



NCN: [2023] UKFTT 00442 (GRC)  
Case Reference: EA/2022/0088

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

**Heard on:  
27 January 2023 (Field House, London)  
16 March 2023 (Cloud Video Platform)**

**Decision given on: 25 May 2023**

**Before**

**Judge O'Connor – Chamber President  
Tribunal Member De Waal  
Tribunal Member Murphy**

**Between**

**Stefania Maurizi**

**and**

**(1) Information Commissioner  
(2) Crown Prosecution Service**

**Appellant**

**Respondents**

**Representation:**

Appellant: E Dehon KC

First Respondent: Did not attend the hearing and was not represented.

Written submissions (19/1/23) drafted by R. Hopkins of Counsel

Second Respondent: R Dunlop KC & T Tabori of Counsel

**Decision: The appeal is ALLOWED on the basis that the Information Commissioner's decision on the 'final part' of the appellant's request for information dated 12 December 2019 is not in accordance with the law.**

**Substituted Decision Notice:**

The Crown Prosecution Service must, by no later than 4pm on 23 June 2023, state if it held the information requested by the appellant in the ‘final part’ of her request for information dated 12 December 2019 and, if it did hold it, either supply the information to the appellant by 4pm on 23 June 2023 or serve a refusal notice under section 17 of FOIA, including what grounds the CPS relies on (save for section 14 (1) of FOIA which the CPS is precluded from relying upon), by 4pm on 23 June 2023.

Reference in this Substituted Decision Notice to the ‘final part’ of the appellant’s request for information dated 12 December 2019, is reference to that part of the appellant’s request considered at paragraphs 142 onwards below.

A failure to comply with this Substituted Decision Notice could lead to contempt proceedings.

**OPEN REASONS**

**Introduction**

1. The Freedom of Information Act 2000 (“FOIA”) provides for a general right of access to information held by public authorities. That right is subject to exceptions and exemptions. It makes provision for its enforcement by the Information Commissioner (“ICO”) and for a right of appeal from a decision of the ICO to the General Regulatory Chamber of the First-tier Tribunal (“FtT”).
2. The appellant is an investigative journalist currently working with a major Italian daily newspaper. She is also the author of a book about Julian Assange, for which she won the European Award for Investigative and Judicial Journalism in November 2021.
3. Julian Assange, an Australian citizen, is the founder and publisher of WikiLeaks. He was the subject of extradition proceedings brought in the United Kingdom by the Swedish Prosecution Authority (“SPA”), for alleged sex crimes. The proceedings were conducted on behalf of the SPA by the Crown Prosecution Service (“CPS”).
4. In June 2012, in order to avoid extradition, Mr Assange sought asylum in the Ecuadorian Embassy in London.
5. On 8 September 2015, the appellant requested information from the CPS (“the 2015 Request”). This was refused by the CPS on 6 October 2015 (“the 2015 Refusal”) and, on 6 February 2017, the ICO concluded that the CPS had complied with FOIA (“the ICO’s 2017 Decision”). The appellant’s appeal to the First-tier Tribunal (“the 2017 FtT”) against the 2015 Refusal was dismissed in a decision of 11 December 2017 (“the 2017 FtT Decision”). That decision was upheld by the Upper Tribunal in 2019 ([2019] UKUT 262 (AAC)) (“the Upper Tribunal’s decision”).

6. The instant appeal concerns a request for documents made by the appellant of the CPS on 12 December 2019 (“the 2019 Request”). In broad terms, the request sought correspondence about Julian Assange between the CPS and the SPA, the Ecuadorian Authorities, the US Department of Justice and the US State Department (“the Requested Information”). This request for information was refused by the CPS on 10 February 2020 (“the 2020 Refusal”), a decision which was confirmed after an internal review, on 28 April 2020.
7. The appellant made a complaint to the ICO on 24 July 2020 (“the 2020 Complaint”). The ICO issued its decision in relation to that complaint on 8 March 2022, concluding that the CPS had complied with FOIA “*in its reliance on section 30(1) and 30(3) FOIA (Investigations and Proceedings) exemptions and had correctly redacted personal data from information it had disclosed.*” (“the ICO’s 2022 Decision”). The appellant appealed to the First-tier Tribunal (“the 2022 appeal”).
8. This document is the OPEN decision on the 2022 appeal and may be disseminated and published without hindrance. A separate CLOSED decision has also been issued. The CLOSED decision is subject to an order made by this Tribunal pursuant to rule 14 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, prohibiting its dissemination to any person or body other than the respondents to this appeal and their legal teams.

### **The 2019 Request and the 2020 Refusal**

9. The appellant’s request for information to the CPS of 12 December 2019 was formed of six parts, and reads as follows:

“Please provide a copy of:

- 1) THE FULL correspondence on Julian Assange between the Crown Prosecution Service and the Swedish Prosecution Service between the 1st of November 2010 and the 8th of September 2015 which has NOT been released to me in my previous FOIA.
- 2) THE FULL correspondence on Julian Assange between the Crown Prosecution Service and the Swedish Prosecution Service between September 2017 and the 1st of December 2019.
- 3) THE FULL correspondence on Julian Assange between the Crown Prosecution Service and the Ecuadorian authorities between the 19th of June 2012 and the 11th of April 2019.
- 4) THE FULL correspondence on Julian Assange between the Crown Prosecution Service and the US Department of Justice between the 1st of November 2010 and the 1st December 2019.
- 5) THE FULL correspondence on Julian Assange between the Crown Prosecution Service and the US State Department between the 1st of November 2010 and the 1st of December 2019.

Finally, please explain when, how and why the emails of a named CPS lawyer, [Mr X, a retired CPS officer, name redacted] were deleted. Given what the Swedish prosecutor said in deciding not to take the charges forward and given what emerged about the CPS advising the SPA not to question JA in the embassy, there is a clear public interest in knowing why

the e-mails of the key person liaising with the SPA were deleted during an ongoing investigation, apparently against the CPS's retention policy."

10. As indicated above, the CPS refused this request both initially on 10 February 2020 and, after an internal review, on 28 April 2020. In summary, the CPS concluded:
  - (a) For Parts 1 and 2 of the 2019 Request, which concern CPS correspondence with the SPA, the CPS relied on section 40(2) (personal information) and section 30(1) (investigations and proceedings) FOIA exemptions.
  - (b) For Part 3, which concerns CPS correspondence with the Ecuadorian authorities, the CPS relied on the section 30(3) FOIA exemption to neither confirm nor deny ("NCND") holding the requested information.
  - (c) For Parts 4 and 5, which concern CPS correspondence with the US Department of Justice and US State Department respectively, the CPS relied on section 30(1) and section 42(1) (Legal professional privilege) FOIA exemptions.
  - (d) For the final part ("Part 6"), the CPS stated that the CPS lawyer had retired in 2014 and his email account had been deleted in line with CPS general practice.

### **The ICO's 2022 Decision**

11. By a Decision Notice dated 8 March 2022, referenced IC-47745-L6Q0, the ICO observed that the CPS had disclosed 330 pages of information in relation to Parts 1 and 2 of the 2019 Request pursuant to a finding made by the ICO when considering the instant complaint, which had been communicated to the CPS in 2021. In relation to other information held by the CPS concerning Parts 1 and 2 of the 2019 Request, the ICO concluded that section 30(1)(c) of FOIA was engaged and that the public interest balance strongly favoured maintaining the exemption.
12. As to Part 3 of the 2019 Request, the ICO concluded that the section 30(3) exemption ("NCND") had been maintained correctly.
13. In relation to Parts 4 and 5 of the 2019 Request, both concerning US authorities, the ICO observed that the appellant had not questioned the engagement of section 30(1) of FOIA and found, once again, that the public interest balance strongly favoured maintaining this exemption, noting when doing so that the extradition proceedings were live.
14. Given the findings identified above, the ICO did not consider the CPS's reliance on section 42(1) of FOIA.
15. Regarding Part 6 of the 2019 Request, the ICO accepted the CPS's evidence that the CPS lawyer had retired, that the deletion of the email account had been carried out in accordance with the then CPS records management policy and that the CPS had previously disclosed to the appellant such information as it held in relation to the deletion of the lawyer's email account.

### **The Evidence**

16. The FtT has before it an OPEN bundle of documentation running to 1139 pages, and a CLOSED bundle of documentation consisting of, *inter alia*, CLOSED correspondence between the first and second Respondents, the CLOSED witness statement of John Sheehan (a solicitor employed by the CPS as a Deputy Chief Crown Prosecutor who has held the post of Head of Extradition since 5 September 2022), the CLOSED witness statement of Mohammed Cheema which was before the 2017 FtT, the CLOSED annex to the ICO's 2017 Decision, and the Requested Information in relation to Parts 1, 2, 4 and 5 of the 2019 Request.
17. In addition, prior to the start of the hearing, both the appellant and the CPS provided comprehensive skeleton arguments to assist the FtT, with the appellant providing a further updated skeleton argument on the morning of the second day of the hearing. The ICO also provided the FtT with written submissions, dated 19 January 2023.
18. The appellant gave evidence through a witness statement dated 30 September 2022 about her own background in investigative journalism, her work on the "*Wikileaks case*", what in her view had changed since the CPS refused her 2015 Request, and the reasons why there is a public interest in matters relating to Julian Assange's story. In a second witness statement, dated 4 January 2023, the appellant provided evidence in response to a second witness statement drawn by John Sheehan. In a third witness statement, dated 27 January 2023, the appellant made corrections to her witness statement of 30 September 2022.
19. The appellant also gave evidence orally before the FtT and was cross-examined. In oral evidence, the appellant provided further details of her investigations into the Julian Assange case, explained the role of the UN Special Rapporteur and gave evidence as to how the UN Special Rapporteur conducted his inquiry into the Swedish investigation of Julian Assange.
20. John Sheehan gave evidence on behalf of the CPS in his first OPEN witness statement, dated 7 December 2022. Therein he described the requested information held by the CPS falling within Parts 1, 2, 4 and 5 of the 2019 Request, provided an explanation of the CPS's position in relation to the disclosure of that information and provided a further response to Part 6 of the 2019 Request. Passages in this witness statement were redacted. In unredacted form, this document formed John Sheehan's CLOSED witness statement.
21. In his second OPEN witness statement, dated 20 December 2022, John Sheehan provided evidence of the CPS's 2022 review of material relating to Part 2 of the 2019 Request, the discovery of further held material as a consequence of that review and the CPS's position in relation to disclosure of that material.
22. John Sheehan also gave oral evidence in OPEN session, confirming the accuracy of his witness statements. He was cross-examined as to evidence given in his first witness statement regarding the review exercises undertaken by the CPS in 2017, 2021, and 2022 and, in particular, his statement that a "*relatively liberal approach*" had been taken by the CPS to those reviews. His attention was also drawn to the

evidence provided by a Mr Cheema on behalf of the CPS to the 2017 FtT, and the 2017 FtT's findings thereon. Mr Sheehan also gave evidence under cross examination, *inter alia*, as to the relevance to the balance of public interest of the chilling effect on ongoing and future extradition work of the divulgence of privileged correspondence into the public domain. Mr Sheehan additionally gave evidence as to the relevance of the contents of the UN Special Rapporteur's report, the impact of the suggested highly unusual or exceptional circumstances of the Julian Assange case and the US extradition request and indictment, the relevance of alleged misconduct by the US authorities, and public interest matters relevant to a consideration of Part 3 of the 2019 Request. As to the final part of the 2019 Request, Mr Sheehan identified in oral evidence, for the first time, that he understood from those that had made enquiries that "*there is a document which is described as desk instructions in relation to the deletion of accounts within 30 days*". He had not seen this document.

23. Mr Sheehan gave further evidence in CLOSED session, including evidence in response to a list of questions prepared by Ms Dehon. A gist of Mr Sheehan's CLOSED evidence was subsequently provided to the appellant in the following terms:

"Mr Dunlop took the witness to his closed statement, which he confirmed was true to the best of his knowledge and belief.

Mr Dunlop asked follow up questions relating to answers the witness had given in open about chilling effect and where he had suggested he could say more in closed.

The witness elaborated on the examples in paragraphs 31 and 32 of his statement, which are redacted in the open statement, and gave further examples of the chilling effect from his personal experience. He was also questioned by the Tribunal about how passage of time may be relevant to any chilling effect as a result of disclosure.

The witness referred to something he said in open evidence and which Ms Maurizi's counsel commented on – i.e. the resources spent on this case. The witness explained that he did not mean to reprimand Ms Maurizi or her counsel. The reason he mentioned resources was that this costs a huge amount and does reduce the CPS's capability. He said if the CPS are going to go through information line by line, the cost will be substantial. A huge amount of time had gone into dealing with this case.

The Tribunal asked and the witness answered the questions submitted by Counsel on behalf of the Appellant.

The tribunal asked questions relating to the balancing of the public interest in respect of all three aspects of the appeal, i.e. information relating to the Swedish Prosecution Service, the Ecuadorian authorities, and the US authorities. The witness answered those questions. Mr Dunlop asked one question in re-examination arising out of a question from the tribunal."



24. Mr Dunlop made oral submissions in CLOSED session on the first day of the hearing. A gist of these submissions was provided to the appellant. On the second day of the hearing, we received oral submissions in OPEN session from both Ms Dehon and Mr Dunlop.
25. In reaching our conclusions on this appeal, we have taken account of all of the evidence and submissions before us, irrespective of whether such evidence or submissions has been specifically referred to during the course of this decision.

### The Facts

26. WikiLeaks is a media organisation which publishes and comments upon censored or restricted official materials involving war, surveillance or corruption, which are leaked to it in a variety of different circumstances. Around February to August 2010, it was reported in the media that Julian Assange and WikiLeaks were the subject of investigation by the US authorities, following publication of confidential US materials.
27. In August 2010, Mr Assange made a visit to Sweden. From this there arose some allegations against him of sexual offences involving two women. However, he left Sweden in September 2010 with permission from the SPA. On 2 December 2010, a European Arrest Warrant (“EAW”) was issued by the SPA in respect of Mr Assange. On 7 December 2010, Mr Assange was arrested in London pursuant to the EAW. On 14 December 2010, he was granted conditional bail. On 24 February 2011, Mr Assange’s extradition to Sweden was ordered, and he was also ordered to surrender to court on 29 June 2012.
28. On 30 May 2012, the UK Supreme Court rejected Mr Assange’s appeal against the extradition order. On 19 June 2012, Mr Assange entered the Embassy of Ecuador in London, where he remained for the next seven years. He failed to surrender to court on 29 June 2012 as was required and a warrant for his arrest was issued.
29. In September 2015, the appellant made a request to the CPS for correspondence in relation to Mr Assange between the CPS and the SPA, the US authorities and the Ecuadorian authorities – the 2015 Request. This request sought the following, in five parts:
  - “1) the FULL correspondence between the Crown Prosecution Service and the Swedish Prosecution Authority concerning the criminal investigation against Mr. Julian Assange
  - 2) the FULL correspondence (if any) between the Crown Prosecution Service and Ecuador about the case of Mr. Julian Assange.
  - 3) the FULL correspondence (if any) between the Crown Prosecution Service and the US Department of Justice about the case of Mr. Assange.
  - 4) the FULL correspondence (if any) between the Crown Prosecution Service and the US State Department about the case of Mr. Assange.
  - 5) the exact number of the pages of the Julian Assange's file at the Crown Prosecution Service.”
30. The CPS refused the 2015 Request and the appellant complained to the ICO. On 6

February 2017, the ICO issued a decision under reference number FS50610253 and the appellant appealed this decision to the 2017 FtT. During the course of the proceedings, the CPS disclosed parts of the requested correspondence with the SPA on 9 November 2017, 17 November and 20 December 2017 (“the 2017 Disclosure documents”) but refused to disclose other information in relation to that correspondence. The CPS neither confirmed nor denied whether it held correspondence with the US or Ecuadorian authorities.

31. On 19 May 2017, the SPA announced that they were withdrawing Mr Assange's EAW as they had decided not to take the charges forward.
32. On 11 April 2019, Mr Assange's asylum status was revoked by the Ecuadorian authorities. On the same date, the Metropolitan Police entered the Embassy and arrested Mr Assange for his failure to surrender to court and on the basis of an extradition request having been received from the US authorities. Mr Assange was subsequently convicted of a Bail Act offence and sentenced to 50 weeks imprisonment.
33. On 13 May 2019, the SPA re-opened its investigation into Mr Assange.
34. On 12 September 2019, the UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, Nils Melzer (“the UN Special Rapporteur”), wrote publicly to the Swedish Government, setting out his evidenced opinion that the way in which the SPA had conducted its preliminary investigation into Mr Assange was not objective, impartial or independent. The UN Special Rapporteur opined, *inter alia*, that there was:
  - (a) A disregard for confidentiality and precaution.
  - (b) A disregard for exculpatory evidence.
  - (c) A proactive manipulation of evidence by specified police officers, which had not been the subject of investigation, nor disciplinary or judicial sanction.
  - (d) A disregard for conflicts of interest.
  - (e) A disregard for the requirements of necessity and proportionality.
  - (f) A disregard for the right to information and adequate defence.
  - (g) A disregard for the right of appeal to the European Court of Human Rights.
  - (h) A disregard of the Mutual Legal Assistance agreement.
  - (i) A complacency and complicity with third party interference.
  - (j) A refusal to guarantee non-refoulement, and
  - (k) Pervasive procedural procrastination.
35. On 19 November 2019, the SPA announced that the investigation regarding Mr Assange had been discontinued, having not further questioned Mr Assange on the allegations made against him.
36. On 12 December 2019, the appellant made the 2019 Request.
37. In its initial response of 10 February 2020, the CPS originally withheld all of the information requested by Part 1 of the 2019 Request, relying on section 40 and



section 30 FOIA exemptions. Following the appellant's complaint to the ICO, the CPS reviewed the information contained in the 2017 Disclosure documents and made further disclosures on 1 September 2021. The covering letter to that disclosure stated that the passage of time since the 2015 Request had affected the section 30 public interest balance. This disclosure comprised a 333-page pdf document which was, in substance, the 2017 Disclosure with some of the previously redacted words now unredacted.

38. Following a subsequent review of the 2017 Disclosure documents, on 17 March 2022 the CPS made further disclosures because of the 'passage of time' by further removing redactions from passages therein.
39. As to the US extradition request, on 4 January 2021 District Judge Baraitser ordered Mr Assange's discharge. On 10 December 2021, the High Court upheld an appeal by the US authorities against that decision and remitted the matter back to the Magistrates' Court. On 14 March 2022, the Supreme Court refused Mr Assange permission to appeal against this decision, and the matter was remitted to Westminster Magistrates Court. SDJ Goldspring subsequently sent the case to the Secretary of State to consider ordering extradition and the Home Secretary thereafter ordered extradition. Mr Assange has lodged an appeal to the High Court against the decision to extradite him, which remains pending.

### **The legislative background**

40. Section 1(1)(b) of FOIA confers a duty on a public authority, in response to a request, to provide information held by it. By virtue of section 2(2)(b) of FOIA, the duty does not extend to information if it falls within an absolute exemption, or within a qualified exemption and "*the public interest in maintaining the exemption outweighs the public interest in disclosing the information*".
41. In the instant matter, the relevant exemptions claimed are those set out in sections 30(1)(c), 30(3) and 42(1) of FOIA, which are qualified exemptions.
42. Section 30 of FOIA relevantly states:  
  

**"30.- Investigations and proceedings conducted by public authorities.**  
(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-  
...  
(c) any criminal proceedings which the authority has power to conduct.  
...  
(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2)."
43. Section 42 FOIA provides:  
  

**"42. – Legal professional privilege.**  
(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”

44. By section 50 of FOIA:

“(1) Any person (in this section referred to as “the complainant”) may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.”

45. Section 57 of FOIA materially states:

**“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.”

46. When an extradition request is made on behalf of a foreign judicial authority the CPS acts as the representative of that authority in the extradition proceedings. This function is assigned to it by section 190 of the Extradition Act 2003. This allocates to the CPS, headed by the Director of Public Prosecutions, “*the conduct of any extradition proceedings.*” There is further discussion of the role of the CPS in extradition proceedings in the decision in R (Raissi) v Home Secretary [2008] EWCA Civ 72, [135]-[143]. The same section of the Extradition Act also assigns to the CPS the function of giving “*advice on any matters relating to extradition proceedings or proposed extradition proceedings.*”

**The FtT’s role**

47. The role of the FtT is set out in section 58 of FOIA:

“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.

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

48. The import of section 58 is that the right of appeal to the FtT involves a full merits consideration of whether, on the facts and the law, the public authority’s response to the FOIA Request is in accordance with Part I of FOIA (Information Commissioner v Malnick and ACOBA [2018] UKUT 72 (AAC); [2018] AACR 29, at paragraphs [45]-[46] and [90]).

49. In accordance with the recent decision of the Upper Tribunal in Montague v Information Commissioner and DIT [2022] UKUT 104 (AAC), at [86], “...the public authority is not to be judged on the balance of competing interests on how matters stand other than at the time of the decision on the request which it has been obliged by Part I of FOIA to make.” In the instant appeal, the CPS refused the 2019 Request on 10 February 2020, and it is at this date that the public interest balance must be assessed.

## Discussion

### Tribunal’s approach to the 2017 FtT Decision

50. The first issue that we consider is the extent to which the 2017 FtT Decision should play a role in our consideration of the instant appeal. Our attention was not drawn to any binding authority on the issue of principle to be applied, but the parties were broadly *ad idem* on this, although not on the application of principle to the facts of the instant appeal.

51. In his written submissions of 19 January 2023, the ICO asserts that Parts 1-5 of the appellant’s 2019 Request were “*substantially identical*” to the 2015 Request made by the appellant to the CPS. The ICO further observes that the FtT considered the CPS’s response to the 2015 Request in the 2017 FtT Decision, which was upheld by the Upper Tribunal on appeal. The ICO then makes the following submission:

“10. The central issue in this appeal is whether Ms Maurizi’s request of 12 December 2019 required different responses to those referred to in paragraph 8 above, by virtue of the passage of time and intervening developments and/or evidence in relation to Mr Assange’s case. The Commissioner is mindful that the public interest balance under section 2 FOIA is to be assessed at the time of the public authority’s response to the request (here, 10 February 2020): *Montague v Information Commissioner and DIT* [2022] UKUT 00104 (AAC).

11. Having considered the witness evidence and the withheld information, the Commissioner’s position is that the passage of time and intervening developments do not alter the conclusions reached in decision FS50610253 and in the decisions of the FTT and UT upholding that decision. Therefore, save as indicated below, the Commissioner invites the FTT to uphold his decision and to dismiss Ms Maurizi’s appeal.”

52. The CPS contend that there has not been a “*material change in circumstances*” since the 2017 FtT Decision, and that the 2017 FtT Decision “*is a complete answer to almost all of [the appellant’s] submissions*”.
53. The appellant’s position is that “*matters have changed since the previous Tribunal’s decision,*” such that a different conclusion should be reached on the public interest analysis. As to the approach in law that should be taken, the appellant submits as follows:

“Where a request has previously been considered by the Tribunal (and on appeal by the Upper Tribunal), but a similar request is made at a later date, the views of the earlier Tribunal are not binding, although they are relevant and attract considerable weight: *Breeze v IC and Norfolk Constabulary* (EA/2013/0053) (“*Breeze*”) at §25. The key question that the Tribunal must ask

is whether there has been any new information which has come to light since the earlier decisions which could cause the Tribunal to come to a different view: *Breeze* §25.”

54. As to the approach to be taken in principle to earlier findings of an FtT, as indicated above we are not aware of any binding authority on the treatment of such earlier findings in FOIA appeals. In *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273 the House of Lords held that the principle of *res judicata* – including issue estoppel – applied equally to public law proceedings. Lord Bridge held, at 281B:

“In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of *res judicata* applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions.”

55. The principle has been held not to apply in the fields of social security and immigration and asylum. In the latter context, the Court of Appeal in *R (Abidoye) v Secretary of State for the Home Department* [2020] EWCA Civ 1425 at [43] recently held that Lord Bridge’s remarks were a statement of general principle rather than a definitive rule. At [40], it approved earlier authority that the technical application of the principle of *res judicata* was ruled out by the requirement that issues of asylum and human rights be decided as they are at the date of decision, whether administrative or judicial. We consider that this is analogous to the obligation of this Tribunal to determine the lawfulness of the decision notice as at the date it was made, see *Montague*.
56. In our view, the correct approach is that summarised by the Court of Appeal in *Secretary of State for the Home Department v BK (Afghanistan)* [2019] EWCA Civ 1358 at [32]-[39]. The well-established principle of administrative law that persons should be treated uniformly unless there is some valid reason to treat them differently, and the public interest in consistency of approach, has been held to provide a sufficient juridical basis to require a Tribunal to treat an earlier decision as an authoritative assessment of the issues at the time it was made, and the starting point for its own decision. If a party relies on facts that are not materially different from those put before, then the second Tribunal should regard the issues as settled by the first decision rather than allowing the matter to be relitigated. Nonetheless, the obligation of the Tribunal to independently decide each case on its own individual merits is preserved and does not impose any unacceptable restrictions on the second Tribunal’s ability to make the findings which it conscientiously believes to be right.

#### Article 10 ECHR

57. By ground 2 of her Grounds of Appeal, the appellant contends that the denial of access to information constitutes an unjustified interference with her rights under

Article 10 ECHR and that, in the instant matter, both the CPS and the ICO have unlawfully failed to apply Article 10.

58. As to the application of Article 10 ECHR, we are bound by the decision of the Upper Tribunal in Moss v Information Commissioner and Cabinet Office [2020] UKUT 242 (AAC), approved in Foreign, Commonwealth and Development Office v Information Commissioner [2021] UKUT 248 (AAC) [2022] 1 WLR 1132. In line with those decisions, we conclude that Article 10(1) ECHR does not extend to include a right of access to information and that the application of Article 10 plays no part in our consideration of the instant appeal.

***Part 1 of the 2019 Request*** – “*THE FULL correspondence on Julian Assange between the Crown Prosecution Service and the Swedish Prosecution Service between the 1st of November 2010 and the 8th of September 2015 which has NOT been released to me in my previous FOIA.*”

59. There is no dispute that section 30(1)(c) of FOIA (public authority investigations and proceedings) is engaged, because extradition proceedings are a form of criminal proceedings which the CPS has power to conduct.
60. Section 30 is a qualified exemption and the issue between the parties is whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
61. Turning to the public interest assessment, we are required to consider the public interest as matters stood on 10 February 2020. Section 2(2)(b) of FOIA requires decision-makers, including the Tribunal, to conduct a balancing exercise, weighing the factors in favour of maintaining the exemption against the public interest factors that favour disclosure. There is neither a presumption in favour of disclosure nor a presumption in favour of non-disclosure. Judging the balance of public interest is a mixed question of law and fact, not an exercise of discretion: (Malnick at [45](5)). Where the decision-maker concludes that the competing interests are equally balanced, the decision-maker will not have concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information – so that disclosure will be required (Department of Health v Information Commissioner [2017] EWCA Civ 374, [2017] 1 WLR 3330, at [46]).
62. In All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner [2013] UKUT 0560 (AAC) (“APPGER”), the Upper Tribunal said at [149]:

“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, 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.”



63. We find that Part 1 of the 2019 Request is substantially the same as Part 1 of the 2015 Request. The 2017 FtT Decision considered Part 1 of the 2015 Request at [47] – [68] therein, the relevant date for its public interest consideration being “September-December 2015”, [50]. It concluded that the public interest in maintaining the exemption under section 30(1)(c) outweighed the public interest in disclosure of the “disputed information”, with the balance coming down “firmly” on the side of maintaining the exemption, [67].
64. We observe, however, that in 2017 the CPS disclosed some material falling within the scope of Part 1 of the 2019 Request. This disclosure is referenced at [11] and [43] of the FtT’s 2017 Decision. The held material was then further reviewed by the CPS whilst the appellant’s 2020 Complaint was being considered by the ICO. As a consequence, “having considered the public interest test, and taking into account the passage of time,” the CPS made further disclosures to the appellant on 1 September 2021 and 17 March 2022, ostensibly by the removal of some of the redacted parts of the material that had been disclosed in 2017.
65. We could, at this juncture, engage in an analysis of whether the information that was disclosed by the CPS in September 2021 and March 2022 (“the Recent Disclosures”) should have been disclosed on 10 February 2020 i.e. by considering whether the public interest on that date required disclosure of the material which was eventually disclosed in September 2021 and March 2022. However, in our view, to do so would add unnecessarily to the length of this already lengthy decision. The position is that even if we were to find in the appellant’s favour and conclude that the Recent Disclosures should have been disclosed in February 2020, we would not have issued a Substituted Decision Notice requiring disclosure of this information, because it has already been disclosed. Of course, that does not preclude us from taking into account in our consideration of other aspects of this appeal the reasons provided by the CPS for the Recent Disclosures.
66. We now turn to consider the public interest in maintaining the exemption for Part 1 of the 2019 Request. The 2017 FtT considered the public interest in maintaining the exemption in relation to Part 1 of the 2015 Request, at [51] to [52] of its decision:
- “51. ...the public interest in maintaining the s.30 exemption arises from the nature of the work done by the CPS extradition unit. It is generally in the public interest that offences be prosecuted and punished. The purpose of the extradition legislation is to serve the interests of justice by making provision for offenders or suspected offenders to be sent to the country which has prosecuted or is prosecuting them. It is also to ensure that the UK does not become a safe haven for criminals. Further, the existence of effective extradition arrangements provides a reciprocal benefit. When the UK wants to extradite offenders or suspected offenders from another country to the UK, this is much more likely to happen where the sending country benefits from effective extradition arrangements with the UK.
52. The question of public interest in maintaining the exemption therefore demands a focus on the practical requirements for the effective conduct of extradition proceedings, in a way which not only serves the particular proceedings but also is in keeping with the wider goals of ensuring that the UK



is not a safe haven and of encouraging other countries in their reciprocal arrangements with the UK.”

67. The 2017 FtT went on, at [53] to [55], to explain why it considered the relationship between the CPS and a foreign authority such as the SPA to be “*akin to the relationship between lawyer and client*”. On its analysis, the holder of the confidence is the foreign authority, which is “*in effect the client*”. It concluded that the CPS remained bound by an obligation of confidence in relation to such information as had not already been disclosed by the SPA itself. The public interest in maintaining this confidence “*is strong, as in the analogous case of maintaining legal professional privilege*”, and “*it is strong both because it is an obligation still owed to the SPA and because of the potential wider impact on extradition proceedings, both outward and inward*” [55].
68. The 2017 FtT further concluded that it would be wrong to apply a blanket approach to the public interest assessment under section 30(1)(c) of FOIA, and we concur entirely with that stated by the 2017 FtT at [68] of its Decision.
69. Moving on, whilst there are some, minimal, aspects of the Requested Information falling within Part 1 of the 2019 Request that can be categorised as anodyne, as well as personal information which it is accepted should not be disclosed, the significant majority of this Requested Information is made up of communications between the CPS and SPA relating to the provision of legal advice, and discussions surrounding wider strategic matters relating to Mr Assange’s extradition proceedings in the UK. We agree with Mr Dunlop’s contention that these are confidential discussions between the CPS and SPA (which the CPS represented before the UK courts in its extradition request).
70. Ms Dehon observes that the SPA has already disclosed correspondence between the CPS and the SPA to the appellant, including unredacted legal advice. She submits that given that the confidence belongs to the confider, in this case the SPA, there can no longer be any credible perceived threat to confidentiality by the CPS disclosing the Requested Information. Ms Dehon further relies on the fact that the CPS has not sought the views of the SPA on disclosure of the Requested Information.
71. In our conclusion, this is ostensibly the same submission that was made to the 2017 FtT and rejected at [63] of its decision. We also reject this submission and conclude that the SPA has not waived confidentiality generally in relation to its communications with the CPS on Mr Assange’s extradition proceedings and, in particular, it has not waived confidentiality in material that it has not disclosed.
72. The 2017 FtT accepted the evidence given by Mr Cheema that the chilling effect of disclosure of confidential information and, in particular, disclosure without the consent of the foreign judicial authority, would be likely to damage the function of the CPS in extradition proceedings “*with the knock-on effects...for the relationship with the SPA in particular and with other prosecuting authorities of judicial authorities more generally...*” [62] and [63]. Before us, Mr Sheehan provided additional detailed evidence in support of the CPS’s contention that its relationships with its international partners is increasingly being threatened by perceived threats to

confidentiality, and that the chilling effect of the disclosure of information that was originally exchanged in confidence, has increased since 2017.

73. We accept this evidence, which Mr Sheehan supports by the provision of specific examples in both his written and oral CLOSED evidence. In our CLOSED decision we provide details of those examples and the consequential damage done to the relationship of trust and confidence that exists between the CPS and foreign authorities.
74. In compliance with the decisions in APPGER and the Department of Health case, the correct approach is to identify the actual harm or prejudice and the actual benefits, that the proposed disclosure would (or would be likely to or may) cause. We do not accept Ms Dehon's assertion that the consequence of this principle is that in order for a chilling effect to weigh in the balance in the instant matter, we must focus on whether the CPS has evidenced the actual harm that disclosure would cause to the relationship between the CPS and SPA. The CPS relies not only on the likelihood of damage to its relationship with the SPA but also on the likelihood of damage to its relationship with other prosecuting and judicial authorities more generally.
75. We conclude that the disclosure of the Part 1 Requested Information would risk damaging the relationship of trust and confidence that exists between the CPS and foreign authorities – a relationship which allows the CPS to conduct extradition proceedings effectively. The importance of this principle was recently reaffirmed in Modi v Government of India [2022] EWHC 2829 (Admin) (DC) at [68], where Stuart-Smith LJ referred to "*the mutual trust that forms the basis of the extradition regime*". The public interest in maintaining the confidence of communications from foreign judicial authorities to the CPS is, in our view, strong and important and weighs heavily in favour of maintaining the exemption. Contrary to Ms Dehon's submissions, we see nothing in this conclusion, or our reasons for it, which is inconsistent with the principle espoused by Charles J at [27] in the Department of Health case.
76. We observe that both the UK and Sweden have freedom of information legislation. However, as the 2017 FtT concluded at [56], "*it does not follow that a foreign country in the position of a client of the CPS, even with legislation such as that in Sweden, would necessarily expect its information to be released by the CPS or be unconcerned if that happened. Moreover, many countries to whom or from whom extradition may be desired do not have freedom of information legislation.*"
77. In reaching our conclusion, we have had full regard to the fact that there are numerous well publicised and unique circumstances to Mr Assange's case, but we do not accept the submission that this reduces to any material extent the weight that we should attach to the public interest in maintaining the exemption. In our view, to reach such a conclusion would require engaging in unmerited and unevidenced speculation.

78. We have also taken account of the fact that the SPA investigation was closed for almost two years, between May 2017 and May 2019, and was permanently closed in November 2019 but, again, conclude that these matters do not reduce to any material extent the weight that should be attached to the public interest in maintaining the exemption. As we have observed above, the public interest consideration is far wider than the CPS's relationship with the SPA and involves the CPS's relationship with its extradition partners more generally and must also be viewed in the context of the CPS's relationships with its foreign partners being increasingly threatened by perceived threats to confidentiality.

79. On the other side of the balance, the appellant maintains that "*the same general public interest in disclosure cited by the [2017 FtT]*" at [57(a)] of its decision, still arises. This passage in the 2017 FtT Decision reads:

"[57] a. Disclosure of official information can promote good government through transparency, accountability, increased public confidence and public understanding, the effective exercise of democratic rights, and other related public goods. The potential benefits of disclosure include the pressure to make governmental decisions and use governmental resources in ways that will withstand public scrutiny. They also include the enabling of constructive public debate, which in effect enlists the help of responsible members of the public in fostering good government.

80. We agree that the matters identified above are all significant public interests weighing in favour of disclosure and we have taken them into account in reaching our conclusions on the public interest balance.

81. We further find that the following matters identified at [57(b)]-[57(d)] of the 2017 FtT's decision also weigh as public interests in favour of disclosing the Part 1 Requested Information:

"[57] b. More particularly, in support of the more general goals above, there is a public interest in information being made available that can increase public understanding of how extradition proceedings are handled by the CPS, including the handling of the relationship with a foreign prosecuting authority.

c. There are some further features unique to this particular case. The matter has dragged on unresolved for a long time. The circumstances have also involved a high cost to the public purse. How this came about, and whether the money has been well spent, are matters of legitimate public concern.

d. So far as the evidence before us goes, Mr Assange is the only media publisher and free speech advocate in the Western world who is in a situation that a UN body has characterized as arbitrary detention. It is a matter of public controversy how this situation should be understood. The circumstances of his case arguably raise issues about human rights and Press freedom, which are the subject of legitimate public debate. Such debate may even help to resolve them, which would itself be a public benefit."

82. We have further born in mind the effluxion of time since the information was

created. As a general rule, the public interest in preventing disclosure diminishes over time, as reflected by the fact that a number of FOIA exemptions cease to apply after specified periods of time (see for example section 63 of FOIA). However, self-evidently the relevance of the passage of time and the weight to be attached to it in the balancing exercise must be viewed through the lens of the facts of the specific case. In undertaking our assessment, we have specifically taken account of relevant events and changing circumstances that have occurred since the creation of the information and since the relevant date for the public interest assessment undertaken by the 2017 FtT. This includes the fact that the SPA’s investigation of Julian Assange was closed for almost two years, between May 2017 and May 2019, and was permanently closed in November 2019, as well as the fact of the withdrawal of the European Arrest Warrant by the Swedish authorities. We have weighed all these matters in the balance in favour of disclosure when reaching our conclusions.

83. In her written and oral submissions, Ms Dehon placed significant emphasis on evidence contained in the UN Special Rapporteur’s report of 12 September 2019 (“the 2019 UN Report”) which, *inter alia*, concluded that the SPA’s preliminary investigation was not objective, impartial or independent, and involved material misconduct. It is asserted that neither the CPS nor the ICO properly took this significant evidence into account in their assessment of the public interest. Reference was additionally made by Ms Dehon to the views set forth by credible press freedom and human rights organisations, and we have taken this material into account.
84. We have summarised the conclusions of UN Special Rapporteur’s report at [34] above. Ms Dehon specifically drew attention to the following statements in the report (quoted from [15e] of Ms Dehon’s skeleton argument of 13 March 2023).
- Strong bias and arbitrariness were displayed in the initial actions of the SPA, including breach of confidentiality, but an investigation into this by the Swedish Ombudsman for Justice was prematurely terminated or suppressed.
  - The SPA disregarded exculpatory evidence and proactively manipulated evidence, including by modifying the witness statement of one of the alleged victims.
  - Key people involved in manipulating evidence were connected through close personal and political ties, including to a former Minister who commented publicly on the case.
  - The Swedish prosecutor, Marianne Ny, issued a detention order and European Arrest Warrant despite having given express authorisation for Mr Assange to leave Sweden; having had three weeks in which he was in Sweden repeatedly asking to be questioned or to respond to the allegations; despite several dates for return to Sweden having been proposed and despite offers to respond to questions in London, or by phone, via video link or in writing, which possibilities were declined “for unconvincing reasons such as work-load, schedule incompatibility, sick leave of police officer MG, and legal obstacles that subsequently were acknowledged not to exist”. Questioning “of suspects or witnesses in the United Kingdom was reportedly standard practice applied by Sweden in dozens

*of contemporaneous criminal investigations under the Mutual Legal Assistance agreement with the United Kingdom.”*

85. The embryo of Ms Dehon’s submission is found at [68] of the 2017 FtT Decision, where the Tribunal state as follows:

“It is not appropriate for us to try to specify in general terms what facts would be sufficient to tip the scales the other way for the purpose of the exemption in s30(1)(c) from the way that they come down in this case. The balance must depend on the particular circumstances. However, to avoid any misunderstanding we would express our disagreement with remarks made by Mr Cheema in his evidence which gave the impression that he regarded non-disclosure as a blanket policy such that only consent from the foreign authority or something like a danger to life and limb would tip the balance. Ms Dehon was right to submit that his approach to upholding the exemption appeared to be too indiscriminate. There are clearly other kinds of considerations than personal safety which would be capable of tipping the balance in particular circumstances. An example might be where there was material misconduct on the part of the foreign judicial authority.” (Emphasis added)

86. We concur with everything said at [68] of the 2017 FtT’s Decision. We also accept that the UN Special Rapporteur is independent, and that there is nothing put forward by the Respondents in this case which undermines the substance of the findings in this Report. Having said that, we do make observations regarding one aspect of that report. The 2017 FtT, at [33] and [39], addressed two emails from January 2011 authored by a CPS lawyer to the SPA, which were later referenced by the UN Special Rapporteur in support of his conclusions of “*Swedish complacency, or even complicity, with third-party interference on the part of the British Crown Prosecution Service (CPS) and, potentially, the US Federal Bureau of Investigation (FBI)*”. These emails are in the public domain and do not form part of the Requested Information. Although not material to our conclusions in this appeal, we nevertheless indicate that we endorse the conclusions of the 2017 FtT, at [33] and [40], in relation to these emails.
87. We have carefully considered the Requested Information for ourselves in the context of the UN Special Rapporteur’s report and the other similar material referred to us by Ms Dehon, and conclude that there is nothing therein which either supports or contradicts the conclusions and reasons of the UN Special Rapporteur; nor does the Requested Information shed any light on whether there has been any other ‘material misconduct’ by the SPA, or the CPS, that is not referred to in the UN Special Rapporteur’s report. It is also prudent to add at this stage that the Requested Information does not evidence any US pressure brought to bear on the SPA.
88. If evidence in the 2019 Requested Information were capable of shining a light on material misconduct on the part of a foreign judicial authority or the CPS, then we have no doubt that this would weigh very heavily in favour of disclosure and may be capable of “*tipping the balance in particular circumstances*”. However, that is not the position in the instant case. Absent this nexus, we conclude that the evidence drawn



from the 2019 UN Report and other similar material does not weigh significantly in favour of disclosure.

89. In conclusion, having carefully considered the parties' submissions, the evidence of the witnesses, the OPEN and CLOSED documentation and all other relevant matters in the manner approved by the Court of Appeal in Department of Health v IC and Lewis, and despite the passage of time, the withdrawal of the EAW, the ceasing of the investigation against Mr Assange, the unusual features of Mr Assange's case and all the other public interest factors identified by the appellant as favouring disclosure, we reach the same conclusion as the 2017 FtT and find that strong and important public interest in maintaining the exemption under section 30(1)(c) significantly outweighs the public interest in favour of disclosure of the Requested Information under Part 1 of the appellant's 2019 Request.
90. We would also have reached the same conclusion on Part 1 of the 2019 Request had we been considering the matter without the benefit of the findings made by the 2017 FtT.
91. Although CPS's 2020 Refusal did not rely upon section 42(1) of FOIA (legal professional privilege) in relation to Part 1 of the 2019 Request, and neither the ICO's 2022 Decision nor the ICO's written submissions before the FtT engaged with this provision, the CPS maintains in its skeleton argument that section 42(1) is engaged and that the public interest balance is the same as that conducted under section 30. In contrast, the appellant contends that section 42 does not apply and that, if it does, then the public interest balance falls in favour of disclosure. Given our conclusion above in relation to Part 1 of the 2019 Request i.e., that section 30(1)(c) applies and that the public interest balance does not fall in favour of disclosure, it is unnecessary for us to address the application of section 42(1) of FOIA to the same Requested Information.

**Part 2 of the 2019 Request** – *“THE FULL correspondence on Julian Assange between the Crown Prosecution Service and the Swedish Prosecution Service between September 2017 and the 1st of December 2019.”*

92. For obvious reasons, the specific information sought in Part 2 of 2019 Request was not considered by the 2017 FtT although, as we have already identified above, the 2017 FtT did discuss public interest issues as of late 2015, that were relevant to the question of whether correspondence on Julian Assange between the CPS and the SPA should be disclosed.
93. The CPS's position in relation to this part of the Request has seismically shifted over time. In its initial decision of 10 February 2020, the CPS's response did not differentiate as between Parts 1 and 2 of the 2019 Request and relied on section 30(1)(c) and section 42(2) to withhold the information sought in these parts of the request.
94. As identified at [43] of the ICO's 2022 Decision, the ICO preliminarily concluded that *“some but not all of the SPA related records”* relating to Part 1 and Part 2 of the



2019 Request should be disclosed. This led to the disclosures in relation to Part 1 of the request, which we have referred to at [64] above. However, upon reviewing its records in the context of Part 2 of the 2019 Request, the CPS concluded that it did not hold any information relating to that part and, on the same date as the ICO's 2022 Decision was issued, it notified the ICO of this fact.

95. On 12 December 2022, after receipt of the appellant's witness statement in the instant appeal, the CPS conducted a further review of the information it holds, and its position pivoted again, with more than 150 pages of information falling within the scope of Part 2 of the 2019 Request having been identified. On 21 December 2022, the CPS informed the parties to this appeal, and the FtT, of the outcome of its review. The CPS, nevertheless, maintains that the information it holds within the scope of Part 2 of the 2019 Request is exempt under section 30(1)(c) of FOIA and that the public interest falls in favour of maintaining the exemption.
96. Once again, we accept that section 30(1)(c) of FOIA is engaged because the information was created in relation to criminal proceedings. The issue between the parties is whether the public interest in maintaining the exemption outweighs the public interest in disclosure.
97. The ICO's 2022 Decision did not differentiate in its conclusions relating to Parts 1 and 2 of the 2019 Request. The ICO's position before the FtT, as reflected at [26] of the skeleton argument provided for the appeal, is as follows:

“In his decision notice, the Commissioner found that the CPS had correctly relied on section 30(1)(c) FOIA in refusing request 2. Having considered the further information the CPS ultimately discovered within the scope of this request, and Mr Sheehan's evidence in relation to that information, the Commissioner maintains that section 30(1)(c) FOIA is engaged and the public interest favours maintaining that exemption. In the Commissioner's view, the balance tips more firmly in that direction than for request 1, given the more recent nature of the information within the scope of request 2.”
98. By way of a CLOSED exhibit to Mr Sheehan's second witness statement, we have been provided with a copy of the information held by the CPS in relation to Part 2 of the 2019 Request.
99. There is a significant amount of personal information within the documentation which the appellant accepts, and we find, should not be disclosed pursuant to section 40(2) of FOIA. There is also information in the CLOSED bundle which does not, if considered in isolation, fall within the scope of Part 2 of the 2019 Request in that it is not correspondence between the CPS and SPA. We provide examples in our CLOSED decision.
100. Insofar as the information in the documentation falls within the scope of Part 2 of the 2019 Request and is not personal information, it is correctly categorised at [8] of Mr Sheehan's second statement as advice and instructions between CPS lawyers and the SPA on casework decisions; advice and discussions about criminal proceedings in relation to breach of bail; advice on the application of English law to

extradition proceedings; or discussion about procedures surrounding the criminal proceedings in both the UK and Sweden. We agree with Mr Dunlop's contention that these are confidential discussions between the CPS and SPA.

101. Turning to the public interest balancing exercise, we have already found above in relation to Part 1 of the 2019 Request that the relationship of trust and confidence that underlies information sharing between prosecuting authorities is an important and weighty public interest.
102. We find in relation to Part 2 of the 2019 Request that disclosure of the Requested Information would be likely to have a chilling effect not only on the relationship of trust and confidence that exists with the SPA, but also with other foreign authorities. In reaching this conclusion we have taken cognisance of, but do not repeat, all that we have said on this topic in our consideration of Part 1 of the 2019 Request above. There is a weighty and important public interest in maintaining that relationship of trust and confidence.
103. We have carefully considered the public interest factors which weigh in favour of disclosure. The factors identified by Ms Dehon in relation to Part 2 of the 2019 Request are the same as those relied upon in relation to Part 1 of the Request. We do not repeat all that we have said above in relation to such matters, but we indicate that we have considered again these factors relied upon by the appellant, specifically in relation to disclosure of the material held in relation to Part 2 of the Request. In particular, we have again analysed the material in the context of the UN Special Rapporteur's report and the other similar material referred to us by Ms Dehon. Having done so, we conclude that there is nothing in the CLOSED material before us which either supports or contradicts the conclusions and reasons of the UN Special Rapporteur, nor does the Requested Information shed any light on whether there has been any other 'material misconduct' by the SPA, or the CPS, that is not referred to in the UN Special Rapporteur's report. In addition, we find that the Requested Information held in relation to Part 2 of the 2019 Request does not evidence any US pressure brought to bear on the SPA.
104. Having carefully considered the parties' submissions, the evidence of the witnesses, and the OPEN and CLOSED documentation, and having given consideration to all relevant factors in the manner approved by the Court of Appeal in Department of Health v IC and Lewis, we find that there is a strong and important public interest in maintaining the s.30(1)(c) exemption. Despite the passage of time, the withdrawal of the EAW and the ceasing of the investigation against Mr Assange by the Swedish authorities, the unusual features of Mr Assange's case and all the other public interest factors identified by the appellant as favouring disclosure, we find that the strong and important public interest in maintaining the exemption under section 30(1)(c) significantly outweighs the public interest in favour of disclosure of the Requested Information under Part 2 of the 2019 Request.
105. Insofar as there is information within the Part 2 Requested Information which can be categorised as "*greetings, pleasantries and courtesies*" occurring around that core of the information, we conclude that the public interest in maintaining the exemption

in relation to these aspects of the information outweighs the public interest in its disclosure. There is little intrinsic value in this information other than to provide context for that which follows. We agree with Mr Sheehan and Mr Dunlop that there can be only limited public interest in disclosure of this information and, also, that the information nonetheless carries an expectation of confidentiality, being created, or held “to aid continuing communication with a view to progressing the case”.

106. As to the application of section 42(1) of FOIA to Part 2 of the 2019 Request, given that we have found that section 30(1)(c) applies and that the public interest balance does not fall in favour of disclosure, we once again conclude that it is unnecessary for us to address the application of section 42(1) of FOIA to the same Requested Information.

**Part 3 of the 2019 Request** – “*THE FULL correspondence on Julian Assange between the Crown Prosecution Service and the Ecuadorian authorities between the 19th of June 2012 and the 11th of April 2019*”

107. This part of the 2019 Request seeks CPS correspondence with the “*Ecuadorian authorities*”, between two key dates: 19 June 2012, when Mr Assange entered the Ecuadorian Embassy and sought asylum, and 11 April 2019 when the Metropolitan Police entered the embassy and Mr Assange was arrested.

108. In her grounds of appeal, the appellant maintains that “*Plainly, the point of the Appellant’s request is to understand whether there was any interaction between the CPS and the Ecuadorian authorities in relation to the extradition requests by the Swedish and United States authorities, given that for a large part of the time when it is known those requests had been made, Mr Assange was in the Ecuadorian embassy.*”

109. In refusing this request, the CPS relied upon section 30(3) of FOIA and the ICO concluded that the CPS had correctly done so.

110. The duty to say what information is held that matches the description in an information request is found in section 1(1)(a) of FOIA. This is known as the duty to confirm or deny: section 1(6). Section 30(3) provides, among other things, that the duty to confirm or deny does not arise in relation to information which is exempt information by virtue of section 30(1), or that would be so exempt if it were held by the public authority (“NCND”). The public interest balance nevertheless still applies to a section 30(3) consideration.

111. The 2017 FtT considered a similar request made of the CPS by the appellant, for “*the FULL correspondence (if any) between the [CPS] and Ecuador about the case of Mr Julian Assange.*” In its 2015 Refusal the CPS had relied, *inter alia*, upon section 30(3) in support of an NCND response to the aforementioned request, as well as in relation to requests for correspondence between the CPS and the US Department of Justice, and the CPS and the US State Department. The appellant contended before the 2017 FtT that section 30(3) was not engaged, given the inherent unlikelihood that any such correspondence, if it existed, would be about the extradition of Mr Assange to Ecuador. The 2017 FtT concluded that it was required to consider the hypothesis that such correspondence might exist and “*the unlikelihood of that hypothesis being true*”

*is not the point*". On that hypothesis, the 2017 FtT found that the only thing that the correspondence would be about, if it existed, was an inquiry or request concerning Mr Assange's extradition to Ecuador, and that any such information would be held by the CPS for the purposes of prospective criminal proceedings. Accordingly, section 30(3) was held to apply to this part of the appellant's request [82].

112. The 2017 FtT then turned to the public interest balancing exercise. It considered that it was plain that the public purpose of the power to bring extradition proceedings would be undermined without a generally consistent NCND policy to prevent express or implied tip-offs. The purpose of the section 30(3) exemption was to enable such a policy to be followed [84]. It further found that the maintenance of a generally consistent policy was not undermined by an occasional exception in appropriate circumstances. The 2017 FtT rejected Ms Dehon's contention that the unusual circumstances of Mr Assange's case justified a departure from the normal policy [89]. The 2017 FtT agreed that Mr Assange had a "*strong personal interest*" in knowing whether the CPS had received extradition inquiries or requests from a State other than Sweden. However, the 2017 FtT was "*unable to see how it would be of more than marginal benefit to the public for that question [concerning extradition enquiries] to be answered*". While the request for information was not expressly linked to extradition, it was necessary to consider the specific question about extradition "*because the effect of departing from the NCND policy in this instance would potentially be to answer that question*" [90].
113. On appeal to the Upper Tribunal, all parties agreed that in determining the NCND aspects of the appeal the 2017 FtT was correct to construct a hypothesis assuming that certain information was held, and then to apply the NCND public interest balancing exercise to that hypothetical information. Before the Upper Tribunal, the appellant asserted that the FtT's hypothetical scenario was unrealistic and that the 2017 FtT had erred by acceding to the CPS's submission that it should hypothecate correspondence in which the Republic of Ecuador requested Mr Assange's extradition. The Upper Tribunal concluded that the 2017 FtT had been entitled to find that, if any correspondence with the Ecuadorian authorities were held by the CPS, it would only be about extradition [190]. It further concluded:

"[197] Given the FtT's finding of fact that, if there were correspondence, it would concern extradition, I cannot but avoid the conclusion that the FtT was also satisfied that, to the extent that Ms Maurizi's request went beyond extradition, the information was not held by the CPS. It should not come as a surprise that the CPS does not hold information that is irrelevant to its functions. Although expressed differently, this analysis really makes the same point as did Mr Dunlop QC in arguing that a NCND hypothesis needs to be linked to the real world. ...

[200] The FtT rightly held that section 30(3) FOIA does not inevitably operate by reference to the entirety of the requested information. In limiting the scope of the hypothetically held information as it did, the FtT was simply following through with the natural consequence of its finding that, if any information were held, it would relate to extradition. I find it very difficult to see how the FtT could have taken a different approach in the light of that

finding. If, despite having found that the only Ecuadorian information that the CPS might hold would concern extradition, the FtT then subjected the entirety of Ms Maurizi’s request to the public interest balancing exercise, it would have only been storing up difficulties. How could it have determined whether the public interest in maintaining the exclusion of the duty to confirm or deny outweighed the public interest in disclosing whether the information was held when, on its findings, much of the information requested would not have been held? But the FtT did not put itself in that position, no doubt because it appreciated that it would have set up an impossible task for itself.”

114. Returning to the instant appeal, Ms Dehon submits that the ICO and the CPS have, when considering Part 3 of the 2019 Request, wrongly focused on correspondence with the Ecuadorian prosecution authorities which, it is asserted, improperly narrows the request. She contends that the extradition interests in play in this case are those of Sweden and the United States, and not those of Ecuador. This is clear, it is said, given that the Ecuadorian authorities revoked Mr Assange’s political asylum and cooperated with the Metropolitan Police “*inviting them into the Embassy to arrest Mr Assange.*” It is averred that the fact that the Ecuadorian authorities did not then seek Mr Assange’s extradition but, rather, that there was an immediate disclosure of the US extradition request, indicates both that the US authorities were well aware of, and prepared for, the impending arrest and also provides significant evidence that the hypothetical correspondence between the CPS and the Ecuadorian authorities may have concerned the US extradition request.
115. We conclude, for the same reasons identified by the 2017 FtT, that if any correspondence with the Ecuadorian authorities is held by the CPS, it would only be about extradition. This was a finding made by the 2017 FtT having heard Mr Cheema’s evidence in this regard. In his witness statement Mr Sheehan indicates that he “*agree[s] with the factual picture that Mr Cheema gave*” to the 2017 FtT. He also provided the same underlying evidence himself, orally, in CLOSED session. There is nothing before us which leads us to a different conclusion to that reached by the 2017 FtT. Given the nature of the responsibilities of the CPS, if there were correspondence between the CPS and the Ecuadorian authorities then, on the balance of probabilities, we find that it would be regarding either an inquiry about possible extradition, a request for actual extradition, or a follow-up to such a request or inquiry.
116. The thrust of Ms Dehon’s submission is that whilst this may be so, this does not preclude the existence of correspondence between the Ecuadorian authorities and the CPS regarding the extradition requests made by the United States or Sweden. This is exactly the point that was addressed by the 2017 FtT at [82] of its decision where the following was found:

“...In our view it is clear on the evidence that the CPS has no proper role in dealing with the Ecuador Embassy or other Ecuadorian authorities on behalf of the SPA. Any such steps would be outside its statutory functions. We are required to consider the hypothesis that correspondence between the CPS and Ecuador concerning the case of Mr Julian Assange might exist. The



unlikely of that hypothesis being true is not the point. We are required to consider the possibility of its being true. If we consider that hypothesis, then on the balance of probabilities the only thing that such correspondence would be about, if it existed, would be an inquiry or request concerning extradition of Mr Assange to Ecuador, or a follow-up to such a request. The information would then be held by the CPS for the purpose of prospective criminal proceedings which it had power to conduct.” [our emphasis]

117. The rationale therein applies equally to correspondence in Mr Assange’s case between the Ecuadorian authorities and the CPS about the US extradition request, as it does about the SPA’s interactions with the CPS. The evidence before us does not lead us to take a different view of the extent of the CPS’s statutory functions. We find that the CPS has no proper role in dealing with the Ecuadorian Embassy or other Ecuadorian authorities on behalf of the SPA or the US authorities, or in relation to extradition requests made of the United Kingdom by those states or bodies. To the extent that Part 3 of the 2019 Request goes beyond this, we find the information not to be held by the CPS.
118. We find that the fact of the immediacy of the US’s response to the withdrawal of Mr Assange’s political asylum by the Ecuadorian authorities and his arrest by the Metropolitan Police does not, contrary to that contended for by Ms Dehon, provide significant, or indeed any, evidence that the hypothetical correspondence between the CPS and the Ecuadorian authorities may have concerned the US extradition request. Whilst, as Ms Dehon identifies, the role of the CPS includes advising a requesting state in relation to proposed extradition proceedings, including how to prepare a provisional arrest, in the hypothetical scenario contended for by Ms Dehon, the requesting state is the US and not Ecuador. There is nothing in the evidence before us which leads us to find that if correspondence between the Ecuadorian authorities and the CPS existed, it would be about anything other than an inquiry or request concerning the extradition of Mr Assange to Ecuador, or a follow up to such a request. Accordingly, we find that section 30(3) would be engaged by such correspondence if it exists.
119. We next turn to the balance of public interest. As identified at [123] of the Upper Tribunal’s decision in 2019, the correct approach in determining the NCND aspect of this appeal is for the FtT to construct a hypothesis, that is assume that the information is held, and then to apply the NCND public interest balancing exercise to that hypothetical information i.e. to balance the public interest in either confirming or denying that the CPS held the hypothetical information. In the instant appeal, the range of hypothetical information under consideration is correspondence between the Ecuadorian authorities and the CPS about an inquiry or request concerning the extradition of Mr Assange to Ecuador, or a follow up to such a request.
120. In addition to the submissions alluded to above, Ms Dehon’s written submissions summarise the appellant’s case on this issue as follows:

“106. Even if the NCND policy were applicable, no weight should be given to the issue of potential disclosure of the current status of extradition



requests, given the status of the Swedish and US requests were well known.

107. The CPS simply relies on its evidence before the Previous Tribunal [OB/527 §35]. This evidence was given against the previous factual background and so does not address the matters set out above, or:
- a. The criticism by the UN Special Rapporteur of the UK and Ecuadorian authorities/ conduct, including his public statement that there has been a relentless campaign of defamation of Mr Assange, including by Ecuador [OB/156]; and
  - b. The changed, much more pressing human rights and press freedom concerns (see §§19-20 above).
108. There is a dearth of information in the public domain concerning the role, if any, of the Ecuadorian authorities and the role played by the CPS, in particular whether there was any contact between the CPS and the Ecuadorian authorities, while Mr Assange was in the embassy, in relation to either the Swedish or the US extradition requests.
109. **Closing:** Mr Sheehan, in his oral evidence, for the first time, accepted that the public interest factors in favour of disclosure of any Ecuadorian authorities, should it exist, is “very significant”. He acknowledged that he did not previously say so, but stated that was his evidence now.”
121. The CPS and ICO both submit that the circumstances have not materially changed since those considered by the 2017 FtT, and that the conclusions of the 2017 FtT, as upheld by the Upper Tribunal, should not be altered.
122. A number of Ms Dehon’s submissions are underpinned by her contention that the scope of the hypothetical scenario that we must consider is wider than that considered by the 2017 FtT and, in particular, includes within its scope hypothetical correspondence between the CPS and the Ecuadorian authorities in relation to either the Swedish or US extradition requests. We have rejected that contention above and restrict our consideration of the public interest balance to the scope of the hypothetical scenario identified at [119] above.
123. We accept that, as of 10 February 2020, Mr Assange had a strong personal interest in knowing whether the CPS had received inquiries about extradition or a request for extradition from Ecuador. However, as the Upper Tribunal recognised (at [203]), the public interest in an individual seeing information about himself is served by the existence of separate legislation - the Data Protection Act 2018, which confers specific rights for that purpose. It is not a factor requiring recognition in a NCND public interest balancing exercise, which will connect to a request made by someone other than the subject of the information. We agree. If this is wrong and it is a relevant factor in the public interest balancing exercise, it is worthy of only minimal weight and would not materially impact on the conclusion in this appeal.
124. The 2017 FtT concluded that there would be no more than a marginal benefit to the public in knowing whether the CPS has received inquiries about extradition or a request for extradition from a state other than Sweden. We observe that in his oral evidence, and upon being referred by Ms Dehon to a passage in the UN Special

Rapporteur's report reading: *"there has been a relentless and unrestrained campaign of public mobbing, intimidation and defamation against Mr. Assange, not only in the United States, but also in the United Kingdom, Sweden and, more recently, Ecuador"*, Mr Sheehan responded by indicating that the allegations therein did not add sufficiently to the very substantial factors in favour of disclosure so as to render such disclosure in the public interest. It is to this exchange that [109] of Ms Dehon's skeleton argument alludes, where reference is made to Mr Sheehan's evidence that the public interest factors in favour of disclosure of any correspondence with the Ecuadorian authorities, should it exist, are *"very significant"*.

125. We have carefully considered this evidence and, although we agree with Mr Sheehan's conclusion that the balance of public interest does not lie in favour of disclosure, we do not concur with his view that the factors in favour of disclosure are 'very substantial.'
126. As the Upper Tribunal identified at [210] when considering the appellant's appeal against the 2017 FtT's Decision on the NCND aspects of the 2015 Refusal, if the appellant succeeds on this aspect of her appeal, public knowledge about Mr Assange's case would only have increased through it being made known that the Ecuadorian authorities either had or had not corresponded with the CPS about Mr Assange, which of course would need to be viewed in the context of the role of the CPS. The same is the position in the instant appeal. There would, at best, be a very modest increase in the public understanding of an unusual case - a finding we make with the UN Special Rapporteur's report well in mind. In addition, disclosure of such information would only lead to a very minimal increase in the public's understanding of the extradition process, whether public funds have been well spent, and the promotion of good governance.
127. Turning to the public interest in upholding the exemption, we accept that confirmation or denial of whether or not information regarding a request for extradition is held, would likely compromise a number of the CPS's criminal proceedings. The purpose of section 30(3) of FOIA is to prevent the subject of an extradition request learning about it in advance and giving that person the opportunity to evade justice by leaving the jurisdiction or otherwise seeking to avoid arrest. This we find to be a strong public interest.
128. As a matter of policy and practice, the CPS would neither confirm nor deny that an extradition request has been received until a person has been arrested in relation to it. Unless the same answer - to neither confirm nor deny - is given in every case an inference will inevitably be drawn by the questioner in any given case, by a refusal to answer. In such circumstances, we find that the public purposes of the power to bring extradition proceedings would be undermined if there were not a generally consistent NCND policy.
129. We agree, however, that the maintenance of a generally consistent policy is not undermined by making an occasional exception to it in appropriate circumstances. Nevertheless, we find that although Mr Assange's is a high-profile and unusual case, that of itself does little, if anything, to reduce the public interest in the

deployment of a consistent policy. Neither does the fact that Mr Assange was the subject of an extradition request by the US authorities at the relevant date.

130. Given what we have said above, we find that the modest public interest benefits in disclosure of the fact that the CPS either did or did not hold information in the form of correspondence with the Ecuadorian authorities in this case, comes nowhere near outweighing the strong public interest in maintaining a consistent NCND policy.

**Part 4 of the 2019 Request** – *“THE FULL correspondence on Julian Assange between the Crown Prosecution Service and the US Department of Justice between the 1st of November 2010 and the 1st December 2019.”*

**Part 5 of the 2019 Request** – *“THE FULL correspondence on Julian Assange between the Crown Prosecution Service and the US State Department between the 1st of November 2010 and the 1st of December 2019.”*

131. It is prudent to consider Parts 4 and 5 of the 2019 Request together. In the ICO’s 2022 Decision it was concluded that the CPS had correctly relied upon s.30(1)(c) of FOIA in relation to these aspects of the 2019 Request. Once again, there is no dispute that section 30(1)(c) of FOIA is engaged, and we conclude that it is. The issue between the parties is whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In reaching our conclusion on this issue we apply, but do not repeat, that said at [60] – [62] above.
132. In her written submissions, Ms Dehon summarises the factors said to weigh in favour of the public interest in disclosure, in the following terms:

“115. While public interest factors in favour of disclosure may be generalised (such as throwing light on a controversial case where there is a distinct lack of transparency), in this instance there are also a number of factors in favour of disclosure of the CPS-USA correspondence that are very different from those in play concerning the CPS- SPA correspondence...

120. ...[the] factors relevant to the public interest in disclosure, ... have changed very significantly since the previous request, where there were only generalised “media freedom” and human rights concerns. Now, credible press freedom and human rights organisations, both domestic and international, are speaking with one voice, in a way that has not happened previously in relation to Mr Assange and WikiLeaks:

- a. **Closing**: The UK’s National Union of Journalists has highlighted the risks to journalism posed by the Assange extradition and the dangerous precedent that the extradition would establish, criminalising common journalistic practices and weakening media freedoms in the UK (Appellant’s Corrections to Witness Statement §§9-12);
- b. **Closing**: The International Federation of Journalists spoke called for the extradition to be halted because of the risks to journalism and media freedom (Appellant’s Corrections to Witness Statement §§13-14);
- c. **Closing**: Amnesty International launched has repeatedly emphasised that the indictment characterises everyday journalistic practices and part of criminal conspiracy, including source protection and secure

communications with sources [OB/163];

- d. A coalition of press freedom and human rights organisations, including the ACLU, Human Rights Watch and Reporters Without Borders, has written on a number of occasions that, despite the organisations having “different perspectives on Mr. Assange and his organization”, they are “united however, in our view that the criminal case against him poses a grave threat to press freedom both in the United States and abroad” [OB/170-171]; and
- e. The International Network of Civil Liberties Organisations, which includes Liberty, has stated that the US’s indictment “raises serious world-wide implications for freedom of the press. The US Justice Department’s charges are an attack on basic journalistic activities such as investigating, soliciting information, cultivating sources, protecting reporters’ identity, and publishing information of public interest.” [OB/167].

121. The CPS and the Commissioner should have given the very strongest weight to this evidence and to the very serious implications for media freedom and should have weighed this strongly in the balance in favour of disclosure. This is the approach the Tribunal should take. ...

123. Finally, the factor which the Previous Tribunal indicated might tip the balance in favour of disclosure in extradition matters – material misconduct on behalf of the foreign requesting state – arises in relation to the US extradition request:

- a. There is credible evidence that the US’s investigation used unlawful or improper means, including improperly obtaining audio and video of Mr Assange’s meetings with his lawyers – this is where legal professional privilege is clearly relevant, because the US breached the protection given to lawyer- client advice [OB/473]; and
- b. There is credible evidence, from the UN Special Rapporteur, that the US is responsible for a relentless campaign on intimidation and defamation against Mr Assange and the extradition request are being used as a means to further that intimidation [OB/156].”

133. In reaching our decision we have considered the Requested Information relating to Parts 4 and 5 of the 2019 Request, which runs to over 552 pages in the CLOSED bundle. In addition to personal information, which it is accepted should not be disclosed, the material within the scope of Parts 4 and 5 of the 2019 Request is made up of communications between the CPS and the US State Department and the CPS and US Department of Justice relating to Mr Assange’s extradition to the US, including the provision of legal advice and queries on wider strategic matters relating to Mr Assange’s extradition to that country.

134. Many of the factors relevant to the public interest in disclosure of the information requested in Parts 4 and 5 of the 2019 Request are the same as those referred to in our consideration of Parts 1 and 2 of that Request. We have set these out at [79] *et al* above, and we do not repeat them at this juncture. We indicate, however, that we have considered these factors again, specifically in relation to disclosure of the

material held in relation to Parts 4 and 5 of the 2019 Request and conclude that each is a significant public interest falling to be weighed in favour of disclosure.

135. We accept that respected human rights and journalistic organisations take the view that Mr Assange's extradition to the US would pose a risk to media and journalistic freedoms, both within the US and elsewhere, including the UK. We further accept that there is a significant public interest in having a legitimate public debate about the extent of such freedoms in circumstances such as those which arise in Mr Assange's case. These are matters which clearly weigh in favour of disclosure.
136. We have also analysed the Part 4 and 5 Requested Information in the context of the UN Special Rapporteur's report and the other similar material referred to us by Ms Dehon, and conclude that there is nothing in that material which either supports or contradicts the conclusions and reasons of the UN Special Rapporteur, nor does the Requested Information shed any light on whether there has been any other 'material misconduct' by the CPS, the US State Department, the US Justice Department or any other US authorities.
137. Turning to the public interest in maintaining the exemption, we agree with the CPS's contention that the Part 4 and 5 Requested Information consists of confidential discussions between the CPS and the US Department of Justice and the CPS and the US State Department, the disclosure of which would risk damaging the relationship of trust and confidence that exists between the CPS and both the US and other foreign authorities.
138. We find, as we did when considering Parts 1 and 2 of the 2019 Request, that the relationship of trust and confidence that underlies information sharing between prosecuting authorities is an important and weighty public interest, and we conclude that disclosure of the Requested Information would be likely to have a chilling effect on the relationship of trust and confidence that exists with both the US authorities, and with other foreign authorities. We do not repeat our reasons for reaching this conclusion. There is, we find, a weighty and important public interest in maintaining that relationship of trust and confidence. The weight we attach to this important public interest is further increased by the fact that the request for Mr Assange's extradition to the US was extant at the relevant time, with proceedings ongoing in the UK, as they still are.
139. In reaching our decision, we have also had full regard to the fact that there are numerous well publicised and unique circumstances to Mr Assange's case, but we do not accept that such matters reduce to any material extent the weight that we should attach to the public interest in maintaining the exemption.
140. Having carefully considered the balancing exercise and the public interest factors which are to be weighed on each side, in our conclusion, once again, the public interest comes down firmly on the side of maintaining the exemption. Whilst we recognise those unusual features of the present case which add weight to the public interest in disclosure, we consider the strong public interest in maintaining the exemption to far outweigh the public interest in disclosure.



141. As to the application of section 42(1) of FOIA to Parts 4 and 5 of the 2019 Request, given that we have found that section 30(1)(c) applies and that the public interest balance does not fall in favour of disclosure, we once again conclude that it is unnecessary for us to address the application of section 42(1) of FOIA to the same Requested Information.

***The final part of the 2019 Request*** – “Please explain when, how and why the emails of a named CPS lawyer, [Mr X, a retired CPS officer, name redacted] were deleted. Given what the Swedish prosecutor said in deciding not to take the charges forward and given what emerged about the CPS advising the SPA not to question JA [Julian Assange] in the embassy, there is a clear public interest in knowing why the e-mails of the key person liaising with the SPA were deleted during an ongoing investigation, apparently against the CPS’s retention policy.”

142. Consideration of the final part to the 2019 Request raises issues as to the Tribunal’s jurisdiction. Before considering the jurisdictional issue, it is necessary to set out the background to this part of the request.
143. The terms of the final part of the 2019 Request are set out in the heading above. Putting this request in context, a named former CPS lawyer, whose email account was of interest to the appellant for the reasons set out in the heading, retired from the CPS in 2014 and, after three months, the lawyer’s email account was deleted, it is said in accordance with the terms of the CPS Records Management Manual.
144. The appellant made a FOIA request relating to the deletion of the lawyer’s email account on 8 October 2018 which asked specific questions about the deletion of the email account. The CPS responded to this on the 5 November 2018. In the November 2018 response the CPS, *inter alia*, confirmed that: there was no correspondence between 1 January 2014 and 31 December 2014 concerning the deletion of the lawyer’s email account, that after three months of staff leaving data associated with their account would normally be deleted unless IT providers were notified to the contrary, the CPS lawyer’s network and email accounts “*would have been deleted in accordance with the 2014 working practice*”, the CPS does not hold event logs showing the date etc of the deletion or disabling of the CPS lawyer’s account, such logs are held for 6 months, and there is no existing change control documentation pertaining to the rationale for the deletion of the account.
145. The appellant was provided with a copy of the CPS Records Management Manual in 2017, which the appellant states does not assist in explaining the deletion of the email account.
146. Returning to the instant 2019 Request, in its Response of 10 February 2020, the CPS said as follows:

“The lawyer concerned retired from the CPS in 2014. Deleting the lawyer’s email account after retirement was in line with CPS general practice.

As you know, issues concerning this matter were considered at the First Tier Tribunal in 2017 (in the case of *Maurizi v IC & Crown Prosecution Service*) and the tribunal referred to this in the decision issued in December 2017. For example at para 41 of that decision the judge said:

“A question arose in evidence about the CPS’s records management policy and about the deletion of the email account of one of the lawyers dealing with the matter, who retired. It became apparent that all significant case papers were intended and believed to be collated separately from the email account. Moreover, the deletion was made before Ms Maurizi’s information request was received. We conclude that there was nothing untoward in the deletion of the email account.””

147. In her request for an internal review of 3 March 2020, the appellant stated:

“On the deleted e-mails, I am NOT content with the CPS just quoting the Tribunal decision. I am requesting all information held by the CPS relevant to when, how and why the e-mails were deleted. None of this information was before the Tribunal. None of it was ever provided to me and to my lawyers to whom I am copying this request for an internal review by the CPS.”

148. The CPS’ responded to the internal review request by maintaining its original response. In her complaint to the ICO, the appellant materially submitted:

“In its original and review decisions, the CPS has made reference to its general policy of deleting employees’ email accounts after they retire, but it has not confirmed whether it holds any information as to whether that was the reason for the deletion of [named lawyer’s] account specifically, or as to when or how [named lawyer’s] account was deleted. Contrary to what is implied by the CPS, those questions were not answered in the course of the proceedings relating to the 2015 Request.”

149. Further correspondence to the ICO sent by the appellant’s counsel, dated 14 December 2021, reads:

“25. Your letter states that *“the CPS have assured the Commissioner, and she accepts, that the deletion of [named lawyer’s] email account was carried out in accordance with the relevant records management policy at the time.”* It appears from that that the Commissioner has not examined the Records Management Manual for herself to determine if the deletion was in accordance with the policy. The CPS provided the manual to Ms Maurizi in 2017.

It is attached to this letter as Attachment 2. Ms Maurizi asks that the Commissioner make her own decision as to whether deletion of the account was in accordance with the policy.

26. Ms Maurizi does not agree that the deletion of the e-mail account was required by, or justified under, the CPS’s Records Management Manual. The Retention Schedule for Criminal Case Files and Related Documents/Material begins at page 29 of the Manual, and states that general correspondence relating to a criminal case file should be retained for *“5 years from the date of most recent correspondence”* (emphasis in original). Page 3 of the Manual requires that electronic records, “including emails”, must have *“their integrity maintained and their retention and disposal requirements defined and adhered to.”* There is no support in the Manual for e-mails being deleted shortly after retirement of an individual, particularly in an ongoing case.

27. The Request is for any information held by the CPS which explains when, how and why [named lawyer's] e-mails were deleted. The CPS has still not informed Ms Maurizi of whether or not it holds the requested information, and, if it does hold that information, provided her with it or explained why it is exempt information. Your letter does not give any reason why the Commissioner considers this is acceptable in light of the obligations under sections 1(1) and 17(1) of FOIA. Ms Maurizi does not agree that it is acceptable.

28. Your letter refers to Ms Maurizi's FOIA request made on 8 October 2018, to which the CPS responded on 5 November 2018, which asked specific questions about the deletion of [the named lawyers] e-mail account. That was a narrow request focusing of very specific questions, which does not explain when, how and why [the named lawyer's] e-mails were deleted. It does not justify the CPS's wholesale failure to comply with sections 1(1) and 17(1) of FOIA in relation to the final part of the Request."

150. In the 2022 Decision, the ICO concluded:

"77. CPS said that a named former CPS officer, whose email account was of interest to the complainant, had retired from CPS, and his email account had been deleted in line with CPS general practice of the day. At the time of his retirement in 2014, his relevant network account had been disabled to prevent its use on the CPS network. After three months, the data associated with the officer's email account had been deleted.

78. CPS added that deletion of the officer's email account had been carried out in accordance with the then CPS records management policy. This had been in line with CPS general practice and was undertaken before the complainant's 2015 first FOIA request had been received. CPS said that CPS had previously disclosed such relevant information as it held in relation to the deletion of the officer's email account.

79. The Commissioner accepted the CPS evidence and decided he therefore had no concerns in respect of the deletion of the officer's email account."

151. We turn first to the issue of the FtT's jurisdiction to consider this aspect of the appeal, which has been raised by both the ICO and the CPS.

152. In written submissions, Mr Dunlop asserts that the final part of the 2019 Request is, in substance, a complaint that the CPS misunderstood its own policies and that it should not have deleted the lawyer's email account. This, it is asserted, is not a FOIA request, but a request for an explanation as to how and why emails were deleted. At the hearing, Mr Dunlop further submitted that, in any event, the request was vexatious because it had previously been made, and answered by the CPS, on multiple occasions.

153. In its skeleton argument for the hearing before the FtT, the ICO expressed concurrence with the CPS's views, contending that the final part of the 2019 Request does not constitute a request for recorded information within the meaning of section 8 of FOIA. The ICO considers that on a fair reading of the 2019 Request as a whole, the final part of the request was seeking an 'explanation' rather than the disclosure of recorded information by the CPS. The ICO observes, however, that in her request

- for an internal review the appellant characterised this request as a request for information.
154. Ms Dehon maintained that the final part of the 2019 Request was a request for information falling squarely within the confines of FOIA. She further observed that the CPS response did not treat the request as vexatious, and the CPS had not asserted as much until its closing submissions at the hearing before the FtT. Ms Dehon also reminded the FtT that, in his oral evidence, Mr Sheehan had disclosed the existence of relevant ‘desk instructions,’ which had not previously been referred to by the CPS and which have never been provided to the appellant.
  155. The purpose of FOIA is stated at its outset to be, “to make provision for the disclosure of information held by public authorities...”. Section 8 of FOIA describes the constituent elements necessary in a “request for information”, with section 8(c) requiring a “description of the information requested”. The term “information” is defined in FOIA as “information recorded in any form” (section 84). We observe that the ICO’s Guidance reads that, “Any genuine attempt to describe information will be enough to trigger the Act, even if the description is unclear.” We concur with this approach.
  156. Bearing in mind the purpose of the Act, as well as the expanse and diversity of the exemptions and exceptions within FOIA that can be deployed by a public authority upon receipt of a request for information, we conclude, when read fairly and objectively and in particular when the final part of the 2019 Request is considered as a whole and set in the context of the totality of the 2019 Request and the background to that request, that the final part of the 2019 Request can be read, and should have been treated by the CPS, as a request for recorded information held by the CPS within the meaning of section 8 of FOIA, as contended for Ms Dehon i.e. a request for the information held by the CPS relevant to when, how and why the e-mails were deleted.
  157. The consequence of this conclusion is that the FtT has jurisdiction to consider an appeal against the ICO’s 2022 Decision made in relation to the CPS’s consideration of the final part of the 2019 Request. The appellant made a complaint to the ICO, *inter alia*, about this aspect of the CPS’s 2020 Refusal in accordance with section 50(1) of FOIA, and the ICO considered this aspect of the 2020 Refusal. The appellant appealed to the FtT against this decision, pursuant to section 58(1) of FOIA.
  158. We now turn to consider the substance of the appeal brought in relation to the final part of the 2019 Request.
  159. Prior to closing submissions, the CPS’s position was that if the final part of the 2019 Request were found to be a request for information under FOIA, it had nevertheless provided a proportionate response to that request in the form of “(i) the witness statement dated 4 August 2017 from Mr Cheema, who explained that the lawyer who had conduct of the extradition proceedings pursued at the request of the SPA had retired from the CPS; (ii) the letter of 10 February 2020; and (iii) the internal review outcome letter.”
  160. In his closing submissions, Mr Dunlop asserted for the first time that, if the final part of the 2019 Request were found to be a request for information, such a request was vexatious.

161. By way of the skeleton argument drawn for the hearing before the FtT, the ICO submitted that if the 2019 Request could be characterised as a request for information, the evidence is that the CPS holds no information within the scope of the request.
162. We first address Mr Dunlop's belated submission that the final part of the 2019 Request was vexatious. By this submission we assume that Mr Dunlop must be seeking to rely upon section 14 of FOIA. We will return to this shortly.
163. By section 17(5) of FOIA, a public authority which, in relation to information, is relying on a claim that section 14 applies must, within the time for complying with section 1(1), give the applicant notice stating that fact. It is beyond dispute that if the CPS seeks to rely on section 14, then it has failed to comply with the requirements of section 17(5) of FOIA in this respect, and therefore failed to comply with its obligations under Part I of that Act.
164. The issue of whether the CPS is jurisdictionally entitled to raise a section 14 ground for the first time at such a late stage in these proceedings is not without its complexity, and our attention was not drawn to any authority which might assist us in our deliberations of this issue. We have nevertheless had regard to the decision in Malnick, and in particular the reference at [102] to the conclusion in Birkett v Department for the Environment, Food and Rural Affairs [2012] AACR 32 that, "*there is no limitation on the issues which the FtT can address on appeal*". We observe however that that the Tribunal in Malnick was considering a wholly different situation to that presented in the instant appeal, and in particular was not concerned with section 14 or section 17(5) of FOIA.
165. Given the lack of argument before us on the issue of whether we have jurisdiction to consider a section 14 ground when it is first relied upon in an appeal before the FtT and given what we say below we proceed on the basis that we do have jurisdiction to consider the late reliance by the CPS on section 14.
166. What cannot be in dispute, assuming we have the jurisdiction to do so, is that we have a discretion as to whether to permit late reliance on this ground, in exercise of our case management functions under the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("2009 Rules"). Having given consideration to the 2009 Rules, and in particular Rules 2, 5 and 23 thereof, we decline to exercise our discretion to permit reliance by the CPS on section 14.
167. It is difficult to envisage that the CPS could have first raised this argument at any later stage. Section 14 was not raised in the CPS 2020 Refusal, or by the CPS with the ICO nor did it feature in the ICO's 2022 Decision. Significantly, it was also not raised in the CPS's rule 23 Response or Amended Response. The submission further failed to materialise in the CPS's skeleton argument for the hearing before the FtT and it was not raised before the FtT on the first day of the hearing. No explanation has been provided by the CPS for its earlier failures to rely on section 14, nor for why this ground was not raised until its closing submissions on the second day of the hearing. The appellant has been denied the opportunity of engaging with this ground in her complaint to the ICO, her grounds of appeal to the FtT, her skeleton arguments before the FtT and, in our view crucially, in evidence before the FtT – whether by giving evidence herself on this issue, or by way of cross examination of



- the CPS's witness. In our view, to permit reliance by the CPS on section 14 of FOIA at such a late stage would be materially unfair to the appellant.
168. In case we are found to be wrong in this conclusion we, nevertheless, go on and consider the substance of the section 14 ground on the evidence we have available to us.
  169. Section 14(1) of FOIA provides that a public authority is not obliged to comply with a request for information if the request is vexatious. 'Vexatious' is not defined in FOIA; In Information Commissioner v Dransfield and Devon CC [2012] UKUT 440 (AAC); [2015] AACR 34, the Upper Tribunal observed it could be defined as the 'manifestly unjustified, inappropriate or improper use of a formal procedure'. It found four broad issues were helpful when determining whether a request is vexatious: (1) the burden imposed by the request; (2) the motive of the requester; (3) the value or serious purpose of the request; and (4) harassment or distress of, and to, staff. However, these considerations are not exhaustive, and all the circumstances of the case must be considered. The test under section 14 is whether the request is vexatious not whether the requester is vexatious.
  170. In his oral closing submissions Mr Dunlop supported his contention that the final part of the 2019 Request was vexatious by drawing the attention to paragraph 7 of Mr Cheema's witness statement of 2 November 2017, the 2017 FtT's decision, the CPS's FOIA response of 5 November 2018, and the Amended CPS Response in the instant proceedings (drafted by Mr Dunlop and Mr Tabori). The gravamen of Mr Dunlop's submission is that there has been an enormous drain on "*people with important jobs*" at the CPS, and that this aspect of the appellant's request has been made, and answered, on multiple occasions.
  171. With respect to Mr Dunlop, the reference to paragraph 7 of Mr Cheema's witness statement is entirely misplaced. This paragraph does not consider whether information is held by the CPS relevant to when, how and why the lawyer's e-mails were deleted, but rather it deals with the data associated with the lawyer's account. Furthermore, the 2017 FtT Decision, which concludes that there was "*nothing untoward in the deletion of the email account*", says nothing at all about whether the CPS holds recorded information relevant to when, how and why the lawyer's e-mails were deleted. Whilst the CPS's FOIA response of 5 November 2018 does touch on matters relevant to the instant request, we agree with Ms Dehon that this letter responded to a much narrower and more focused request. As to the CPS's Amended Response in the instant appeal, it is difficult to understand how the provision of information in this document can be relevant given that it post-dates the 2019 Request by three years. In any event, the information therein is not of itself evidence and, once again, does not address the terms of the request made.
  172. Having considered all matters holistically, we find that Mr Dunlop's reliance on section 14 of FOIA in relation to the final part of the 2019 Request is unsustainable.
  173. Moving on, the import of our finding that the final part of the 2019 Request was a request for information falling within section 8 of FOIA, is the engagement of the obligations on the CPS under section 1 of FOIA to confirm or deny whether the

requested information is held and, if held, to communicate the information to the appellant, subject to the exemption and exceptions in FOIA.

174. If the ICO finds that a public authority has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so under section 1(1), or if the public authority has failed to comply with any of the requirements under sections 11 or 17 of FOIA, then by section 50(4) of FOIA the ICO must specify the steps that must be taken by the authority “*for complying with that requirement and the period within which they must be taken*”. It is, however, open to the ICO to decide on a section 50 complaint that the public authority has not acted in accordance with requirements of Part I of FOIA but, nevertheless, issue a Decision Notice specifying that no further steps need be taken by the public authority.
175. In our conclusion, the CPS were required to, but did not, inform the appellant in the 2020 Refusal whether or not it holds the information requested in the final part of the 2019 Request. To this extent we find that the 2020 Refusal is not in accordance with section 1(1)(a) of Part I of FOIA.
176. The CPS could, for example, have said that it does not hold any such information, or stated that it holds such information but that this has already been disclosed, or stated that it holds such information but that it is exempt pursuant to a provision in Part II of FOIA. The 2020 Refusal takes none of these approaches in relation to the final part of the 2019 Request. As we have already found above, the recitation of a passage from the 2017 FtT Decision, which concludes that there was “*nothing untoward in the deletion of the email account*” says nothing at all about whether the CPS holds recorded information relevant to when, how and why the lawyer’s e-mails were deleted.
177. The ICO’s function under section 50(1) of FOIA is to decide “*whether...a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I [of FOIA]*”. The ICO’s duty is to state “*in what respect or respects the authority has failed to comply with its duties*” (Malnick [78]).
178. The ICO’s 2022 Decision lacks clarity in its consideration of the final part of the 2019 Request. The respective paragraphs of the 2022 Decision do not address the CPS’s consideration of this issue but rather, on our reading, reach an independent conclusion not communicated to the appellant in the 2020 Refusal, that the CPS had “*previously disclosed such relevant information as it held in relation to the deletion of the officer’s email account*” i.e. that it held no information in this regard that had not already been disclosed.
179. In our conclusion, the proper and lawful approach for the ICO to have taken was to find that the CPS had failed to comply with its obligation under section 1(1)(a), to inform the appellant in writing whether it holds information of the description specified in the request. The ICO failed to undertake this stage of the analysis in the 2022 Decision. Of course, we accept that had the ICO concluded that the CPS had failed to comply with its obligations under section 1 of FOIA to “*provide confirmation or denial*”, then one approach the ICO could have taken thereafter, in light of the acceptance of the CPS’s evidence that the “*relevant information as it held in relation to the deletion of the lawyer’s account*” had been disclosed, would have been to specify in

that Notice that no further steps need be taken by the public authority. We also take cognisance of paragraph 3 of the ICO's 2022 Decision, in which it is stated that the ICO "*did not require the CPS to take any steps to comply with legislation*".

180. Where does that leave the instant appeal. The FtT's role under section 58 of FOIA is focused on the correctness of the ICO's decision notice under appeal. The task of the FtT is to decide whether the ICO's decision notice "*is not in accordance with the law*". Section 58 imposes the "*in accordance with the law*" test on the tribunal to decide independently and afresh.
181. The ICO's 2022 Decision does not comply with the requirement on the ICO to state "*in any specified respect*" whether the request for information made in the final part of the 2019 Request has been dealt with by the CPS in accordance with the requirements of Part I of FOIA. The CPS's 2020 Refusal did not inform the appellant of whether or not it holds the requested information and, as a consequence, the 2020 Refusal is not in accordance with section 1(1)(a) of Part I of FOIA. For this reason, we find that the ICO's 2022 Decision is not in accordance with the law and that the appeal in relation to this part of the 2019 Request must be allowed.
182. Moving on, in his oral evidence Mr Sheehan indicated that "*very detailed enquiries*" had been made by the CPS, and that he "*understood from those who made the enquiries*" that there is a document "*which is described as desk instructions in relation to the deletion of material within 30 days*" which was "*the practice at the time*". The appellant has not been provided with a copy of these "*desk instructions*" and Mr Sheehan has not personally seen them. In these circumstances, we are not prepared to conclude that the "*desk instructions*" fall within the scope of the final part of the appellant's 2019 Request, but neither can we find that they do not.
183. Consequently, although the appeal is allowed in relation to the final part of the 2019 Request, we do not make a Substituted Decision Notice requiring provision to the appellant of the 'Desk Instructions', but rather we issue a Substituted Decision Notice which requires the CPS to do what it was obligated to do in 2020 when responding to the final part of to the 2019 Request.

Signed:  
*Judge O'Connor*  
Chamber President

Dated: 9 May 2023