



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL
(INFORMATION RIGHTS)**

Appeal No EA/2010/0174

BETWEEN:

MR STEVEN MATHIESON

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

And

DEVON AND CORNWALL CONSTABULARY

Additional Party

**RULING ON ADDITIONAL PARTY'S APPLICATION FOR PERMISSION
TO APPEAL TO THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS
CHAMBER)**

Permission to appeal to the Upper Tribunal (Administrative Appeals Chamber) against the decision of the First-tier Tribunal (Information Rights) dated 11 April 2011 is hereby granted.

The First-tier Tribunal (Information Rights) hereby suspends the effect of its Decision dated 11 April 2011, pursuant to rule 5(3)(1) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, pending determination of the appeal by the Upper Tribunal.

1. This appeal concerns the Appellant's request to the Additional Party for information pursuant to the Freedom of Information Act 2000 ("FOIA"). On 20 July 2009, the Appellant requested the following information from the Additional Party:
 - (1) *The locations of fixed, operating number-plate recognition cameras operated by Devon and Cornwall Police or its agencies.*

(2) *The locations of CCTV cameras with ANPR functionality used by Devon and Cornwall Police”.*

2. The Additional Party refused the request on 18 August 2009, in reliance upon sections 31 (1) (a) (b) and (c) and section 24 of FOIA. During correspondence between the Respondent and the Additional Party, the Additional Party confirmed that it did not hold the information referred to in part (2) of the request. The Appellant was informed of this and agreed that his complaint should proceed in relation to part (1) of the information request only.
3. During the course of the Respondent’s enquiries, the Additional Party withdrew its reliance upon section 31(1) (c) of FOIA and confirmed that it relied upon sections 31 (1) (a) and (b) and also section 24 of FOIA in refusing the information sought. The Respondent proceeded to consider whether the exemptions under sections 31 (1) (a) and (b) were engaged and if so to apply the public interest test. The Respondent explicitly did not consider in the Decision Notice the exemption that the Additional Party had earlier claimed under section 24(1) FOIA.
4. The Respondent issued his Decision Notice FS50270424 on 23 September 2010, in which he found *inter alia* that the exemptions under sections 31 (1) (a) and (b) FOIA were engaged. He concluded that, although the public interest factors were finely balanced, the maintenance of the exemption outweighed the public interest in disclosure in this case. In reaching his conclusion, the Respondent noted that the Additional Party had not specified whether its case was that disclosure “*would*” or “*would be likely to*” prejudice the prevention or detection of crime or the apprehension or prosecution of offenders when claiming the above exemptions. The Respondent had therefore applied the test of “*would be likely to*” for the benefit of the Additional Party. In view of the above conclusions the Respondent stated that he had not considered whether the exemption under s. 24(1) FOIA was engaged.
5. On 11 April 2011, the First-tier Tribunal (Information Rights) heard the Appellant’s appeal on the papers, with the agreement of all parties. It allowed the Appellant’s appeal against the Decision Notice. The Tribunal reached a different judgement from that of the Respondent in respect of the public interest test and found that the public interest in disclosure outweighed the public interest in maintaining the exemptions in the particular circumstances of this case. The Tribunal made a substituted Decision Notice as follows:
 - “1. *The Public Authority failed to deal with the Complainant’s request for information set out in paragraph 2(1) below in accordance with the Freedom of Information Act 2000 in that it should have communicated the requested information to him;*
 2. *The Public Authority is now required to communicate the requested information to him no later than 35 working days from the date of this decision.*”

6. The Additional Party was joined to these proceedings at its own request on 7 January 2011. It filed a Reply dated 31 January 2011 in which it generally supported the Respondent's Decision Notice and Reply. It made some additional arguments but did not specifically raise the section 24 exemption on which it had previously relied. The Additional Party submitted a witness statement to the Tribunal, made by Louise Fenwick on 1 March 2011. The Tribunal allowed the witness statement to be filed in evidence even though it was filed after the date given in the Tribunal's directions. Ms Fenwick is the Freedom of Information Officer for Devon and Cornwall Constabulary. Her statement contained argument in support of the Additional Party's position but did not provide the Tribunal with any additional evidence to support its case. Ms Fenwick suggested briefly in her statement that the Additional Party still wished to rely on the exemption under section 24(1) FOIA. As noted above, this exemption had specifically not been considered by the Respondent in reaching his decision and it had not been raised by the Additional Party either as a late exemption, in filing its Reply, or subsequently. The Tribunal decided that it was not appropriate for it to consider an exemption mentioned in a witness statement but not otherwise raised by the Additional Party, because the other parties had not been given appropriate notice of it as an issue before the Tribunal.
7. In its decision, the Tribunal noted that, despite having applied to join as a party to the proceedings and being afforded the opportunity to file evidence, the Additional Party had not filed evidence that assisted the Tribunal. The Tribunal further noted that that there was, overall, a weak case made by the Additional Party as to why it argued that disclosure of the information sought would be likely to prejudice policing. The Additional Party had sought to rely upon hypothetical argument and evidence which had been produced in relation to other police authorities, rather than producing its own evidence as to the material issues. The Tribunal found that this evidence was sufficient for the Tribunal to find that the exemptions under sections 31 (1) (a) and (b) FOIA were engaged, however it did not consider the evidence provided a sufficient basis for concluding that the public interest in effective policing outweighed the public interest in disclosure of the requested information in the circumstances of this case.
8. The Additional Party now applies for permission to appeal to the Upper Tribunal on grounds that:
 - (i) The Tribunal erred in law in failing to consider the application of the s.24 exemption. It is argued that the Additional Party's Response did not refer to s.24 because the Appellant's Grounds of Appeal had not referred to it; however, as it had originally relied on the s.24 exemption, the Tribunal should have considered it even though the Respondent's Decision Notice had not adjudicated on the issue and the Additional Party had not later raised it. Further that the Additional Party was under no obligation to claim it as a late exemption in the circumstances;

- (ii) The Tribunal erred in law in finding that disclosure of the precise locations of the ANPR cameras would assist the public to exercise their rights under the Data Protection Act 1998;
- (iii) The Tribunal erred in law in finding that disclosure of the precise locations of cameras would facilitate a debate as to how ANPR cameras are used;
- (iv) The Tribunal erred in law in relying on guidance issued by South Yorkshire Police;
- (v) The Tribunal erred in law in its assessment of the public interest.

9. I consider that that ground (i) above is a point of law which should properly be ruled upon by the Upper Tribunal. It strikes at the procedural fairness of the proceedings and (although this is not argued) it may be relevant to the Tribunal's duty to give effect to the overriding objective under rule 2 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. It seems to me that grounds (ii) to (v) above relate to the Additional Party's disagreement with the Tribunal's decision rather than the identification of discrete points of law, however they may amount to points of law to the effect that the Tribunal's findings on the evidence before it was perverse and I am accordingly content to give permission in respect of all five grounds.

10. Rule 43 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 provides that on receiving an application for permission to appeal to the Upper Tribunal, the Tribunal must first consider whether to Review the decision in accordance with rule 44. Rule 44 provides that when considering an application for permission to appeal, the Tribunal may undertake a Review of the relevant decision if it is satisfied that it contains an error of law. I am not satisfied that that there was plainly an error of law in this decision so that I am able to change it by way of Review. However, I do consider that arguable points of law arise, in respect of which I now give permission to appeal.

11. Under rule 21(3) of the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended, the Additional Party now has one month from the date this ruling is sent to lodge an appeal with the Upper Tribunal (Administrative Appeals Chamber), 5th Floor, Chichester Rents, 81 Chancery Lane, London, WD2A 1DD.

Signed:

Dated 10 May 2011

Alison McKenna
Tribunal Judge