



Case Reference: EA/2022/0095

[2022] UKFTT 00394 (GRC)

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

**Heard on by CVP on 6 October 2022**

**Decision given on 4<sup>th</sup> November 2022**

**Before**

**TRIBUNAL JUDGE Stephen Cragg KC  
TRIBUNAL MEMBER Dave Sivers  
TRIBUNAL MEMBER Kate Grimley Evans**

**Between**

**MICHAEL GUY SMITH**

Appellant

**And**

**INFORMATION COMMISSIONER**

Respondent

**Decision: The appeal is Dismissed.**

**Substituted Decision Notice: No substituted decision notice.**

**Mr Smith represented himself**

**The Commissioner was represented by Michael White.**

## **REASONS**

### MODE OF HEARING AND PRELIMINARY MATTERS

1. The proceedings were held via the Cloud Video Platform. All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
2. The Tribunal considered an agreed open bundle of evidence comprising 603 pages, a closed bundle written submissions from both parties and a bundle of authorities.
3. The case was listed for half a day although the parties were not aware that this was the case (we note that the Appellant had replied 'Unknown, but perhaps half a day' in the time estimate section of the appeal form). In the end we did use part of our afternoon session, the Appellant was able to address us for over two hours in the hearing, and we had the benefit of his thirty-page skeleton argument.
4. The Appellant also renewed his application to adjourn the hearing, which had been considered by the registrar and the Judge prior to the hearing. For the reasons set out in response to those applications, the renewed application to adjourn was not granted.

### BACKGROUND

5. The Commissioner is the regulator responsible for ensuring, amongst other things, that public authorities comply with requests for information made under the Freedom of Information Act 2000 (“FOIA”).
6. However, the Information Commissioner is also a public authority and is required to itself comply with FOIA in respect of any requests received.
7. This appeal concerns requests for information made by the Appellant to the Information Commissioner as a public authority.
8. The Tribunal will follow the approach taken in other documents in this case and refers to the Information Commissioner as (a) ‘the ICO’ when he is acting in the capacity as a recipient of FOIA requests; and (b) ‘the Commissioner’ when he is acting in the capacity of a regulator and as the respondent to this appeal.
9. There is a history to this matter. The Appellant made a number of FOIA requests to the ICO, in connection with its practice of publishing online the names and addresses of registered data controllers.
10. The ICO failed to deal with all the requests made and accepted that some were outstanding only after a decision notice was issued dealing with other aspects of the requests. The ICO then issued responses to those outstanding requests with which the Appellant was not satisfied. He sought to bring his complaints about these later responses into a Tribunal appeal on the other issues but was unsuccessful (see decisions from the FTT and the Upper Tribunal).
11. The matters were pursued by further complaint to the Commissioner, which led to the decision notice which is the subject of the current appeal.
12. Essentially, the Appellant challenges the findings of the Commissioner upholding decisions of the ICO that it does not hold further information in relation to the requests that had been outstanding, other than some information to which the exemption under s42 FOIA (legal professional privilege) was applied.

## THE DECISION NOTICE

13. The decision notice of 21 March 2022 summarises the position as follows: -

1. The complainant requested the ICO to disclose information relating to the register of fee payers and the processing and publication of personal data. This was a 15-part request and has been submitted three times to the ICO. The three requests are referred to as the Group 1, 2 and 3 requests. The ICO responded to the Group 1 requests on 25 October 2019, following an earlier decision notice issued by the Commissioner on 11 September 2019. It responded to all of the Group 2 requests on 9 January 2022 (it had responded only to parts 10 and 14 previously) and it responded to the Group 3 requests on 8 January 2022.

2. Following receipt of the responses to the Group 1, 2 and 3 requests, the complainant remained dissatisfied and asked the Commissioner to consider whether the ICO had now met its obligations under FOIA, whether any further recorded information was held by the ICO at the time of the requests and to consider whether there had been any procedural breaches of the legislation.

3. The Commissioner's decision is that the ICO has now met its obligations under FOIA, although this is a result of a fresh search conducted in response to the Commissioner's section 50 investigation. The ICO located three further documents. In addition to this the complainant has identified further documents which the Commissioner considers falls within the scope of the request and should have been identified by the ICO's searches. On this basis, the Commissioner is satisfied that, on the balance of probabilities, no further recorded information is held (other than that which has now been newly identified by the ICO and the complainant). The new information identified is however exempt from disclosure under section 42 and 21 FOIA.

14. However, the Commissioner identified further procedural breaches of the legislation in addition to those recorded in the Commissioner's earlier notice of 11 September 2019. The ICO breached section 10 FOIA as it did not respond to the Group 2 and 3 requests within the statutory time for compliance. Furthermore, as the ICO did not identify all recorded information held falling within the scope of the Group 1, 2 and 3 requests within twenty working days it again failed to comply with section 10 FOIA. Finally, it breached section 17(1) as it did not identify the exemptions being relied upon to withhold the newly identified information.

15. A table of all the requests made in the three groups and the responses is contained in an annex to the decision notice which can be found at

<https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4019998/ico-76861-g6c6.pdf>.

16. The Commissioner in his response to this appeal has set out the requests which are at issue in this appeal, together with the replies. We have set out an edited version of this as Annex 1 below as perhaps the best way to understand the requests made by the Appellant which are at issue and the responses of the ICO.

17. It can be seen from the annexes that the response to the majority of the requests is that the ICO does not hold anything further within the scope of the requests and that is the main focus of the challenge in this appeal (we will consider later the reliance on s42 FOIA for some documents later in this decision).

18. In the decision notice the Commissioner has examined the claims by the ICO that no further information is held and considered the arguments by the Appellant to the contrary.

19. Thus, at paragraphs 40-43 the Commissioner sets out what is described as the ICO's 'original position'. This set out the senior staff and managers consulted over the requests (see paragraphs 40-41) and that 'searches would encompass searches of its records management systems, Sharepoint EDRM, and previously, Meridio as well as any case management systems that might be considered relevant' (paragraph 40).

20. The Commissioner also states that: -

A fresh search has however been conducted by the ICO in response to the Commissioner's section 50 investigation and the results of this are explained below under the section 'The Complainant's position'. This has located some further information falling within scope and additionally the complainant has identified some further information falling within scope. (paragraph 43).

21. At paragraphs 44-48 the Commissioner records the various points made by the Appellant to the effect that he believed that more information was held. This included queries as to whether further information would have been generated when emails

were answered (para 45); the likelihood that information would exist in relation to consultations with the DCMS when there was a ‘transition from the register of notifications which existed prior to 25th May 2018, to the register of fee payers’ (para48); information relating to an IT project ‘to make the necessary modifications to the registration process for the register of notifications’ (para 48); and the possibility that the ICO had ‘deleted some information related to the project to implement the register of fee payers’.

22. The response of the Commissioner to these points is recorded as follows: -

49. The Commissioner asked the ICO to address these specific points and confirm whether any further recorded information is held as a result of the consultations and discussions with DCMS and when this was created to then work out whether it would have fallen into scope of Group 1, 2 or 3 requests. The Commissioner also asked the ICO to confirm whether any information was deleted, if it was deleted, why, and whether the ICO considers this was in accordance with its records retention policy.

50. With regards to searches, the Commissioner explained that the complainant is concerned that members of the project team were not consulted and asked to search – namely [four redacted names]. The Commissioner therefore asked whether these individuals were consulted and asked to search? If not, the Commissioner asked whether they could be approached now to see if any further recorded information is held? If further recorded information is identified the ICO would need to then determine whether it was held at the time the Group 1 requests were made, or later on when the Group 2 requests were made or, subsequently the Group 3 requests.

51. The ICO contacted again all those involved in the initial consultations and the additional individuals the Commissioner had specified and asked them to conduct further searches in order to confirm whether anything further is held which falls in scope of the request. With regards to discussions with DCMS, the ICO informed the Commissioner that there is no information falling in scope of the request. [name redacted] has advised that whilst they did consult with DCMS about the new regulations, she cannot recall that the ICO ever consulted specifically on the issue of publication of the register and reasonable searches have located nothing in scope.

23. The Commissioner also ascertained from the ICO that information had been deleted in line with the ICO’s Retention and Disposal Policy and said that he ‘is therefore

satisfied that any information that was deleted was done in line with the ICO's retention and disposal policy' (para 52).

24. In paragraph 54 the Commissioner sets out the Appellant's points raised about 'Article 30' records requested for the purposes of Request 6. He said that 'it is sufficiently clear to establish that the Article 30 records contain nothing about processing for the purposes of publishing the entries in the register of fee payers' and referred to emails where the ICO had provided justifications and explanations which could be described as purposes. The Commissioner responded as follows: -

55. The Commissioner put it to the ICO that the complainant considers that these emails are recorded information relevant to request 6 and should have been disclosed.

56. The ICO argued that if the complainant's position is that he maintains the further emails referred to at paragraph 54 above should have been identified and disclosed, the ICO disagrees. FOIA requires the ICO to perform reasonable searches to identify all the information held. It consulted with the individuals who may have held information falling in scope and performed searches of relevant areas of the ICO's records management system. The ICO considers that it performed appropriate and thorough searches of the areas of its record management system and contacted individuals it would reasonably expect to hold information in scope if it existed. It does not consider it would have been reasonable to search every piece of correspondence or enquiry the ICO received on the off chance any information falling in scope of the complainant's requests existed, especially given he is already in receipt of the emails he has referred to as they are addressed to him. In any event to search all correspondence and enquiries received would undoubtedly take the request over the cost limit under section 12. However, the ICO said that should the Commissioner consider these documents should have been identified through reasonable searches and that the ICO should have disclosed these emails, then this would engage section 12 of the FOIA as any attempt to locate information of this nature would undoubtedly exceed the cost limits. Alternatively, the specific emails referred to by the complainant would be exempt under section 21 of the FOIA as they are already reasonably accessible to him.

25. In relation to whether further information is held the Commissioner concluded as follows: -

59. The Commissioner is satisfied that, on the balance of probabilities, all recorded information which was held at the time of the Group 1, 2 and 3 requests has now been identified by the ICO. The ICO has explained exactly

what searches it undertook and how these were of all relevant staff and business areas.

60. This is because the Commissioner asked the ICO to carry out fresh searches during his section 50 investigation to ensure that it had identified all recorded information held and therefore complied with its obligations under section 1 of FOIA.

61. As a result of the fresh searches conducted, two further documents have been identified as falling within the scope of the Group 1 requests (and would therefore also fall within scope of the Group 2 and 3 requests). This information is however being withheld under section 42 FOIA. One further document was located relevant to the Group 3 requests which has also been withheld under section 42 FOIA (this was not however held at the time of the Group 1 and 2 requests).

...

63. In this case the Commissioner does not consider it reasonable for the ICO to search all correspondence and enquiries given it is a large public authority and records will be spread across various departments and locations. Fresh searches ensured all original consultees were consulted again and the four individuals whom the complainant was concerned had not been approached were also consulted. In addition, a further member of staff was consulted which located the three further documents being withheld under section 42.

64. However in terms of the emails referred to by the complainant as falling within the scope of the request and not located by the ICO identified at paragraph 54, the Commissioner considers it may have been reasonable to search for this information. The ICO would not have to search all correspondence and enquiries, only correspondence and enquiries from one particular individual (the complainant given the ICO's interaction with him on this subject matter). On this basis the Commissioner considers it unlikely section 12 FOIA would apply to search for correspondence with one individual however he would accept that this information would be reasonably accessible to the complainant and therefore exempt under section 21 FOIA.

26. In relation to section 42 FOIA (which is an exemption relating to legal professional privilege), the Commissioner explains that: -

...a further staff member was contacted by the ICO. They have advised that they had been involved in the ICO's internal compliance project in the run up to the implementation of GDPR and were aware of some documents generated as part of this project that might fall in scope of the request. .... they have now conducted additional searches of the information held in connection with this



project and have managed to locate two documents that would appear to fall in scope of the complainant's request, specifically requests 6 and 10. Whilst they only contain a limited amount of information, these should have been identified and considered for disclosure at the time of the Group 1 requests (and could therefore also have been held at the time the Group 2 and 3 requests were made). However, these documents contain legal advice and are being withheld under section 42 of the FOIA.

27. The Commissioner concluded that the documents were covered by the s42 FOIA exemption and that the public interest balance to be applied favoured the non-disclosure of the documents.

### LEGAL FRAMEWORK

28. Section 1 FOIA provides that: -

(1) Any person making a request for information to a public authority is entitled—

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and  
(b) if that is the case, to have that information communicated to him.

...

(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

29. The Tribunal in *Linda Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072; 31 August 2007) held that in determining a dispute as to whether information is 'held' at [13]: -

There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information. However, it argued (and was supported in the argument by the Information Commissioner) that the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner's findings of fact are reviewed. We think

that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.

30. Section 42 FOIA states that information in respect of which a claim to legal professional privilege (LPP) could be maintained in legal proceedings is exempt information. Section 42(1)(a) FOIA reads, materially, as follows: -

**42.— Legal professional privilege.**

(1) Information in respect of which a claim to legal professional privilege... could be maintained in legal proceedings is exempt information.

31. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. For information to be covered by litigation privilege, it must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It covers communications between lawyers and third parties, as long as they are made for the purposes of the litigation. Litigation privilege applies to a wide variety of information, including advice, correspondence, notes, evidence or reports.
32. However, this is a qualified exemption which means that in addition to demonstrating that the requested information falls within the definition of the exemption, there must be consideration of the public interest arguments for and against disclosure to demonstrate in a given case that the public interest rests in maintaining the exemption or disclosing the information. When applying the public interest test the approach to be taken is whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information: s2(2)(b) FOIA.

33. In relation to the application of the public interest test in s42 FOIA cases, in *DBERR v O'Brien v IC* [2009] EWHC 164 QB, Wyn Williams J gave the following important guidance: -

41. ... it is for the public authority to demonstrate on the balance of probability that the scales weigh in favour of the information being withheld. That is as true of a case in which section 42 is being considered as it is in relation to a case which involves consideration of any other qualified exemption under FOIA. Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question.

53.....The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight. Accordingly, the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least.

34. Further, in *Corderoy and Ahmed v Information Commissioner, A-G and Cabinet Office* [2017] UKUT 495 (AAC)), the Upper Tribunal noted as follows in emphasising that the s42 FOIA exemption is not a blanket exemption: -

68. The powerful public interest against disclosure ... is one side of the equation and it has to be established by the public authority claiming the exemption that it outweighs the competing public interest in favour of disclosure if the exemption is to apply. However strong the public interest against disclosure it does not convert a qualified exemption into one that is effectively absolute.

35. The development of the doctrine of legal advice privilege, and of the rationale for it, is traced in detail in the speech of Lord Taylor of Gosforth CJ in *R v Derby Magistrates Court, ex p B*, [1996] AC 487, and then summarised by him as follows at 507D:

The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.

## THE APPEAL AND THE HEARING

36. The Appellant's appeal is dated 19 April 2022. The grounds are listed as follows: -

- Ground 1: The decision notice should have found that the ICO has more recorded information in the scope of my FOI requests.
- Ground 2: The decision notice should have found that the public interest favoured disclosure in relation to the information the decision notice found to be covered by a section 42 FOIA exemption.
- Ground 3: The decision notice incorrectly decides that the ICO has complied with section 1(1)(a) FOIA for some of my FOI requests.
- Ground 4: The decision notice should have found further breaches by the ICO of section 16 FOIA
- Ground 5: The decision notice incorrectly finds that the ICO complied with the earlier decision notice FS50804336 of 11th September 2019.
- Ground 6: The decision notice has incorrectly dated the ICO's responses to my Group 3 requests.

37. For the appeal hearing the Appellant's comprehensive skeleton argument helpfully set out why he was 'sceptical of the claim that the ICO has no more information within the scope of my requests', for the purposes of Ground 1. He said that these centered around four lines of enquiry: -

- The ICO is under a legal obligation as a data controller relying on the public task lawful basis to have more records than it says it has.
- Enquiries related to how in practice the ICO would likely have transitioned from the register of notifications, which existed prior to 25th May 2018, to the register of fee payers, and the ICO's responsibilities during that transition. In particular the artefacts and records that would have been likely to have been generated for this transition.
- The evidence that the ICO had some information within the scope of some of my requests which they deleted.

□ Whether all the relevant people identified as working on the project to implement the register of fee payers have been asked to search for any recorded information.

38. The Appellant's wholly reasonable approach (as it was before the Commissioner) was to analyse what information he thought the ICO should hold in relation to its functions, who should have been asked to search for it, and to question exactly what information had been deleted prior to the request.
39. The Commissioner's response is to say that whether more information is held is a factual question and draws attention to the extensive investigation that the ICO carried out in response to the requests in issue.
40. In relation to the s42 FOIA exemption (Ground 2) the Appellant does not state a position as to whether the exemption applies (as he has not seen the withheld material).
41. In terms of the public interest, the Appellant warns (as does the case law) about elevating s42 FOIA to the status of a blanket exemption. He notes the Commissioner's view that availability of the DPIA and Policy means that 'Disclosure of the small amount of legally privileged information would add nothing further of value to this discourse and would not be in the public interest'. The Appellant raises the possibility that the withheld material is in some way inconsistent or incompatible with the information disclosed, or that it adds nothing at all of substance to the material disclosed. In both cases he argues these would be factors to take into account when balancing the public interest.
42. The Commissioner points to the strong interest in public authorities – in this case, the ICO – being free and unconstrained in seeking legal advice without fear that such advice is likely to be disclosed in due course, particularly in circumstances where it is still relevant to a live issue or policy (as it is here, it is argued, given that the Commissioner is still publishing the Register and publishing controllers' addresses thereon). The Commissioner invites the Tribunal to consider the relevant documents in the closed bundle and submits that that they do not, for example, go to a matter in which there has been any journalistic interest, or suggest that the ICO has acted in a manner that is in any way reprehensible.

43. The Appellant raises some additional matters in his appeal. He argues that ‘the decision notice incorrectly decides that the ICO has complied with section 1(1)(a) FOIA for some of my FOI requests’ (Ground 3) as the ICO did not confirm that all the information provided was in fact responsive to the Appellant’s requests. The Commissioner says that what the ICO needed to do to comply with its duties under s1(1) FOIA was simply to provide information it held, and confirmation of holding the information was implicit in its provision.
44. The Appellant complains that ‘the decision notice should have found further breaches by the ICO of section 16 FOIA’ (the duty of a public authority to provide advice and assistance so far as it would be reasonable to expect the authority to do so, to requesters) (Ground 4). This ground is based on the fact that the ICO did not carry out internal reviews in relation to some of the requests. The Commissioner says in his skeleton argument that: -

It is very clear from the extensive correspondence in the bundle that the ICO has engaged at great length and in good faith with the Appellant in respect of his requests, and the Commissioner does not consider that internal reviews were required in order to discharge the ICO’s duties under section 16 FOIA.

45. The Appellant also states that the decision notice overlooks the fact that the ICO’s compliance with the earlier decision notice FS50804336 was out of time (Ground 5), and ‘that the decision notice has incorrectly dated the ICO’s responses to my Group 3 requests’ (Ground 6). The Commissioner argues that these points are ‘immaterial to the outcome of the complaint or decision appealed’.

## DISCUSSION

46. The Appellant has introduced detailed arguments in writing and orally. It is not possible to do justice to every point he makes.
47. However, from the point of view of the Tribunal there are two main questions to be answered. The first is whether the Commissioner was correct to find that, on the balance of probabilities, the ICO does not hold any further information within the scope of the requests made by the Appellant (Ground 1). The second is whether the Commissioner was correct to find that the public interest in relation to any documents

covered by legal professional privilege favoured the withholding rather than the disclosure of those documents (Ground 2). We will consider each of those questions in turn and then refer more briefly to the other Grounds raised by the Appellant.

### **Holding any further information**

48. As the parties agree, it is necessary for the Tribunal to decide on the balance of probabilities whether the ICO holds any further information within the scope of the Appellant's requests.
49. In our view it is appropriate to consider the factors set out in the *Bromley* judgment as set out above, and to consider the four headings presented to the Tribunal by the Appellant in writing and at the hearing (and as set out above).
50. In this case there are clearly failings in relation to the ICO's initial analysis of the requests from the Appellant, although in our view the way the requests were presented did not make the task an easy one for the ICO. However, by the time the Appellant's complaint had been investigated by the Commissioner, it is the case that further searches, at the behest of the Commissioner, had been carried out and responses provided to the Commissioner.
51. We have set all this out above, and cited extensively from the decision notice, and it is our view that the result has been a series of thorough, considered, rigorous and widespread searches covering an appropriate number of relevant people and sources. It is clear, in particular, that the Commissioner, during the investigation, responded to points made by the Appellant and asked for further steps and searches to be undertaken in relation to those points.
52. We take on board the Appellant's point that where the ICO is under a legal obligation as a data controller to have more records than it says it holds, then we should approach the case with some care. We also accept that where there has been a process such as the transition from the register of notifications, there will often be information generated as a result. However, our role is not to consider what information should be held by the ICO. Our role is to consider whether the public authority does, in fact, hold the requested information. In our view, and on the facts, if the extensive searches

described by the Commissioner and as carried out by the ICO have not revealed any further information, then it is unlikely that further information is held.

53. In relation to the Appellant's point that some of the requested information may have been deleted in line with the ICO's data deletion policy, it does not appear to us that this takes things any further. We are considering the position at the time the request was made. If the information was deleted before the Appellant's request was made, then it was not held at the time of the request. The fact that some information was deleted does not, in our view, imply that further information was held within the scope of the requests which could or should have been disclosed.
54. Further, in relation to the Appellant's concern that not all the relevant people at the ICO were asked to search records, we note that these points were made to the Commissioner by the Appellant (and further individuals identified). It can be seen from paragraphs 50-51 of the decision notice that the Commissioner made further requests to the ICO and the Commissioner records that 'the ICO contacted again all those involved in the initial consultations and the additional individuals the Commissioner had specified and asked them to conduct further searches. In our view, these further steps insisted on by the Commissioner, and carried out by the ICO, provide further evidence that sufficient searches were made in this case.
55. The Appellant raised another point that some of the information that has been disclosed 'does not meet the description I specified in my requests'. However, we accept the Commissioner's response that, if this is the case, it stems from the ICO's attempt to disclose as much information requested as it can, rather than any attempt to mislead or obfuscate the issue as to what information is held. It may be the case that some information which the Appellant feels is not within the scope of his request has been disclosed, but that does not lead to a conclusion that the ICO holds further information that is within the scope of the request.
56. Lastly, during the hearing the Appellant made submissions to the effect that the ICO was motivated to withhold information within the scope of the requests. We have seen no evidence of that and, indeed, the decision notice indicates that extensive efforts have been carried out to find a definitive answer as to whether further information is held or not.



57. Taking all this into account, it is our view that, on the balance of probabilities, the ICO does not hold further information in relation to the Appellant's request. We note that the Appellant made some arguments about where the burden of proof lay in this case. For the avoidance of doubt our conclusion is the same whether or not the burden of proof is on the Commissioner to show that no further information is held, or on the Appellant to show that further information is held.

### **Section 42 FOIA**

58. The Tribunal has seen the relevant withheld information and, in its view, it consists of information to which the exemption in s42 FOIA applies.

59. Having reached that conclusion, the approach we have to take is to recognise that there is a significant in-built public interest in non-disclosure in LPP cases under s42 FOIA, as the court said in *DBERR* paragraph 53, 'in any event'. As the court indicated in paragraph 51 of that case it is 'not necessary to demonstrate any specific prejudice or harm from the specific disclosure of the documents in question'.

60. It is then necessary to assess whether there are other factors to be taken into account which support non-disclosure, and then consider whether the public interest in disclosure is equal to or outweighs those combined factors.

61. No specific additional factors have been raised by the Commissioner which justified the decision that the public interest favoured non-disclosure. Conversely, in our view the public interest in favour of disclosure are not strong. As submitted on behalf of the Commissioner, the Tribunal can confirm that there is nothing in the documentation which is contradictory to any policy or guidance issued by the ICO. We also agree with the Commissioner that the information does not add very much, or anything, to the sum of knowledge already available to the Appellant.

62. We recognise that there may be cases where the public interest in disclosure will outweigh the in-built public interest in protecting LPP, and that s42 FOIA

does not provide for a blanket exemption. However, in our view this is not one of those cases for the reasons set out above. The public interest in disclosure is not strong in this case and the public interest balance is in favour of non-disclosure. That is our conclusion regardless of which of the parties has the burden of proving where the public interest lies.

### **Other grounds**

63. In our view a correct interpretation of s1(5) FOIA is that the provision of information under s1(1)(b) FOIA amounts to confirmation that information was held for the purposes of s1(1)(a) FOIA. Section 1(5) FOIA says in terms that a ‘public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b)’. In our view in this case there was nothing further to be done by the ICO to comply with s1(1)(a) FOIA.
64. Looking at the case in the round, and the extensive efforts which we have found both the ICO and the Commissioner to have undertaken by the time the Commissioner issued the decision notice, the Commissioner was correct to find that there was not a breach of s16 FOIA.
65. In the circumstances of this case, mistakes such as overlooking the fact that a response to a request was outside the statutory time limit, or wrongly recording a date, do not in our view amount to anything in the decision notice which is not in accordance with the law or an exercise of discretion which should have been exercised differently by the Commissioner such as to provide grounds to allow the appeal.

### CONCLUSION

66. On the basis of the above, the Tribunal dismisses the appeal.

**Stephen Cragg KC**

Judge of the First-tier Tribunal

Date: 1 November 2022

Date Promulgated:

ANNEX 1: Summary of requests in dispute with Appellant's and ICO's responses

(edited from the Commissioner's skeleton argument for appeal hearing).

**Requests 2 and 8**

Request 2 ...is as follows:-

*Is it your contention that the use of a PO Box or 'alternative address' is compliant with The Data Protection (Charges and Information) Regulations 2018?"*

This request was later reformulated into Request 8, with the Appellant describing Request 8 as "My further attempt to clarify what I'm asking for now [in Request 2]".

Request 8 was as follows:

*The ICO collects for the register of fee payers the name and address of each registering data controller provided via paragraph 3(a) of Regulation 2 of The Data Protection (Charges and Information) Regulations 2018. Paragraph 5(b) of Regulation 2 says that for the purposes of paragraph 3(a), "the address of a person (other than a registered company) carrying on a business is that of the person's principal place of business in the UK."*

- *Does the ICO have a policy, with regards to enforcement of these regulations, for what it regards as acceptable as a person's principal place of business in the UK?*
- *If so please send me a copy of the ICO's policy.*
- *Does the ICO have a procedure for verifying that the address a person has provided is their principal place of business in the UK?*
- *If so please send me a description of the procedure.*

The ICO confirmed to the Commissioner that it did not hold any information that was responsive to Requests 2 and 8: [C407]. This was explained to the Appellant in:-

(a) an email on 25 October 2019, which stated in response to Request 8 that the ICO did not have the policies or procedures sought: [B149]-[B150];

(b) a letter of 8 January 2021 (misdated 2020), which stated in response to Requests 2 and 8 that:

*"The only information that may fall in scope of these requests is held in our DPIA and Publication of Register of Fee Payers Policy. We have previously provided these to you, but I have attached the latest versions here. There is nothing further held beyond what we have advised you in our previous responses": [B236].*

The Appellant took issue with this in correspondence, for example in the email of 27 January 2021 that appears at [B284]-[B285], in which he states inter alia:

“Whilst I think it is clear that these documents are relevant and related to my requests in some sense that is not the same as saying that they do actually contain all of the information I seek. I think in a number of cases they do not contain all of the information I seek. Do you disagree and maintain that they do provide all the information I seek for all the requests I have asked you to review? Or is it that you agree that they do not provide all of the information I seek but maintain that the ICO does not have any further recorded information within the scope of my requests that I have

asked you to review? If so please clarify which information you believe you have provided for which requests and which you have not because you maintain that the ICO has no such recorded information. As written the wording of your letter is much more vague and equivocal. It seems as if you are avoiding providing a clear view on whether they contain all of the information I seek with the requests I am now asking you to review.

The ICO wrote back to the Appellant on 29 January 2021 – [B288] – to confirm, inter alia:-

... we have provided copies of the information that we hold and that fall under the scope of your requests. If specific information you are seeking is not present in the disclosed information, please take this as confirmation that it is not held.

### Requests 2 and 9

Request 3, at [B125], is as follows:

*“When did you start publishing the register again?”*

This request was later reformulated into Request 9, with the Appellant stating in an email on 2 January 2019 “I think, given the context in which this question was asked, it was already very clear. But, in order to make things even clearer I can further clarify now by expanding on a more complete set of requests for publishing dates of the register as follows”: [B139]-[B140]. The Appellant went on to set out Request 9, in the terms set out below.

The ICO responded to this request on 25 October 2019. For ease of reference, its response has been interpolated below, in unitalicised bold text: [B149]-[B150]:

• *On which date did the ICO cease to publish on its website at <https://ico.org.uk/> data from the register of notifications (described at the time on the website as the "Register of data controllers") that pertained before the data protection law changes which commenced on 25th May 2018.*

**We do not hold a specific record of this, but we believe we stopped publishing the public register around 5 May, before the GDPR changes were made.**

- *On which date, on or after 25th May 2018, did the ICO start to publish data from the register of fee payers, set up via the data protection law changes which commenced on 25th May 2018.*

**21 June 2018**

- *Please also specify any dates on which the register of fee payers was subsequently taken down from the website at <https://ico.org.uk/> and subsequently put back up on the website. I don't require any dates when the only reason that the register of fee payers was unavailable was general technical website operational problems at <https://ico.org.uk/> rather than deliberate purposeful actions in relation to the publication of the register of fee payers.*

**We do not have any records of us purposefully making the register unavailable and we do not believe we have intentionally taken the register down after 21 June 2018**

*Please answer the above requests in relation to the register of notifications and the register of fee payers in two ways:*

- *In relation to a publicly searchable form, such as the current one at <https://ico.org.uk/ESDWebPages/Search>.*
- *In relation to a downloadable file or set of files containing multiple entries from the register such as currently referred to at <https://ico.org.uk/aboutthe-ico/what-we-do/register-of-fee-payers/download-the-register/>.*

**An updated, downloadable version of the public register has not been made available after 25 May 2018.**

*Continuing:*

- *Currently the page at <https://ico.org.uk/about-the-ico/whatwe-do/register-of-fee-payers/download-the-register/> says that the "register of fee payers is currently unavailable to download". Does the ICO have a policy or plan to make this downloadable version of the register of fee payers available again?*
- *If so is there a target date for when this would happen and what is it?*

**We have plans to make the public register of fee payers downloadable. At this stage we do not have dates for when it will be available to download from our website. We are currently exploring some technical issues that need to be resolved before we can place the information we hold in a downloadable format on the website, but this work is ongoing. I can confirm that we do intend to publish one once our website development issues are resolved to the extent that this is possible.**

**In the meantime the public register of fee payers is available on our website, it is searchable, and it is free to use and re-use the data under the terms of the Open Government Licence (OGL).**

*• Were there any periods when the register of fee payers' data was unavailable on the ICO's website at <https://ico.org.uk/> , in either of the two ways referenced, when it was instead available at the UK government web archive of the ICO website at <https://webarchive.nationalarchives.gov.uk/> ? If you do not have this information about the UK government web archive I would be grateful if you could direct me to who does”*

**We do not hold information regarding what information is available on the National Archives website. The National Archives holds archived versions of the Information Commissioner’s Office website. Therefore historical data in regard to the fee payers’ register is available via the National Archives website, please find a link to this below.**

**[https://webarchive.nationalarchives.gov.uk/\\*/http://www.ico.org.uk](https://webarchive.nationalarchives.gov.uk/*/http://www.ico.org.uk)”.**

## **Requests 4 and 10**

Request 4 is as follows:-

*Turning to the matter of your lawful basis for publishing my personal data. You are maintaining that it is under the lawful basis of "Public task". But you have failed to adequately address my points in my original email regarding this. In particular you have not given any specific reference to a statute law which gives you this publishing right. In your email reply you simply refer to Article 6(1)(e) of the GDPR, but as you know this merely introduces the "Public task" lawful basis. It is not the specific law needed for this particular case. Recital 41 of the GDPR does say that you do "not necessarily require a legislative act adopted by a parliament" but your "legal basis or legislative measure should be clear and precise and its application should be foreseeable to persons subject to it". You have failed to do this. Moreover your own guidance notes at: <https://ico.org.uk/for-organisations/guide-to-the-general-dataprotection-regulation-gdpr/lawful-basis-for-processing/public-task/> state "For accountability purposes, you should be able to specify the relevant task, function or power, and identify its basis in common law or statute. You should also ensure that you can demonstrate there is no other reasonable and less intrusive means to achieve your purpose." You simply haven't done this and I invite you to do this again now.*

This request was later reformulated into Request 10, with the Appellant stating as follows, in respect of Request 4, in an email on 2 January 2019: [B138]:-

*It is unclear to me whether your refusal of my Freedom of Information requests extends to this version of my request. Nevertheless my further attempt to clarify what I'm asking for now is:*

*The ICO have previously said that the publication on the ICO's website of the register of fee payers, including some personal data of individual data controllers, is done under the public task lawful basis. The ICO's published guidance on the public task lawful basis at <https://ico.org.uk/for->*

*organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/public-task/ says public authorities relying on the public task lawful basis should "Document your decision to rely on this basis to help you demonstrate compliance if required. You should be able to specify the relevant task, function or power, and identify its statutory or common law basis."*

- *Does the ICO have documentation regarding the decision to rely on the public task lawful basis and does any such documentation include a specification of the relevant task, function or power, and its statutory or common law basis?*
- *If the ICO does have such documentation then please send me a copy of it.*
- *If the ICO does not have any such documentation then please send me any records you have regarding why this documentation was regarded as unnecessary in spite of your own published guidance and obligations under Recital 41 of GDPR.*

The ICO responded to Requests 4 and 10 as follows, on 25 October 2019:-

There is no documented decision, it is stated in our Privacy Notice that we rely on the public task as the lawful basis. The Privacy Notice contains the purpose and legal basis for processing, please find a link to this on our website: <https://ico.org.uk/global/privacy-notice/pay-a-data-protection-fee/>

There have been two updates to the Privacy Notice since its publication, which I have detailed below.

17 May 2019 – Updated to include information about fees recovery and our use of external solicitors.

25 June 2019 - Change of data processor from Barclays to Global Payments.

All other content was present when the updated privacy notice was published prior to GDPR coming in on 25 May 2018.

As this information is reasonably accessible to you by other means it is exempt from disclosure under section 21 of the FOIA.

The Commissioner went on to explain, in an email dated 8 January 2021 (misdated 2020) – [B237] – that:-

To the extent we hold information falling in scope of these requests it is held primarily in our privacy notice (to which you have previously been directed and is technically exempt under section 21 of the FOIA), our DPIA and Publication of Register of Fee Payers Policy, the latest versions of which are attached. I have also attached our response to the regulator following your complaint to the Commissioner under case reference RFA0804334. Where this contains your personal data it has been disclosed to you on a discretionary basis as opposed to ‘the world at large’ under the FOIA.



The Commissioner explained further, in the table appended to his email to the Appellant of 9 January 2022 – [B292]-[B293] – that:-

We consider we hold information in connection with this request and this was disclosed in our response – namely the DPIA publication of the register of fee payers and our response to the regulator in response to his complaint. Eg the following extract from the DPIA: Article 57 of the GDPR lists the tasks required of the commissioner as the supervisory authority in the UK. Article 57(d) requires the Commissioner to promote public awareness and understanding of the risks, rules, safeguards and rights in relation to processing. We consider publication of the register to be integral to us fulfilling this task.

In the course of correspondence with the Commissioner in respect of the complaint underpinning this appeal, the ICO discovered, from additional searches, further information falling within the scope of this request that was subject to legal professional privilege: see closed bundle, and [B302]-[B305].

### **Requests 5 and 11**

Request 5 is as follows:-

*Currently my address on the register is listed as “withheld”. Do you plan to maintain it like this, including on any re-enabled facility to download the entire register? Will this continue once you’ve introduced the email address option? I.e. can I continue to have my domestic residential address and email address withheld from the published register? If so do you plan to offer this facility to others who object or during the registration process?”*

This request was later reformulated into Request 11, with the Appellant stating as follows, in respect of Request 5, in an email on 2 January 2019: [B140]:-

*Part of this request is specific to me, and so not related to a Freedom of Information request. My further attempt to clarify now the part which I believe is a Freedom of Information request is:*

- *If an individual data controller complains about the publishing of their domestic residential address or email address in the published register of fee payers, does the ICO have a policy that covers whether or not this data will be listed as “withheld” on the published register of fee payers?*
- *If so please send me a copy of this policy.*
- *Are there any plans to ask individuals whether they consent to have this information published as part of the registration process or will it be left to individuals exercising their general right to object such as under Article 21 of GDPR?*

The ICO responded to Requests 5 and 11 as follows, on 25 October 2019 – [B151]:-

We do not hold a policy and as stated in our Privacy Notice [...] we rely on the public task as the lawful basis for processing.

The Commissioner went on to explain, in an email dated 8 February 2021 – [B165] that:-

As advised previously the lawful basis for processing is the public task and therefore consent is not required.

The Commissioner explained further, in the table appended to his email to the Appellant of 9 January 2022 – [B298] – that:-

No specific ‘policy’ is held – however, we hold information about the scenario described in the first part of the request – in our DPIA and Policy on the publication of the register. For example, sections 2.2, 3.1 and 4 of the DPIA. Section 2.2 of the DPIA also covers the second part of Q11.

### **Requests 6 and 12**

Request 6 is as follows:-

*What does the ICO think is the purpose, under the new legal framework, of the register of fee payers?*

This request was later reformulated into Request 12, with the Appellant stating as follows, in respect of Request 6, in an email on 2 January 2019: [B140]:-

*“My further attempt to clarify what I’m asking for now is:  
Article 30 of GDPR requires the ICO to document the purposes of any processing of the personal data gathered for the register of fee payers.*

- Does the ICO have such documentation and if so please send me a copy of it?*
- Do the purposes go further than those specified in the privacy notice at <https://ico.org.uk/global/privacy-notice/pay-a-data-protection-fee/> ?”*

The ICO responded to Requests 6 and 12 as follows, on 25 October 2019 – [B151]:-

We can confirm that, pursuant to Article 30 of the General Data Protection Regulation 2016 (GDPR), the ICO holds a record of processing activity for the processing of personal data in respect of the register of fee payers. I have attached a csv file to this response which contain the information you have requested. This a live document which is currently under review.”

The ICO confirmed in respect of these requests in a further letter on 8 January 2021 (misdated 2020) – B238 – that:-

The only information held beyond what has previously been advised and provided to you is contained within the latest version of our DPIA/Policy. I have also attached the relevant section of the latest section [sic] of our Article 30 ROPA.

### **Requests 7 and 13**

Request 7 is as follows:-

*Your email solution makes no sense to me whatsoever. It just doesn't seem like it's been thought through properly. You talk about giving data controllers the option, but how? When they register or renew? I suppose you could do it then, although of course I would argue you have to give people, who are registering as data controllers as individuals, the option of neither their postal address nor their email address being published. But given how you're referring to whether I object I assume your plan sounds like you intend that it would apply to everyone on the register. But then how would this be achieved? Do you plan to email everyone on the register and ask them if they want their email address to be published rather than their postal address, giving them the option of as you suggest registering a new email address? Or do you just intend to start publishing the existing email address they've provided? My recollection of the fee registration process was that I had to give an email address in the context of providing contact details and I thought it said that it wouldn't be published. Can you confirm this?*

This request was later reformulated into Request 13, with the Appellant stating as follows, in respect of Request 7, in an email on 2 January 2019: [B140]:-

*My further attempt to clarify what I'm asking for now is:  
In an email to me on 20th August 2018 you referred to an email solution to give individuals the option of providing an email address giving them the option to provide a way of being contacted without that identifying where they are based.*

- Does the ICO have any specification documents as to how this solution is intended to work and how it would change the process of registering by data controllers?*
- If so please send me a copy of any such specification documents.*
- Does the ICO still intend to proceed with this email policy?*
- If the ICO does still intend to proceed with this email policy then is there a target date for when the change would be rolled out and what is it?*

The ICO responded to Requests 7 and 13 as follows, on 25 October 2019 – [B151]:-

We do not hold specification documents but individuals are given the option of providing an email address as an alternative if they raise a concern.

In an email of 8 February 2020, the ICO confirmed:-

In regard to your query about an email solution' and a policy in regard to this. As previously advised we do not hold a policy. Therefore we have nothing further to add.

The ICO confirmed in respect of this request in a further letter on 8 January 2021 (misdated 2020) – B239 – that :-

Nothing further is held beyond what you have been previously advised. The only information of relevance is held in the DPIA/Policy and our privacy notice.

With a further email to the Appellant on 9 September 2022, the ICO enclosed a table in which it noted inter alia that:-

We don't hold a 'specification document' as such. However, information about the 'email solution' and any changes to the process of registering is held in section 2.2 and 3.1 in the DPIA. No other information is held: [B299].

### **Request 14**

Request 14 is as follows:-

*Firstly regarding a Data Protection Impact Assessment:*

- *Did the ICO carry out a Data Protection Impact Assessment (DPIA) which covered the processing of data gathered for the register of fee payers?*
- *If so when was the DPIA carried out?*
- *If a DPIA was carried out please send me a copy of any DPIA document.*
- *If the ICO did not carry out a DPIA did you document the reasons why you did not?*
- *If you did document the reasons why you did not carry out a DPIA then please send me a copy of this documentation.*
- *If you did not carry out a DPIA did you rely on a prior Privacy Impact Assessment (PIA) for the previous register of notifications, perhaps with appropriate updates?*

The ICO responded to Request 14 as follows, on 25 October 2019:-

A DPIA was not completed for the register of fee payers when the new regulations came in last year. There are no documented reasons why we did not carry out a DPIA. There was not a prior Data Privacy Impact Assessment.

In an email to the Appellant on 8 February 2020, the ICO wrote:-

You also enquired about a Data Protection Impact Assessment (DPIA) for the register of fee payers. We can advise that a DPIA is in the process of being completed: [B165].

A DPIA was done subsequently. With a further letter to the Appellant on 8 January 2021 (misdated 2020), the ICO enclosed a copy of the DPIA: [B239]-[B240].

## Request 15

Request 15 is as follows:

*Concerning the current register of fee payers please provide the following numbers:*

- *Total number of entries on the register of fee payers, i.e. the total number of data controllers who are on the register of fee payers including those whose entry rolled over from the register of notifications. Then amongst this total number:*

- *The number of entries on the register of fee payers in tier 1 - micro organisations.*

- *The number of entries on the register of fee payers who specified an organisation type of "Individual / Sole trader".*

- *The number of entries on the register of fee payers who specified an organisation type of "Individual / Sole trader" and where the address given of the data controller is a domestic residential address. If such addresses are not flagged as such on the register then please provide a reasonable estimate if possible.*

*When providing these numbers please provide them for the most recent date where it is practicable to provide them and tell me what that date is.*

The ICO responded to Request 15 as follows, on 25 October 2019: -

Please find below the figures for the total register by Tier.

Dec 2018:

Tier 1 – 563,454

Tier 2 – 20,491

Tier 3 – 6,340

Total = 590,285

The current register:

Tier 1 – 563,699

Tier 2 – 40,818

Tier 3 – 6,259

Total = 611,046

We have 172,746 sole traders on the register (we do not have a status for individual).

We do not have anything that differentiates between a residential and non-residential address so we cannot provide an answer to this.