey also relied on the remarks of the Upper Tribunal in *All Party Group on Extraordinary Rendition v IC and FCO* [2013] UKUT 560 (AAC) at paragraph 45, where the Upper Tribunal uses the expression 'fuzzy boundaries', in relation to the exercise of assessing whether information 'relates to' a FOIA s23 body (security services etc). We read that paragraph as referring to the possibility of differing assessments being made, when s23 is applied, not as laying down any legal proposition about the meaning of 'relates to', whether in FOIA s23 or otherwise. The Upper Tribunal expressly did not enter upon any question concerning whether the test which had been adopted by the First-tier Tribunal in that case was correct (see paragraph 45, first sentence). In addition, it was not necessary to discuss in that case precisely where the boundary lay, because the Upper Tribunal took the view that none of the documents which it examined came anywhere near the boundary (see

paragraph 46). In these circumstances we are not assisted on the present issue by the citation of paragraph 45 of the Upper Tribunal's decision.

28. Mr Buley, in common with the Commissioner, relied on the remarks of the First-tier Tribunal in the same case, *All Party Group on Extraordinary Rendition v IC and FCO* EA/2011/0049-0051, 3 May 2012, at paragraph 65. (Mr Randall was a member of that Tribunal.) Mr Buley pointed to the wide expressions used by the First-tier Tribunal in paragraph 65:

> [65] Applying the ordinary meaning of the words "relates to", it is clearly only necessary to show some connection between the information and a s.23(3) security body; or that it touches or stands in some relation to such a body. Relates to does not mean 'refers to'; the latter is a narrower term.

29. However, we note that the initial apparent width of these words was limited by further explanation. In paragraph 68 the First-tier Tribunal stated that "relates to" was about the contents of the information, ie, was the information about something to do with a security body? At paragraph 70 the Tribunal also referred to the application of a 'remoteness test'.

30. The phrase 'relates to' is also used for a number of exemptions in FOIA s35(1). In *Department of Health v IC* EA/2013/0087, 17 March 2014, the First-tier Tribunal (of which Mr Randall and I were part) wrote:

> [28] The phrase 'relates to', read literally, is capable of indicating a very remote relationship. But in s35, as in s23, the function of the phrase 'relates to …' is to demarcate the boundary of a FOIA exemption. It is clear, therefore, that it should not be read with uncritical literalism as extending to the furthest stretch of its indeterminacy, but instead must be read in a more limited sense so as to provide an intelligible boundary, suitable to the statutory context.
>
> [29] In *APPGER* [2012] at [68] the First-tier Tribunal decided that in s23 the phrase 'relates to' was directed to the contents of the information – what the information was about; a less direct relationship would not qualify. While s35 differs from s23, we consider that this conclusion is equally applicable to s35. A merely incidental connection between the information and a matter specified in a sub-paragraph of s35(1) would not bring the exemption into play; it is the content of the information that must relate to the matter specified in the sub-paragraph. … …

31. These remarks on the meaning of 'relates to' were not challenged on the appeal to the Upper Tribunal: *Department of Health v IC* [2015] UKUT 0159 (AAC).

32. The Commissioner and DWP also relied on *R v Smith* [1975] QB 531. The Courts Act 1971 s10(1) and 10(5) defined the extent of the jurisdiction of the High Court over the Crown Court by case stated, or by what is now called judicial review, as regards judgments or matters other than those 'relating to trial on indictment'. A Crown Court ordered a solicitor to pay costs personally after a trial was adjourned on the day when it was listed to begin. The question was whether it lay within the High Court's jurisdiction to hear a challenge to that order. Lord Denning MR said at 542C:

> … … what about the present order on the solicitors to pay the costs personally? Is that order one "relating to trial on indictment"? The words "relating to" are very wide. They are equivalent to "connected with" or "arising out of." So interpreted, they cover the present case. The order against the solicitors arose out of a trial by indictment. It related to the adjournment of it. It was, therefore, an order "relating to trial on indictment."

33. Sir Eric Sachs took a similar view on this point at 546F-547D.

34. Megaw LJ did not. He said at 545A-B:

> … … I am by no means convinced that an order made by the Crown Court against a solicitor, in the exercise of its inherent disciplinary jurisdiction over an officer of the court (if that be the true nature of the order) is properly to be described as an order "relating to trial on indictment," merely because an order against a defendant in a trial on indictment in respect of costs incurred in that trial is an order "relating to trial on indictment." I think that the title which has been given to this appeal, *Reg. v. Smith*, is inaccurate and misleading. Neither the Crown as prosecutor nor Mr. Martin Smith are in any way concerned. The appeal is, and should be entitled as, an appeal by the solicitors concerned.

35. Mr Buley acknowledged in oral argument that the statutory context discussed in that case was very different from SSAA s123. Given the difference in wording, statutory context, and subject-matter, and all the more in view of the disagreement among the members of the Court, we do not consider that we gain any assistance from *R v Smith* in construing SSAA s123.

36. In particular, we are unable to accept that in s123 it is appropriate to regard 'relating to' as equivalent to 'arising out of'. To do so would broaden the reach of the section far beyond its evident statutory purpose. Take the case of a review by the DWP of how a particular benefit claimant was dealt with. Assume the review makes a recommendation for future national implementation: 'At point X in the customer journey, best practice is that DWP's communication to the customer be both by letter and by telephone.' This recommendation could be described as 'arising out of' the circumstances of how the particular customer was dealt with, because that would be the context in which and from which the reviewer came up with it. But it does not seem to us that a prohibition on publication of a best practice recommendation in this form would advance the statutory purpose, sensibly understood, of protecting information which relates to a particular person.

37. In SSAA s123 the function of the phrase 'relates to …' is to demarcate the boundary of a criminal offence created for the purpose of protecting information relating to individuals. In our view this phrase should not be read with uncritical literalism as extending to the furthest stretch of its indeterminacy, but instead must be read in a more limited sense so as to provide an intelligible boundary for the criminal offence, suitable to the statutory purpose and context. We consider it is unhelpful to focus narrowly on the expression 'relates to'. A better understanding is to be gained by considering the phrase 'relates to a particular person'. In our view information which 'relates to a particular person' is information which is

in some sense about that person. In the above example of a best practice recommendation, the recommendation is not information which is about a particular person. We conclude that to fall within the prohibition the content of the information must relate to a particular person.

38. It may be objected that someone might infer from the terms of a general recommendation that whatever was being recommended had not been done in the particular case; therefore a general recommendation could impliedly reveal something that relates to a particular person. Whether this was so might depend upon the wording of the recommendation; there might be special cases where specific wording might impliedly reveal something about 'a particular person', even though not an identifiable person. But we do not accept this as a general proposition. A person carrying out a review, based on a particular case, may make a recommendation for an improvement in departmental practices for dealing with vulnerable claimants irrespective of whether the recommendation reflects a problem which actually eventuated in the particular case. In general, no confident inference could be drawn one way or the other, as to whether the problem did eventuate in a particular case, simply from knowledge of the recommendation. It therefore seems to us that it would not normally be right to regard a general recommendation as information which relates to a particular individual. From its very nature, a recommendation about how to deal with vulnerable claimants would normally relate to vulnerable claimants in general; there would normally be nothing sufficiently specific about it to make it information which relates to a particular vulnerable claimant, ie, to a particular person.

39. We also bear in mind the position of employees who must carry out their work without risk of incurring criminal liability under s123. If the prohibition is read as concerned with the content of the information, it is relatively straightforward to apply. A DWP employee dealing with information would generally be able without too much difficulty to make a judgment about whether the content of the information relates to a particular person. An employee who was in a position where they might disclose information would necessarily have access to the content of the information in order to make that judgment. The wider construction, for which DWP and the Commissioner argued, would make the employee's situation impracticably difficult, since on the wider view information could 'relate to' a particular person, by being in some way connected with that person or in some way arising out of dealings with that person, without the relationship being apparent on the face of the information.

40. We therefore reject the DWP's and the Commissioner's wide construction of the phrase in s123(1) 'which relates to a particular person'. We read it in the sense explained above. We uphold this part of Ground 3. We deal with the practical consequences separately below.

'Acquired in the course of his employment'

41. The appellant seeks to further limit the scope of s123(1) by arguing for a distinction between information 'acquired' by the DWP and information 'created' by it. We do not accept this argument. Certainly there are legal contexts where such a distinction may make good sense,

but in our view s123 is not one of them. The prohibition is directed at employees. The point of it is to keep private the affairs of individuals. If an employee refuses someone's benefit claim, all employees are bound to keep the relevant personal information private, including the refusal of the claim. The appellant's argument would have the effect that the particular employee who refused the claim was not bound to keep the refusal private, on the ground that the refusal was information created by that particular employee. That would make no sense. In our view an employee may 'acquire' information 'in the course of his employment', within the meaning of s123(1), by creating the information in the course of their employment.[3] In our view it matters not whether the information is acquired by being generated within the DWP or acquired from outside the DWP; if the content of the information is about a particular individual, it is protected by s123(1) from disclosure by any employee who acquires it in the course of their employment.

Failed to consider that disclosure could be made with lawful authority from the Secretary of State?

42. The appellant refers to SSAA s123(9)(b), under which the Secretary of State may lawfully authorise disclosure. The argument is that the Commissioner failed to consider whether such authority might have been given for some of the information in some of the reviews.

43. In support of the possibility that such authority may have indeed been given, the appellant refers to information in the public domain, following an inquest into the death of a Mr O'Sullivan. In our view this does not support the appellant's argument. DWP provided information to the Coroner pursuant to the legal provisions which govern the conduct of inquests, and thus pursuant to SSAA s123(9)(c). This did not require a specific exercise of the power of the Secretary of State under s123(9)(b).

44. DWP has stated that it is very unlikely that there exists some authorisation from the Secretary of State for public disclosure of information relating to individuals whose cases were the subject of peer reviews. The appellant has provided no material to contradict this statement, and we accept it.

<u>Ground 4 – 'failure to consider previous disclosure'</u>

45. By s123(3)(b), it is not an offence to disclose information which has previously been disclosed to the public. The appellant's argument is that some of the information in the reviews might previously have been disclosed to the public.

46. The appellant relied on the example of Mr O'Sullivan as an example of this. However, DWP stated that there was no DWP peer review in the case of Mr Sullivan. There is no evidence before us of prior public disclosure of information in the reviews, which would otherwise be protected by s123, and we have no reason to think that such disclosure has taken place.

[3] On this aspect DWP relied on a First-tier Tribunal decision *Vijayakumar v IC* EA/2014/0235, 31 March 2015. We have reached our view independently of this case and it is not necessary for us to discuss it.

47. We therefore reject this ground of appeal.

Practical consequences of upholding Ground 3 on the meaning of 'relates to a particular person'

48. DWP, because of its interpretation of s123, regarded the whole of the reviews as prohibited from disclosure. We have arrived at a different construction of s123. On examination of the reviews, it is plain that there is material in them which does not relate to particular persons in the sense that the content of the information is about those persons.

49. Broadly speaking, applying the interpretation of SSAA s123(1) which we have set out above, the information in the peer reviews which is or is not prohibited from disclosure is as summarised in the following table:

UNPROHIBITED	**PROHIBITED**
Title page[4]	Names and details of individuals
Guidance and Notes for Peer Review authors	
Peer Review – purpose and methodology	Name and details of individual subject of the review. In cases where disclosure of the name of the commissioning body could enable identification of the person the subject of the review, the name of the commissioning body.
Focus of Peer Review – heading only	Focus of Peer Review - contents
Background – heading only	Background – contents
Summary of findings/lessons learnt – in most reviews, heading only	Summary of findings/lessons learnt – in most reviews, contents
Recommendations for Local consideration – heading, and contents which are not about the individual	Information within the Recommendations for Local consideration which is about the individual Information which could enable

[4] The title page may also contain the name of one or more persons who carried out or approved the review. These should be either left in or redacted as appropriate in accordance with the usual policies for applying FOIA s40 to personal data of public servants. (The identity of the office at which the reviewer was based is not caught by the s123 prohibition, because it does not indicate the region where the customer resided or was dealt with, and so is not relevant to identification of the customer.)

	identification of the individual
Recommendations for National Customer Journeys – all, except anything which is of a specific nature which would reveal something about the individual	See left column
Timetable of events – heading only	Timetable of events – all contents
	Annexes - all
Footer to each page, except customer name	Customer name in footer to each page

50. The above can be no more than broad guidance, because the particular contents of reviews show some variation, and there is also on occasion some variation in the format.

Conclusions and remedy

51. Our conclusion is that the Commissioner's Decision Notice was not in accordance with the law. He did not apply the absolute exemption in FOIA s44 correctly. This is because he misapprehended the interpretation and application of s123 of the Social Security Administration Act 1992. He adopted a wide construction of the expression in s123(1) 'information … which relates to a particular person', on the basis of which he regarded the whole of the peer reviews referred to in the appellant's request as being prohibited from disclosure. On what we judge to be the legally correct interpretation of that expression, as explained above, he ought to have determined that for substantial parts of the peer reviews the FOIA s44 exemption was not engaged, because those parts were not prohibited from disclosure by SSAA s123.

52. Accordingly, pursuant to FOIA s58(1)(a) we allow the appeal.

53. The obvious course is for us to set aside the Decision Notice and to remit the matter to the Commissioner to be re-determined in accordance with our findings. However, there is currently a difficulty in that the decision of the Upper Tribunal in *Information Commissioner v Bell* [2014] UKUT 106 (AAC) seemingly prevents us from making a formal remission of the matter to the Commissioner: see the discussion in *Clucas v Information Commissioner* EA/2014/0006, 2 June 2014 at [35]-[66] and in *Home Office v Information Commissioner and Cobain* [2015] UKUT 27 (AAC) at [41].

54. We set aside the notice, and reserve for further argument any further relief which it would be appropriate for us to grant.

55. We express the hope that DWP will revisit Mr Pring's information request in the light of our decision to allow the appeal and set aside the Decision Notice and, under the oversight of the Commissioner, disclose what should have been disclosed in answer to his request. If the

parties are not able to resolve the matter by agreement within 5 weeks after the date of this decision, we invite them to make further submissions as to what, if any, further order or orders we ought to make, consequent upon our decision.

Signed on original

/s/ Andrew Bartlett QC, Tribunal Judge