



Neutral citation number: [2025] UKFTT 00040 (GRC)

Case Reference: FT-EA-2024-0086

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

**Decided without a hearing  
Decision given on: 20 January 2025**

**Before**

**JUDGE SOPHIE BUCKLEY  
JUDGE BRIDGET SANGER  
MEMBER MARION SAUNDERS**

**Between  
Simon Parsonson**

Appellant

**and**

**The Information Commissioner**

Respondent

**Representation:**

For the Appellant: did not appear

For the Respondent: did not appear

**Decision:** The appeal is dismissed.

**REASONS**

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**Introduction**

1. This is an appeal by Simon Parsonson against the Commissioner's decision notice IC-269736-G3P8 of 7 March 2024 which held that the ICO was entitled to rely on s21 (information accessible by other means) and s 42 (legal professional privilege - LPP) of Freedom of Information Act 2000 (FOIA) to withhold the requested information.
2. In this decision, the ICO, in its role as public authority, will be referred to as the ICO. In its role as decision maker (and Respondent) it will be referred to as the Commissioner.

### **The request for information**

3. Simon Parsonson requested the following information from the ICO on 4th October 2023:

*"3. Any and all ICO case logs, meeting minutes relevant and part of the Facewatch decision making process that concluded in March 2023. Specifically who Stephen Bonner, Emily Kearney and John Edwards sought advice from when Policing Minister Chris Philip MP wrote to the ICO in February 2023.*

*5. Documents showing how ICO key performance indicators and service management targets are measured and recorded internally at the ICO.*

*6. Internally issued ICO policy and policy guidelines regarding complaint handling against the ICO and its staff itself.*

*7. Internally issued ICO policy and policy guidelines regarding data protection and information rights complaints received by the public."*

*(Parts 1, 2, 4 and 8 of the request were processed a subject request under the Data Protection Act 2018)*

4. The ICO responded on 25th October 2023. It provided links to some of the requested information via disclosure log entries and ICO website resources and advised that the information was therefore exempt from disclosure under s21 of FOIA. It advised that the exemptions cited in previous disclosure entries still applied, namely sections 31, 40(2), 42, and 44 of FOIA.
5. Following an internal review, the ICO wrote to the complainant on 7 November 2023. It provided further guidance on how to access the links in its previous response and stated that it was upholding its application of sections 21 and 42 of FOIA.

6. On 10th November 2023 Mr Parsonson contacted the Commissioner to complain about the way the request had been handled. He raised dissatisfaction with the application of sections 21 (information available by other means) and 42 (legal professional privilege).

### **Decision notice**

7. In a decision notice dated 7th March 2024 the Commissioner:
  - 7.1. Confirmed that he did not consider the scope of his investigation to include anything other than the exemptions claimed under s21 and s42. This was further to the request from the Appellant on 10th November 2023, in which he raised dissatisfaction with the application of those two sections only. He did not take issue with the other aspects of the ICO's response.
  - 7.2. Concluded that s21 (information accessible by other means) was engaged. He was satisfied that the links sent to the Appellant were working.
  - 7.3. Concluded that s42 (legal professional privilege) was engaged. The Commissioner concluded that advice privilege applied because *the information requested was a confidential communication between client (the ICO) and a legal adviser, made for the dominant purpose of seeking and giving legal advice.*
  - 7.4. Confirmed that s42 is a qualified exemption and concluded that the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

### **Summary of grounds of appeal**

8. The Grounds of Appeal are:

#### **Ground 1: information available by other means**

9. S21 FOIA: the Appellant disagrees that the information purportedly provided is, in fact, publicly available. He asserts that there is very little publicly available information already disclosed by the ICO relating to Facewatch or live facial recognition. He asserts that the documents made available by the ICO in the form of links to Disclosure Logs are not accessible or machine

readable and should therefore be made available in a more accessible format.

### **Ground 2: LPP**

10. S42 FOIA: the Appellant asserts that a blanket exemption to LPP is not the correct approach to take and that the exemption can only apply where the public authority anticipates that the information sought will be for the purpose of litigation.
11. The Appellant asserts that the exemption can only apply where a public authority is made aware that the information sought is for the purpose of litigation; and that it is a fact that there is no active litigation in this jurisdiction.
12. The Appellant asserts that the public interest in disclosure outweighs the public interest in maintaining the exemption. He does not accept that the ICO has considered each document individually and is concerned that a blanket exemption has been applied. He submits that the use and widespread nature of facial recognition technology dictates that any request for information should be considered of significant interest to all.

### **Ground 3: other sections**

13. At paragraph 6 of his grounds of appeal the Appellant cites paragraph 6 of the Decision Notice, in which the Commissioner confirms that the ICO has confirmed that *"the exemptions cited in previous disclosure log entries still applied, namely sections 31, 40(2), 42 and 44 of FOIA"*. It follows from this that *"the Commissioner considers that the scope of his investigation is to determine whether the ICO is entitled to rely on sections 21 and 42 of FOIA to withhold the requested information. The complainant has not raised issue with ICO's response that other FOIA exemptions still applied to the previous disclosures. Accordingly, the Commissioner has not investigated that aspect of the response."*
14. The Appellant seeks explanation for this from the ICO and submits that they ought to have been dealt with in the Decision Notice of 7th March 2024.

### **The Commissioner's response**

15. The Commissioner submits that the Tribunal must, in part, strike out the appeal under rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (“the 2009 Rules”) insofar as it relates to exemptions other than s21 and s42. He writes [Response of the Information Commissioner dated 22.4.2024 para 2]:

*The Commissioner submits that the Appellant’s request for internal review and his subsequent section 50 complaint were limited to the ICO’s application of section 21 and 42 FOIA. The Commissioner therefore limited the scope of his investigation and Decision Notice to the information withheld under these two exemptions. In so far the Appellant’s grounds assert that he wishes to challenge the ICO’s application of other exceptions applied to different parts of the withheld information, this would fall outside the Tribunal’s jurisdiction.*

16. On s21 the Commissioner submits that there was no fault with the links provided to the Appellant and the information contained within them was, therefore, accessible and publicly available. He is satisfied that the s21 exemption was properly applied.
17. On s42 the Commissioner determined that the exemption had not been provided on a blanket basis. The Commissioner was satisfied that the material marked fell under the category of legal advice privilege and that it therefore met the definition of legal privilege. He did not feel that the arguments put forward by the Appellant in his grounds of appeal were sufficient to outweigh the compelling public interest in maintaining legal professional privilege in relation to advice that remained live at the time of the request.
18. The Commissioner confirmed that only sections 21 and 42 were within the scope of his investigation. He concluded that he was satisfied that the ICO had correctly applied sections 21 and sections 42 FOIA.

### **Additional submissions**

19. On 22nd April 2024 the Appellant made some further submissions, the key points of which the Tribunal found to be as follows.
  - 19.1. The appeal should not be struck out in whole or in part as there are no grounds upon which the Tribunal can do so.

- 19.2. The Notice of Appeal which was lodged takes issue with the entirety of the Commissioner's position with regard to IC-262955-N0M8 and IC-269736-G3P8.
- 19.3. The signposted disclosure logs were broken hyperlinks which were not accessible or readable. He had requested them in a more accessible or machine-readable format and that had been refused.

## **Legal Framework**

### ***S1: General right of access to information held by public authorities***

20. There is a general right to access information held by public authorities.

### ***S2: Effect of exemptions***

21. The general right is tempered by certain exemptions, including those relied upon in this matter. Where exemptions are not absolute, a public interest balancing exercise must be undertaken.

### ***Section 21: Information accessible by other means***

22. Information which is reasonably accessible to the applicant other than through a FOI request is exempt information. In other words, there is no burden on a public authority to disclose information which is already available.
23. This is an absolute exemption.

### ***Section 42: Legal Professional Privilege.***

24. S42(1) provides that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information. Legal professional privilege covers both legal advice privilege and litigation privilege. Legal advice privilege covers confidential communications between lawyer and client for the purpose of giving or receiving legal advice or related legal assistance. Litigation privilege covers documents brought into being for the dominant purpose of litigation. The privilege extends to evidence of the content of those communications or documents.

25. S 42 is a qualified exemption under s2(2)(b), so that the public interest test has to be applied. It is recognised that there is a significant 'in-built' interest in the maintenance of legal professional privilege (**DBERR v O'Brien and Information Commissioner** [2009] EWHC 164), due to the importance in principle of safeguarding openness in communications between a legal adviser and a client, to ensure that there can be access to full and frank legal advice, which is fundamental to the administration of justice. The tribunal recognises that "although a heavy weight is to be accorded to the exemption, it must not be so heavy that it is in effect elevated into an absolute exemption" (**DCLG v IC and WR** [2012] AACR 43 at [44]) and the weight will vary according to the specific facts of each case.
26. We adopt the approach set out in **DBERR** at para 53:
- ...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.
27. In considering the factors that militate against disclosure the primary focus should be on the particular interest which the exemption is designed to protect.
28. The case of **All Party Parliamentary Group on Extraordinary Rendition (APPGER) v IC & Foreign and Commonwealth Office** [2013] UKUT 560 (AAC) gives guidance on how the balancing exercise required by s 2(2)(b) of FOIA should be carried out:
- "... when assessing competing public interests under FOIA the correct approach is to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote. This ... requires an appropriately detailed identification of, proof, explanation and examination of both (a) the harm or prejudice, and (b) benefits that the proposed disclosure of the relevant material in respect of which the exemption is claimed would (or would be likely to or may) cause or promote."

## The role of the tribunal

29. The tribunal's remit is governed by s58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

### **List of issues**

30. The issues for the tribunal are as follows:

#### ***Section 21***

31. Was the Commissioner right to conclude that the information provided was already publicly available?

#### ***Section 42***

32. Is the information marked as redacted subject to s42, contained within the bundle of documents sent to the Appellant containing various redactions covered by legal professional privilege?

#### ***Public interest***

33. Where s42 is engaged, in all the circumstances of the case, does the public interest in maintaining the particular exemption outweigh the public interest in disclosing the information?

#### **Evidence**

34. We read an open and a closed bundle.
35. The closed bundle contained the information that was disclosed to the Appellant in unredacted form. The redactions were removed and the redacted sections labelled with relevant exemptions claimed.
36. The Tribunal was satisfied that it was necessary to withhold this information under rule 14.
37. We reviewed a gist of the closed material, which had been provided to the Appellant. We were satisfied that the gist withheld no more than was necessary from the Appellant.



### **Further applications and submissions**

38. Upon consideration of the bundle the Tribunal requested a further response from the Respondent with regard to the application of s42 to certain elements of the closed bundle.
39. An Order dated 22nd November was sent to the parties, with a closed annex which was sent to the Respondent only. The Respondent was invited to provide its explanation as to why certain extracts, detailed in the closed annex, were subject to the exemption under s42.
40. The reason for this was to ensure that the Tribunal properly understood the reasoning for the claimed exemption, so that we could make our decision.
41. On 25th November, the Tribunal received further information from the Respondent as follows:

*In accordance with the case management directions dated 22 November 2024, I write to confirm that the material detailed in the closed Annex A is not claimed to be exempt under section 42 of the Freedom of Information Act 2000 (FOIA). Upon taking instructions, it has become clear that the material detailed in the closed Annex A was mistakenly marked up as being exempt under section 42 FOIA within the closed hearing bundle. The material detailed in closed Annex A was withheld under section 31 FOIA rather than section 42 FOIA. A copy of the redacted disclosure sent the Appellant can be found at pages D155-D185 of the open hearing bundle. The redacted disclosure can be cross referenced with the contents of the closed hearing bundle and this will demonstrate that the material detailed in closed Annex A was withheld under section 31 FOIA rather than section 42 FOIA from the outset. The Commissioner apologises to the Tribunal for this error within the closed hearing bundle.*

*For completeness, as explained within the Commissioner's response dated 22 April 2024 (paragraphs 37-39), as the Appellant's section 50 complaint was limited to the ICO's application of section 21 and 42 FOIA, the Commissioner submits that the ICO's application of section 31 FOIA falls outside the scope of this appeal.*

42. On the same date the Appellant responded by email:

*How exactly does it fall outside of the appeal?*

*Regardless of Section of FOIA you are claiming an exemption and that is now being appealed.*

*I am appealing your decision not to disclose material not the section of the Act you seem to want to pick and choose.*

43. The Tribunal is grateful to both parties for their prompt submissions.

## **The findings of the Tribunal**

### ***Jurisdiction***

44. At paragraph 11 of his grounds, the Appellant states: "I invite the Tribunal to compel the ICO to at the very least make reasonable efforts to identify and provide disclosure material that doesn't fall into the s21 or s42 FOIA exemption."

45. We felt it important to point out that the Tribunal has no jurisdiction to do so. Our powers in this appeal are limited to consideration of the Decision Notice, as set out in s58 FOIA:

### ***S58 Determination of appeals.***

*(1) If on an appeal under section 57 the Tribunal considers—*

*(a) that the notice against which the appeal is brought is not in accordance with the law, or*

*(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*

*(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

### ***Sections 31, 40(2) and 44***

46. The Tribunal does not have jurisdiction to make any decision with regard to the ICO's reliance on these sections. The jurisdiction of the Tribunal comes from the Decision Notice which is the subject of this appeal. That notice dealt with his complaints in respect of s21 and s42.

47. The Appellant noted, incorrectly, in his further submissions of April 2024 (referenced at paragraph 20.2, above), that his appeal notice related to "the entirety of the Commissioner's position with regard to IC-262955-N0M8 and IC-269736-G3P8". This is not correct. The appeal notice relates to IC-269736-G3P8 only.

48. The Decision notice restricts itself to matters around s21 and s42 only. The Commissioner was clear that other, previously claimed exemptions, did not form the substance of that complaint.
49. The Appellant argued, in his response to the Tribunal on 25<sup>th</sup> November 2024, that reliance on s31 was a new exemption, only then being claimed.
50. We have cross referenced the bundle, as invited to by the Respondent, and are satisfied that the relevant sections in the open bundle, as sent to the Appellant, are indeed marked with reference to s31 not s42.
51. The Tribunal therefore accepts that the s42 exemption was claimed in error, as set out by the Respondent on 25th November and that the relevant extracts had in fact been redacted with reliance on s31.
52. This is not, therefore, a new exemption and does not fall under our jurisdiction. Our decision was made in respect of the remaining items which the Commissioner confirmed he had found to fall under s42.
53. Our jurisdiction comes from the Decision Notice. We may only review the decision of the Commissioner. We have no jurisdiction to deal with the Appellant's concerns about sections 31, 40(2) and 44 where those have not been considered by the Commissioner in his Decision Notice.

***The application to strike out***

54. The application to strike out was therefore not considered.

***s21: Information accessible to applicant by other means***

55. The Commissioner gave evidence that the links were working at the time of his response. The Tribunal, in assessing the evidence, tested the links and found them to be working. The Appellant has not explained how, or in what manner, he found the information to be inaccessible. He has, however, noted that he requested the information be sent to him in machine-readable format.
56. The Appellant is also able to search for the relevant information by using disclosure log numbers as a search term. This was also verified by the Tribunal.
57. The Appellant has not disclosed any disability or accessibility needs and has not declared himself not to be computer literate. Indeed, he has corresponded with the Tribunal and the Respondent by email and via web forms throughout.
58. There is no rule within the Act as to the format in which information should be available. S21 simply refers to the material being "reasonably accessible".

We find that this information was available and reasonably accessible as evidenced by the Commissioner.

59. We concluded that the information that was withheld subject to the s21 exemption is available by the means described and the Commissioner was therefore right to uphold the exemption.

***s42: legal privilege***

60. The definition of Legal Professional Privilege falls into two categories: legal advice privilege and litigation privilege.
61. We found the redacted information contained within the closed bundle to fall under the first category, legal advice privilege. We were satisfied that this was not a blanket exemption and that the particular redactions did each amount to an example of legal advice privilege.
62. As set out at paragraphs 25-29 above the exemption under s42 is qualified. The Tribunal therefore considered the information and weighed up the public interest balance in supplying it and whether it would be in the public interest to do so.
63. As in any case, the weight of the public interest in maintaining the exemption is high. The information itself is of limited value to the public and, as such, it was our view that the public interest in disclosing it was not outweighed by the high public interest in maintaining the exemption of legal professional privilege.
64. We note that it is the Appellant's view that the matters about which he is concerned should be of critical public importance. He did not, however, provide any arguments as to the specific application of the public interest test to the information sought.
65. Applying the test set out in **DBERR** (paragraph 27, above), it was our finding that there were no features supporting disclosure of the withheld information which were of equal or greater weight than the general public interest factors in non-disclosure. We did not find that the redacted words were of sufficient value to the public discourse.
66. Following the **APPGER** case, (paragraph 27 above) we were not persuaded that there was any benefit promoted by the disclosure of the relevant information that would outweigh the prejudice to the ICO of the same. The benefits, if any, to the disclosure of the information were not clear. There is a general prejudice to the disclosure of legally privileged material in that it risks preventing public authorities from having open discourse with their legal

advisers for the purpose of obtaining legal advice and exercising their powers lawfully.

**Conclusion**

67. The appeal is dismissed. The decision of the Commissioner was not wrong in law and we did not find that he ought to have exercised his discretion differently.

Signed

Tribunal Judge Sanger

Date:

3rd January 2025