



**IN THE UPPER TRIBUNAL**

**Appeal No. UA-2022-000771-GIA**

**ADMINISTRATIVE APPEALS CHAMBER**

On appeal from the First-tier Tribunal (General Regulatory Chamber)

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

**Tribunal Case No:** EA/2021/0062

**Tribunal Venue:** CVP video hearings on 5 October 2021 & 3 March 2022

**FTT Decision**

**Date:** 9 March 2022

**Between:**

**ANDREW PRESTON**

Appellant

- v -

**(1) THE INFORMATION COMMISSIONER**  
**(2) THE CHIEF CONSTABLE OF WEST YORKSHIRE POLICE**

Respondents

**Before: Upper Tribunal Judge Jones**

Hearing date: 15 November 2022

Decision date: 8 December 2022

**Representation:**

Appellant: Appeared in person

First Respondent: Did not appear nor participate

Second Respondent: Mr Robert Cohen, counsel instructed by the Chief Constable of West Yorkshire Police

**DECISION**

**The decision of the Upper Tribunal is to allow the appeal.** The decision of the First-tier Tribunal made on 9 March 2022 under number EA/2021/0062 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

## Directions

- 1. The case is remitted to a freshly constituted panel of the First-tier Tribunal (FTT) for rehearing.**
- 2. There will be a complete re-hearing of the appeal except that the following finding of the FTT at paragraph 25 of its decision of 9 March 2022 is upheld: ‘this does not mean that the Public Authority has either falsified records or deliberately withheld information within scope of the FOIA Request and we find there is no evidence to support any such malfeasance’. Therefore, the Appellant is only entitled to appeal on the grounds that the Second Respondent held more information in relation to his request than that it disclosed but he is not entitled to argue or give any evidence to suggest that the Second Respondent deliberately withheld or falsified information in response to his request.**
- 3. The parties may rely on evidence that was not before the FTT at the hearings on 5 October 2021, 3 March 2022 or when it made the original decision on 9 March 2022.**
- 4. Other consequential directions, including whether the form of any hearing, and the filing of evidence and submissions are to be made by the FTT.**

**These Directions may be supplemented by later directions by a Tribunal Judge in the General Regulatory Chamber of the First-tier Tribunal.**

## REASONS FOR DECISION

### Introduction

1. The Appellant (Andrew Preston) appeals the decision of the First-tier Tribunal (General Regulatory Chamber) – Information Rights - (“the FTT”) dated 9 March 2022.
2. The FTT (Judge Brian Kennedy QC, John Randall CBE and Dave Sivers) dismissed an appeal by the Appellant against a decision of the Information Commissioner (‘the Commissioner’, the First Respondent to this appeal) in a Decision Notice (‘DN’) dated 2 February 2021.
3. The Appellant had requested information under the Freedom of Information Act 2000 (‘FOIA’) relating to the processing of FOIA requests by West Yorkshire Police (the Second Respondent) during a specified timeframe between 2014 and 2020.
4. The Information Commissioner decided that West Yorkshire Police had failed to respond to the Appellant’s request within 20 working days and therefore breached section 10(1) of FOIA (time for compliance with request). However, the Commissioner decided that, as the response to the request for information had been provided to the Appellant, West Yorkshire Police was not required to take any further steps in relation to the DN.
5. In its decision dated 9 March 2022, the FTT dismissed the Appellant’s appeal and decided on balance (see [25]-[27] of the decision set out below) that West Yorkshire police did not hold more information which met the terms of the FOIA request than that which it had already provided to the Appellant. It therefore found no error of law in the Commissioner’s DN.

6. The Appellant appeals to the Upper Tribunal ('UT'), with permission granted by the FTT on 7 April 2022. The FTT granted permission to appeal on the following ground of appeal:

'It seems to me that if we failed to properly consider Material evidence to the straightforward issue before us [whether West Yorkshire Police held more information than that provided to the Appellant], or were distracted by evidence that was untrue, irrelevant or became distorted in respect of the objective of the hearing and the Appellant were able to argue and persuade this to the UTT then the appellant may have an arguable case and should be allowed an opportunity to make his appeal.'

### **The hearing before the Upper Tribunal**

7. On 15 November 2022, I held an oral hearing of the Appellant's appeal before the Upper Tribunal sitting at Leeds Employment Tribunal.

8. The Appellant appeared in person. The Second Respondent, West Yorkshire Police, was represented by Robert Cohen of Counsel. The First Respondent, the Commissioner, did not attend the hearing but had not been required to do so. Further, the Commissioner filed no written submissions in respect of the appeal proceedings and did not participate in any manner.

9. I am grateful to the Appellant for the assistance of his written arguments and to both him and Mr Cohen for their oral submissions.

### **The Request for Information**

10. On 14 April 2020, following earlier correspondence, the Appellant wrote to West Yorkshire Police and requested information in the following terms:

'It now appears appropriate and convenient to please raise here, a fresh FOI [Freedom of Information] request for the timing related to all FOI requests processed by WYP [West Yorkshire Police] in the period from 1<sup>st</sup> June 2014 to today, 20th April 2020.

For each FOI request and associated linked IR [internal review] request, I would simply like to know the date the request was made, the date the response was supplied, whether any IR was carried out and if so, when that final IR response was communicated.

Finally, I would like to know the status of the outcome of each FOI request, linking together which case was escalated to the ICO [Information Commissioner's Office], further to the IRT [Information Tribunal – the predecessor to the FTT], or to any other legal arena, all with relevant dates please, reference numbers and outcomes.

Please ensure the data is accurate and is provided in excel editable format'.

11. West Yorkshire Police responded by email on 18 June 2020, albeit attaching a letter dated 14 May 2020. It provided information that purported to meet the terms of the request.

12. The Appellant requested an internal review on 1 July 2020.

13. Following an internal review, West Yorkshire Police wrote to the Appellant on 9 September 2020, maintaining its original position.

### **The Information Commissioner's Decision**

14. In its Decision Notice dated 2 February 2021, in so far as relevant, the Information Commissioner decided that West Yorkshire Police had breached section 10(1) of the FOIA by failing to comply with section 1(1) of the FOIA within the statutory time period. The request in

this case was submitted on 14 April 2020. However, it was not until 18 June 2020 that West Yorkshire Police provided its substantive response.

15. The Commissioner also stated at paragraphs 11 and 12 of the DN:

‘11. The Commissioner acknowledges that the complainant disputes the accuracy of the information that West Yorkshire Police provided. She recognises that he went to some considerable effort to highlight the discrepancies in the information disclosed to him, providing her with various reports and spreadsheets in that regard.

12. However, a public authority will have complied with their obligations under the FOIA where they have provided the recorded information that they hold in relation to a request, irrespective of whether this information is accurate or not. The Commissioner cannot assess the accuracy of information published on a website or disclosed in response to a request.’

### **The FTT proceedings**

16. The Appellant appealed the Commissioner’s DN to the FTT. On 29 March 2021, the Commissioner applied to strike out the Appellant’s appeal submitting that he was only concerned with the accuracy of the information provided to him in response to his request and this was beyond the scope of the duty to provide information held by the public authority and outside the scope of the ICO’s and FTT’s jurisdiction.

17. On 13 April 2021 the FTT refused to strike out the appeal but emphasised that the only issue which the proceedings would consider was whether the information provided to the Appellant was, or was not, “complete”. In other words, whether, on the balance of probabilities, West Yorkshire Police held more information which met the terms of the request made by the Appellant on 14 April 2020.

18. On 5 October 2021 the FTT held a first hearing of the appeal at which the Appellant appeared in person and the Commissioner relied on written submissions opposing the appeal. The FTT’s case management directions (at [2]) stated that the Appellant presented detailed and comprehensive submissions and satisfied the panel that there was a prima facie case to answer. It continued:

‘However a full and fair hearing would not be possible without providing the Respondent and more importantly the Public Authority an opportunity to challenge (in the course of the hearing) the Appellant’s submissions and present their full and detailed response to the submissions made before us, at this now adjourned hearing. The issues, in our considered opinion, require further submissions on the evidence being presented to be fully considered and tested.’

19. In its directions the FTT therefore stated that it required further submissions in answer to the evidence presented by the Appellant. It adjourned the hearing for the Commissioner and the West Yorkshire Police, the public authority and now Second Respondent, to challenge and present full and detailed response to the submissions made.

20. Subsequent to that hearing the Second Respondent participated in proceedings, with counsel filing a skeleton argument on 17 November 2021. However, no evidence was filed on behalf of the Second Respondent. There was no witness statement or written report or analysis explaining why the Appellant’s analysis was incorrect or explaining why the inconsistencies

between the data available regarding the number of FOIA requests that the Second Respondent processed did not give rise to an inference or finding that the Appellant had not been provided with all the information it held.

21. The adjourned appeal hearing took place before the FTT by CVP remote video technology on 3 March 2022 in which the Second Respondent participated, through its counsel, Mr Cohen.

*The FTT Decision*

22. The FTT dismissed the Appellant's appeal against the Commissioner's DN in its decision dated 9 March 2022.

23. The FTT recorded the Appellant's primary submission in the appeal at [11] of the decision:

'11. The Appellant asserts that the Commissioner has repeatedly misinterpreted the grounds of appeal in this case. The Appellant repeats point 4 of his previous correspondence:

*"4. This appeal is not made on the grounds that WYP [West Yorkshire Police] has failed to comply with some duty to provide accurate information where the only information it actually holds is inaccurate. Nor does it suggest that WYP should create new information to satisfy the request.*

*This appeal is made on the grounds that the authority has failed to provide accurate information which it held at the time of the request".'*

24. At [18] of the decision, the FTT recorded submissions made on behalf of the Second Respondent as to why any differences or inconsistencies between the information provided to the Appellant from that contained in a) responses to previous [FOIA] requests, and b) data published publicly by the Information Commissioner and derived from the National Police Chiefs Council [NPCC], did not give rise to an inference that it held other information that it did not provide to the Appellant:

'17. The Appellant had questioned why similar [FOIA] requests made some time apart had resulted in significantly different responses. The Second Respondent explained that the requests sought information at differing levels of granularity thus the comparison was not of like for like.

18. The Appellant had questioned why information supplied to the Information Commissioner as a part of a review of the handling of FOIA requests by Police Forces differed from information supplied in response to his request. The Second Respondent explained that the information had not been supplied directly to the Information Commissioner but had been collected and collated by the National Police Chiefs Council [NPCC], thus the format in which information was presented to the Information Commissioner was not in the control of the Chief Constable.'

25. In its discussion section of its decision at [22], the FTT repeated some arguments on behalf of the Second Respondent:

'22. Counsel for the Second Respondent explained that it must be understood that the data gathered from the Second Respondent's system provided to the Appellant was raw data. He did not ask for a commentary on it and was not entitled to one under FOIA.

This means that it may contain apparent inconsistencies or artefacts from the process of data recording, which appear surprising. However, this does not make good an argument that the Second Respondent held material, which they unlawfully failed to provide.’

26. The FTT’s own reasoning and conclusion on the issue was provided at [25]-[27] of the decision. In particular it rejected any suggestion that the Second Respondent had provided the Appellant with falsified records or that it deliberately withheld information within the scope of the FOIA request:

‘25. In summary, the Second Respondent submits that the idiosyncrasies and anomalies highlighted by the Appellant are referable to FOIA timetables, the application of filter responses, and the manner in which raw data is recorded in the system. The Tribunal accepts the Appellant’s criticisms of the methodology and systems used by the Second Respondent in the collation and storage of data. It does appear to be an ineffective way of recording and holding accurate information and probably not in the public interest. However this does not mean that the Public Authority has either falsified records or deliberately withheld information within scope of the FOIA Request and we find there is no evidence to support any such malfeasance. It would make sense if the Public Authority considered devising and enforcing a more transparent system but that does not prove the Second Respondent is holding further information within the scope of the request.

26. On the two issues referred to at paragraphs 17 and 18 above the Tribunal found the explanations provided by the Second Respondent to be wholly credible.

27. Accordingly, addressing the question of the limited issue before us, as to whether, on the balance of probabilities, West Yorkshire Police held more information which meets the terms of the request, we can find no error of Law in the DN nor error in the exercise of any discretion by the First Respondent. The DN must therefore stand and the appeal is dismissed.’

## **The Law**

### *The general right of access to information under Section 1 of FOIA*

27. Section 1 of FOIA provides for a general right of access to information which is held by public authorities (see s.1(1)) in the following terms:

- (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.
- (2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
- (3) Where a public authority—
  - (a) reasonably requires further information in order to identify and locate the information requested, and
  - (b) has informed the applicant of that requirement,the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.
- (4) The information—

(a) in respect of which the applicant is to be informed under subsection (1)(a), or  
(b) which is to be communicated under subsection (1)(b),  
is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

(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).

28. The essential position is that a person requesting information from a public authority has a right, subject to exemptions, to be informed by the public authority in writing:

- a. whether it holds the information (s.1 (1)(a) FOIA); and
- b. to have that information communicated to him, if the public authority holds it (s.1(1)(b) FOIA).

29. When determining whether or not information is held, the Commissioner and Tribunal should apply the normal civil standard of proof - the balance of probabilities. The FTT, 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':

‘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. ([13].)’

30. The Tribunal has consistently applied the balance of probabilities when approaching this question: see, for example, *Malcolm v Information Commissioner* EA/2008/0072 at [24]; *Dudley v Information Commissioner* EA/2008/008 at [31], and *Councillor Jeremy Clyne v IC and London Borough of Lambeth* EA/2011/0190 at [21]-[22]. Importantly, in *Clyne v IC and London Borough of Lambeth* the Tribunal held that the ‘issue for the Tribunal is not what should have been recorded and retained but what was recorded and retained. ([38]). The Tribunal was satisfied that a gap in the public authority’s documentary records reflected ‘inconsistent and poor administrative practice’ but this did not amount to a breach of FOIA.

*The jurisdiction of the FTT on an appeal from the Information Commissioner*

31. On appeal to the FTT under s.57 FOIA, it must decide whether the Information Commissioner's decision notice is in accordance with the law (s.58(1)(a) FOIA) and whether the exercise of any discretion ought to have been exercised differently (s.58(1)(b)). The FTT may also reviewing findings of fact on which the decision notice is based (s.58(2)). The relevant sections provide as follows:

Section 57 FIOA – Appeal against notices served under Part IV

(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.

(2) A public authority on which an information notice or an enforcement notice has been served by the Commissioner may appeal to the Tribunal against the notice.

(3) In relation to a decision notice or enforcement notice which relates—

(a) to information to which section 66 applies, and

(b) to a matter which by virtue of subsection (3) or (4) of that section falls to be determined by the responsible authority instead of the appropriate records authority, subsections (1) and (2) shall have effect as if the reference to the public authority were a reference to the public authority or the responsible authority.

Section 58 FOIA – 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.

*The Upper Tribunal's jurisdiction on appeal from the FTT*

32. The FTT in its decision exercised its jurisdiction by confirming the Decision Notice as in accordance with the law and without error in the exercise of any discretion. It made a factual finding that the First Respondent was correct to decide that the Second Respondent had provided to the Appellant all the information it held in relation to his request.

33. The Upper Tribunal may only set aside that decision if it concludes that the FTT erred in law in making its decision (as provided by section 11 of the Tribunals Courts and Enforcement Act 2007). That means the Upper Tribunal must determine if there was an error of law in the way in which the FTT came to its conclusion, for example, in relation to its factual findings: by failing to take into account relevant or material evidence or matters; by taking into account evidence or matters irrelevant to the issue in the case; by making an unreasonable finding or coming to an irrational conclusion that no reasonable tribunal properly instructed could have reached; or by failing to give sufficient reasons for its conclusion or decision.

**The Appellant's submissions**

34. The Appellant submitted that the FTT erred in its decision in finding on balance that the Second Respondent did not hold any other information than that which it had provided in response to his FOIA request (for the reasons it gave at [25]-[27] of the decision).



35. The Appellant provided lengthy written submissions and grounds of appeal. These included a 24 page written document submitted to the FTT with his grounds of appeal to the Upper Tribunal. This included tables and spreadsheets analysing the comparison of the data provided a) in response to previous FOIA request; and b) by the NPCC to the Commissioner, in respect of the Second Respondent's FOIA returns to the information provided to the Appellant directly by the Second Respondent. It identified 6 grounds of appeal (BP1-BP6). There was also a 28 page document submitted to the Upper Tribunal, pages 14-28 of which related to information received from the National Police Chief's Council (NPCC) on 7 April 2022 which was obtained subsequent to the FTT's decision but confirmed the information the Appellant had already provided to the FTT.

36. It is not necessary to address any of these documents or arguments in any detail for two reasons: 1) the Appellant was only granted permission to appeal on the error of law ground identified by the FTT as set out at the beginning of this decision; 2) much of the argument concerned re-running arguments in detail of fact and evidence rather than grounds for finding an error of law in the FTT's decision.

37. Further, I will be allowing the appeal for the reasons set out below and all of the Appellant's arguments can be subsumed in the re-hearing of the appeal before a freshly constituted FTT.

38. Nonetheless I can summarise the Appellant's submissions in this way. His oral submissions consisted of 11 parts but, like the written arguments, essentially he re-ran the same arguments that he had made before the FTT. These were to the effect that the information provided a) by the NPCC on behalf of West Yorkshire Police to the Commissioner; and b) in relation to previous FOIA requests, each revealed a far greater number of FOIA requests that had been made to and processed by the Second Respondent during the relevant years than the number of requests that the Second Respondent provided to the Appellant in response to his request. This gave rise to a strong inference that the Second Respondent held more information (more data regarding FOIA requests it had received and processed) than that it provided to him.

### **The Second Respondent's submissions**

39. Mr Cohen, on behalf of the West Yorkshire Police filed no written submissions in reply to the appeal but he was not required to do so, there being no direction to that effect.

40. In his oral arguments, he submitted that, as the decision acknowledged at [27], the dispute before the FTT consisted of a comparatively narrow issue – whether the Second Respondent held further information than that which it provided to the Appellant. He contended that this was not a case in which nothing had been provided and where it was alleged that something should have been forthcoming. This was a case in which the Appellant was arguing that he had received some information, but more should have been provided. The Appellant had in fact received a very large amount of information. More than 7,700 data points had been supplied to him in relation to his request regarding the number of FOIA requests made to and processed by West Yorkshire Police.

41. Importantly, Mr Cohen noted that the Appellant's case before the FTT was that the information provided by West Yorkshire Police was falsified or deliberately withheld i.e. deliberately inaccurate and incomplete. The Appellant had received 7000 data points from the Second Respondent and it was important to bear in mind that he had alleged fraud against the

Second Respondent in providing the information. The FTT was entitled to look at the Second Respondent's arguments and entitled to decide that they were more credible.

42. Mr Cohen argued that it was clear that the Chief Constable's officials properly understood the request that the Appellant had made and set about answering it. The fact that more than 7,700 entries were provided demonstrates that a wide ranging and detailed search was then undertaken (which included reviewing more than one database). The FTT had therefore correctly concluded that no other information was held. Just like in *Clyne* it was the Tribunal's function to consider what was held as a matter of fact, not to be drawn into analysing what should have been held. The Appellant may well be able to show problems with the records, but the FTT was right to find that this did not show that other records were held.

43. Mr Cohen relied on the fact that the Second Respondent had been uninvolved in the original proceedings before the FTT, playing no role in the strike out proceedings nor the earlier hearing on 5 October 2021. The Appellant had presented a detailed analysis to the FTT but each of the prima facie grounds as to the why the FTT had initially been troubled had been answered. For example, the negative response times for answering FOIA requests was explained by the fact that they were almost entirely associated with the non-typical responses where there was no substantive response to the FOIA request that could be given such as where there was a preliminary reason that the request was bound to fail. While the Appellant had relied on his mathematical skills to analyse the data sets given to him, the FTT was satisfied that the explanations given by the Second Respondent for the apparent anomalies was correct.

44. Mr Cohen submitted that the FTT directed themselves correctly as to the question and the legal parameters in the dispute – did the Chief Constable hold information that had not been released to the Appellant, who is correct and why? The FTT did not need to refer to the arguments in a granular way but did so adequately. For example, in relation to the NPCC data the FTT had reasonably and properly found that the Second Respondent had explained the difference in the data provided and this could be explained by what questions were asked about the data and how the questions were asked and how the data was extracted.

45. The task of the FTT was not to look at whether the Second Respondent had done a good job of record keeping and or whether aspects of record keeping could be improved - the question was as a matter of fact not whether it adopted the correct methodology but whether it obtained and provided all the data that it held.

46. Mr Cohen accepted that it might have been better if the FTT had engaged with the arguments on the appeal in a slightly more granular way – but the UT's task on an appeal was not to look for perfection but simply whether the FTT had committed an error of law and that threshold was not met. The height of the appeal was that the FTT had confused the issue in the appeal but it had not done so because it accepted the question was whether West Yorkshire Police held and provided all the information to the Appellant that had been requested. The FTT gave sufficient reasons for deciding this central issue in the appeal at [25]-[27] (also accepting arguments at [17]-[18] of the decision).

47. In doing so, the FTT did grapple with the fact that there was inconsistent evidence and data and whether the explanation for this was a difference of methodology – whether the Appellant's request sought information that was like for like with data previously provided under previous FOIA requests or published by the Commissioner and collated by the NPCC (having been obtained from the Second Respondent).

48. The FTT also grappled with the issue of the negative results being attributed to the fact that data gathered from the system was not raw data (see [22]). At [22] of its decision the FTT

had properly accepted that why and how data was extracted and gathered from the Second Respondent's system explained why a different answer was given to the Appellant under FOIA from that others received (it was raw data provided to the Appellant).

49. At [25] of its decision, the FTT reasonably accepted that inconsistencies were referable to the manner of the requests and inconsistency in methodology. The FTT reasonably accepted the submissions of the Second Respondent made at [17] and [18] at [25] - it accepted that on the balance of probabilities that the Second Respondent that it had provided all information it held. Even if the FTT might have expressed itself more clearly, it dealt with the central issue and explained the difference in the information given to the Appellant. In relation to the ultimate question, the FTT's was a reasonable and proper decision in which no error of law was made.

### **Discussion and analysis**

50. The FTT gave permission to appeal on the following ground that it:

‘...failed to properly consider material evidence to the straightforward issue before us [whether West Yorkshire Police held more information than that provided to the Appellant], or were distracted by evidence that was untrue, irrelevant or became distorted in respect of the objective of the hearing...’

51. This ground requires reframing so that it identifies recognisable or conventional errors of law. It identifies potential errors by the FTT in: a) failing to take into account relevant material or evidence or b) taking into account irrelevant material or evidence, in its fact finding and conclusion on the central issue in dispute in the appeal. If these potential errors of law are made out on the facts of this case, it would also follow that the FTT also failed to give sufficient or adequate reasons for its decision.

52. Notwithstanding Mr Cohen's submissions, I am satisfied that the FTT did indeed err in law in making its decision in the two ways identified in the grant of permission and as reframed. It erred in law in finding on the balance of probabilities that the Second Respondent held no other information within the scope of the request and all the requested information had been provided to the Appellant. It failed to take into account relevant evidence and took into account irrelevant matters.

53. I begin with the form of the FTT's decision. The FTT did not include any fact-finding section within its decision nor attempt to summarise the written evidence it received. After reciting the parties' arguments at [7]-[18] the FTT began its discussion section at [19] of the decision under the heading 'Conclusion'.

54. In most of this final section, at [19]-[24] of the decision, it concentrated on the issues concerning the quality and accuracy of the data provided to the Appellant by the Second Respondent. For example, there was a significant number of negative result times' where, according to the data provided, the Second Respondent had replied to FOIA requests even before they had been submitted (there was a negative number of days between the closure of the case and the receipt of the request so that it was closed before it was received). The FTT accepted the Second Respondent's explanations provided in counsel's submissions for these inconsistencies or anomalies within the data. However, as the FTT had already identified in the Appellant's argument (see [11] of the decision), the quality or accuracy of the data provided is not important and was not the central issue in the appeal. The reliability of the data provided was only relevant to the extent it might give rise to an inference that more data was held than disclosed.

55. The only issue in the appeal was whether the Second Respondent held more information (data) than that disclosed to the Appellant. The FTT only addressed this central, and limited, issue as to whether the Second Respondent held further information or data that it had not disclosed to the Appellant, in three very short paragraphs at the end of its decision, [25]-[27].

56. At [25] it rejected the Appellant's submission that the inaccuracies gave rise to an inference that the Second Respondent had falsified records or deliberately withheld information within the scope of the FOIA request and found there was no evidence to support any malfeasance. For the reasons I return to below, this was an entirely rational and reasonable finding in the absence of any prima facie evidence of wrongdoing or fraudulent conduct on the part of the Second Respondent. Although the Appellant is not subject to professional codes of conduct, he should have not made allegations against the Second Respondent tantamount to fraud without a prima facie or evidential basis on which to do so.

57. However, it does not discount the possibility that the Second Respondent mistakenly or carelessly failed to provide all the information it held. On this crucial aspect of its decision the FTT's only reasons were provided at [26]. At [26] the FTT accepted as 'credible' the Second Respondent's explanations and referred to its submissions at [17] & [18]. These submissions were recorded earlier in the decision that:

17. The Appellant had questioned why similar requests made some time apart had resulted in significantly different responses. The Second Respondent explained that the requests sought information at differing levels of granularity thus the comparison was not of like for like.

18. The Appellant had questioned why information supplied to the Information Commissioner as a part of a review of the handling of FOIA requests by Police Forces differed from information supplied in response to his request. The Second Respondent explained that the information had not been supplied directly to the Information Commissioner but had been collected and collated by the National Police Chiefs Council, thus the format in which information was presented to the Information Commissioner was not in the control of the Chief Constable.

58. In light of the findings at [25] and [26], at [27], the FTT came to the conclusion that on balance the Commissioner did not err in finding that the Second Respondent held no more information than that provided to the Appellant.

59. In doing so, I am satisfied that the FTT a) failed to take into account relevant evidence; b) took into account irrelevant matters that had been presented to it by the Second Respondent; and c) failed to ensure procedural fairness so that the Appellant had a fair opportunity to challenge the Second Respondent's case.

60. First, the FTT failed to take into account relevant evidence supplied by the Appellant. Within its decision the FTT did not refer to the evidence to which it was referred by the Appellant other than addressing arguments in the most cursory terms at [12] and [13]. It made no findings of fact (other than coming to the conclusion on the balance of probabilities that all the relevant information that had been provided). The FTT did not explain or record any of the details of any of the evidence or submissions relied on by the Appellant.

61. The Appellant's analysis identified potential extra data compared to the information that he had been provided. It gave rise to a reasonable inference that other data was held by the Second Respondent than that disclosed to him. This inference was based upon: a) different data provided in relation to other numbered information FOIA requests to that contained in the

response to the Appellant's request; b) the Commissioner's own information published by the Information Commissioner's Office ('ICO') as derived from the NPCC and obtained from the Second Respondent.

62. The Appellant documented and presented evidence to the FTT to support his claim that the Second Respondent had not disclosed all the information it held. The Appellant had analysed the comparable source of information and presented this in a detailed analysis to the FTT and each Respondent. Neither Respondent had objected to the existence or accuracy of the information contained in the Appellant's spreadsheets. The FTT had already identified on 5 October 2021 that the analysis called for an answer.

63. For example, the Appellant's analysis provided evidence that an additional 101 completed FOIA requests had been dealt with by the Second Respondent but had been omitted in the data supplied to him. Based upon his statistical analysis of the information provided by the ICO in their response to an earlier FOIA request from a different requester (no. 3755/19), the Appellant supplied evidence that there were additional 28 FOIA records not provided to him for the period September 2019 to March 2020 and 101 records for the period from April 2015 to June 2019. Another example of the inconsistencies was in respect of the volume of data records, supplied in response to the Appellant's FOIA request. Following a comparison of 'date received' records, with the information contained in the ICO report, over the seven month period spanning September 2019 - March 2020, the Appellant identified 32 FOIA records (each one corresponding to an FOIA request) and for the period April 2015 to June 2019, 212 FOIA records that appeared to be absent from the data disclosed to the Appellant by the Second Respondent.

64. The Appellant also relied on his analysis of the difference in the information contained in the ICO reports of FOIA requests processed by the Second Respondent based on information provided by it to the NPCC which disclosed a greater number of data points than that provided to the Appellant. The information was supplied to the NPCC by the Second Respondent and then passed to the Commissioner. The subsequent information supplied by the Second Respondent to the NPCC and on to the Information Commissioner on 5 April 2022, although not available to the FTT, confirmed that the data that provided by the NPCC to ICO on behalf of the Second Respondent in relation to FOIA requests was accurate. The NPCC had checked the data received from the Second Respondent to ensure consistency with the data provided to the ICO.

65. The FTT simply failed to record or address this material and take into account the evidence supplied by the Appellant in any, or any sufficient, detail.

66. Second, the FTT took into account irrelevant matters in making the factual finding that the Second Respondent held no other material. The irrelevant matters were submissions of counsel for the Second Respondent in reply for which there was no evidential foundation. Although the Respondents were not required to answer each and every point in the Appellant's analysis through evidence, they were required to meet the broad thrust of the case.

67. The Second Respondent had not relied upon nor provided any evidence in reply to the Appellant's analysis. It did not give factual explanations for the inconsistencies in any evidence (for example, by supplying a witness statement or written report explaining the differences in results compared), let alone oral evidence that could be tested in cross examination. It simply relied on the untested and unreferenced submissions of counsel as to potential explanations for anomalies. However, the Second Respondent provided no response to discredit, contradict or undermine any of the Appellant's evidence or analysis. The Second Respondent (like the Commissioner) provided no evidence in reply to the extensive examples but simply relied on

counsel's submissions as recorded at paragraph 17 of the decision to explain the difference – the granularity of the data requested.

68. Such an explanation is at a high level, does not descend into detail and does not address the particular analysis provided and give specific answers to the discrepancies highlighted. The explanations provided by the Second Respondent were not obviously right or unarguably accurate so as to be conclusive without the need for evidence, nor were they numerically substantiated.

69. The Appellant's analysis and evidence called for an evidential answer as to how there was a significantly greater number of FOIA requests processed by the Second Respondent, as recorded by the ICO, from those provided by the Second Respondent. This required an explanation of how the different numbers had been extracted in answer to the different request which would explain why the difference occurred. It required more than a high level generic answer without evidential basis.

70. The FTT therefore erred in taking account the unevidenced submissions explaining the inconsistencies and relying on them to find that more likely than not the Second Respondent held no further information. The explanation for the inconsistency in information given by the Second Respondent provided by counsel may or may not turn out to be accurate but it is not based on evidence provided by the police force itself (there was no witness statement, written report or equivalent from the Second Respondent).

71. In the absence of any witness or formal evidence from the Second Respondent which engaged with the Appellant's case, the FTT relied on mere argument to support its assertion that it "*had provided all the information it holds*". The FTT erred in law in making such a factual finding on the balance of the probabilities, failing to take into account the Appellant's detailed analysis and taking into account an unevidenced explanation in reply.

72. Third, there was a further error of law committed by the FTT, additional to that of taking into account submissions that did not rely on any evidence. Even assuming counsel's explanation was given on instructions from the Second Respondent, by permitting an explanation for the inconsistencies to be given during the course of oral submissions and not in writing or in evidence filed in advance, the FTT did not ensure the Appellant had advance notice of the case he had to meet. He was not able to fully consider the explanation nor the ability to analyse the Second Respondent's case and to test it in cross examination or submit further evidence in reply. This gave rise to procedural unfairness or a breach of natural justice.

73. The Second Respondent's submissions may or may not have force, but they were not founded in evidence and they were only provided during the hearing and not in advance in writing (the Second Respondent's skeleton argument of November 2021 did not descend into any detail). The Appellant therefore did not have any advance notice of the key arguments that the Second Respondent would be making in reply to his appeal.

74. All the information on which the Second Respondent wished to rely should have been disclosed in writing in advance of the hearing, preferably in the bundle. The reasoning of the Second Respondent was only first presented orally at the adjourned hearing and was absent from the bundle provided by the First Respondent, prior to the adjourned hearing. The Appellant was not asked if he had any objections to the inclusion of the Second Respondent's oral submissions at any point. He may have been disadvantaged by not having sight of a written version of the Second Respondent's submissions, prior to the adjourned hearing which took place on 3 March 2022.

75. As a result of these three errors, the FTT also provided inadequate reasoning for its factual finding and decision at [26] because the essence of its only reasoning was simply to rely on the Second Respondent's submissions.

76. For all these reasons, I am satisfied that the FTT's errors of law were material to its factual finding that the Second Respondent had provided all the information it held in relation to the Appellant's request. The FTT's decision should be set aside.

### **Remaking or remitting the decision**

77. The question then arises whether the FTT's decision should be re-made or remitted. Mr Cohen invited me to remit the case to a freshly constituted FTT were the appeal to be successful. I agree that this is the correct course. I am satisfied that this is not a case where it would be just and fair for me to re-make the decision. The issue in this case turns on evidence of fact and factual findings should be made following an FTT hearing before a full tribunal panel and at which the Second Respondent has the opportunity to present evidence. I am also reluctant to make any fresh findings of fact when the Upper Tribunal is primarily an appellate tribunal established to decide matters of law on appeal from the FTT. The FTT is a specialist fact finding tribunal, with the benefit of experienced and expert members who can consider all that evidence afresh. Further, my remaking the decision would result in reduced rights of appeal for the parties, thereafter only to the Court of Appeal, compared to the appeal avenues available from decisions of the FTT.

78. In light of this decision, the Second Respondent may wish to and is entitled to present evidence in reply to the Appellant's case at the re-hearing (and to which the Appellant may reply). I leave the specific directions as to the form of re-hearing and service of evidence and submissions to be made by the FTT to whom it is remitted.

79. I do however limit the nature of the re-hearing in this regard. At paragraph 25 of its decision, the FTT rightly rejected the suggestion that the data provided by the Second Respondent was deliberately withheld or was falsified or fabricated. There was no error of law in its factual finding in this regard. There was no prima facie case to support these allegations and the Appellant was wrong to pursue the appeal on that basis. If the Second Respondent's data was inaccurate in the sense that it was incomplete or did not represent all data held (even if the data was of low quality) there was no evidence on which to suggest that this was anything other than the mistaken, inadvertent or careless conduct on the part of the Second Respondent.

### **Conclusion**

80. For the reasons set out above, I allow the Appellant's appeal. I am satisfied that there was an error of law in the FTT's decision and it should be set aside. I remit the matter to a newly constituted FTT for a fresh determination as to whether the Second Respondent held more material in relation to the requested information than that it disclosed. I do not limit the material that may be relied on by the parties at the fresh hearing, but the Appellant is not permitted to proceed with any allegation that the Second Respondent deliberately withheld information or provided falsified information in response to his request. I make directions in the terms set out above. Further consequential directions are for the FTT to make.

81. I repeat my thanks to the parties for their assistance in deciding this appeal.

**Judge Rupert Jones**  
**Judge of the Upper Tribunal**  
Authorised for release on 8 December 2022