First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2019/0010

Determined, by consent, on written evidence and submissions
Considered on the papers on 22 August 2019.

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Henry Fitzhugh
and
Anne Chafer

Between

Arron Banks

Appellant

and

The Information Commissioner

Respondents

BACKGROUND

1. This is a case where the Appellant requested information from the Information Commissioner's Office (ICO) as a public authority. Even though the request was made of the ICO, it is still the Information Commissioner (the Commissioner) who had to deal with complaints about how the request was dealt with, by way of a decision notice.

2. The background to the request is that the ICO is carrying out a major investigation, commencing in May 2017, into the use of data analytics following the making of various allegations made about the processing of personal data during the course of the 2016 Brexit referendum. As of February 2019 the Commissioner described the investigation as 'ongoing', and it has led to a number of regulatory and prosecutorial actions against a variety of bodies and companies.

3. The Commissioner's response to this appeal accepts that the investigation is of significant public interest and says that the ICO has issued a number of public documents, starting in July 2018 which set out general detail about the progress of the investigation. One report from the ICO is entitled '*Investigation into the use of data analytics in political campaigns: Investigation update 11 July 2018*' and is available on the ICO website. An abstract included in the Commissioner's response reads as follows:-

> *4.8 Relationship between Leave.EU and Eldon Insurance, Big Data Dolphins and the University of Mississippi case*
>
> …
> In addition, we are investigating allegations that insurance customer data was sent to the USA and in particular to the University of Mississippi, and whether that was a contravention of the eighth data protection principle under the DPA98.
>
> The ICO has engaged with the University of Mississippi, seeking to understand whether the personal data of UK citizens has been transferred to the US by Eldon Insurance

Services or related companies. This line of enquiry is ongoing.

A UK resident had also, filed a law suit in a Mississippi court to determine whether any UK data was transferred to Mississippi and whether the data was then used to illegally target voters during the EU referendum campaign.

On the 26th April the Court issued a temporary preservation order to prevent any UK personal data held at the University of Mississippi being removed. The ICO was then made aware of the order and provided a letter in support of the preservation request but not joining in the case, as it would of course be of interest to the ICO that any potentially relevant evidence was preserved.

On the 21st June 2018 the case for a permanent preservation order was rejected by the Court, as the Court found that the plaintiff had not exhausted all reasonable means of finding out whether his data was being held by the University. We continue to liaise with senior officials at the University in this regard.

4. The Commissioner explains that the UK resident referred to who filed the lawsuit in Mississippi is the 'named individual' in the request in this case (see below), and is a figure in the Fair Vote Project. The lawsuit was brought against Eldon Insurance Ltd and Big Data Dolphins Ltd, in both of which, the Commissioner explains, the Appellant has an interest.

5. The Commissioner also refers to a hearing of the Digital, Culture, Media and Sport (DCMS) Select Committee on 17 April 2018 where a witness referred to Big Data Dolphins Ltd working with the University of Mississippi and the possible holding of UK citizens' data in the United States. As a result, and as explained in the 11 July 2018 report, the ICO took a decision to write a letter (dated 4 June 2018) to the Court in Mississippi supporting the preservation of any personal data transferred to the University of Mississippi, in order that it might be considered as part of the ICO's wider investigation.

6. A copy of that letter was attached to the Appellant's request of 14 June 2018 where he asked for information of the following description:

> "1. The communications between the ICO and [named individual]/the Fair Vote Project and their representatives;
>
> 2. The communications between [named individual] and the "[named individual]" referred to in that e-mail; and
>
> 3. The onward communications between [named individual] and yourself or other members of the ICO."

7. On 26 June 2018 the ICO responded. It confirmed that information was held falling within the scope of the request but that this was exempt from disclosure under section 31(1)(g) with subsection 31 (2)(a) and (c) FOIA.

8. The Appellant requested an internal review on 27 June 2018. The ICO upheld its original position in a decision dated 25 July 2018. The Appellant contacted the Commissioner on 14 August 2018 to complain about the way his request for information had been handled.

THE LAW

9. This is a sensible place to set out the relevant law as it is relied upon by the Commissioner in the decision notice and the response to this appeal. Section 31 FOIA states, materially that:

> (1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-
>
> …..
> (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)…
>
> (2) The purposes referred to in subsection (1)(g) to (i) are—
> (a) the purpose of ascertaining whether any person has failed to comply with the law,
> …
> (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,

10. The Commissioner explains in paragraphs 11 and 12 of her decision notice dated 17 December 2018 that:-

> 12. As with any prejudice based exemption, a public authority may choose to argue for the application of regulation 31(1)(g) on one of two possible limbs – the first requires that prejudice 'would' occur, the second that prejudice 'would be likely' to occur.
>
> 13. The ICO has stated that it believes the likelihood of prejudice arising through disclosure is one that is likely to occur, rather than one that would occur. While this limb places a weaker evidential burden on the ICO to discharge, it still requires the ICO to be able to demonstrate that there is a real and significant risk of the prejudice occurring.

11. The Commissioner has given fairly brief reasons for deciding that the ICO was right to say that the exemption under s31 FOIA applied. In further summary, these reasons are as follows:-

(a) The ICO exercises a number of statutory functions for ascertaining whether a data controller has failed to comply with the law and/or for deciding whether regulatory action in relation to the DPA is justified.

(b) Section 31 (2)(a) and (c) apply when the ICO is considering whether or not data protection obligations have been complied with.

(c) The ICO considers that disclosure of the requested information, especially when there was an ongoing investigation, 'would create a real risk of distracting from and causing interference with the investigative process, resulting in prejudice to the its regulatory functions'.

(d) As the 'investigation to which the withheld correspondence relates

was live at the time of the request', the Commissioner considers the likelihood of prejudice occurring to the carrying out of the ICO's statutory functions, is real and significant.

12. Section 31 FOIA is a qualified exemption, and is therefore subject to a public interest test.

13. The Commissioner considered arguments in favour of disclosure including increased transparency, the progress made in the current investigation, the public interest in understanding how data analytics had been used, and the number of people potentially affected and the high profile of the current investigation.

14. The Commissioner considered arguments against disclosure including potential prejudice to the ICO carrying out investigations without external influence, the need to maintain effective and productive relationships with the various parties with which it communicates, the heightened importance of the current investigation, the dangers of piecemeal disclosure during an investigation, and the fact that further public statements from the ICO during the investigation are likely.

15. Having noted that the public interest for and against disclosure was 'strong', the Commissioner concluded that on balance 'the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption'.

THE APPEAL

16. The Appellant filed his appeal dated 8 January 2019. He includes a background to the request, in which he explains that the legal action in

Mississippi is, in his view, politically motivated and based on misleading evidence given to the DCMS Select Committee. He explains how permission to introduce the ICO letter was refused by the Mississippi court in a hearing on 5 and 6 June 2018. He believes that the ICO would have been aware that this was the case. He says that the proceedings were subsequently struck off and that the ICO would have been made aware of this by an email sent to the ICO on 22 June 2018.

17. The Appellant notes that another report from the ICO in November 2018 entitled, '*Investigation into the use of data analytics in political campaigns: A report to Parliament 6 November 2018'* confirmed at para 3.5.4 that

> We found no evidence that Big Data Dolphins ever actually functioned, and no evidence that Leave.EU, Eldon or any associated companies had transferred any personal data relating to UK citizens to the [University of Mississippi].

18. On that basis the Appellant argues that the letter was not actually relevant to the exercise of any of its functions for the purpose of the exemptions in s31(1) and (2) and at the time of the appeal, the ICO had completed its investigation to which the request relates some time ago and no wrongdoing had been discovered.

19. In the appeal the Appellant accepts that 'the ICO may have had an argument at the time of the Original FOIA Request, that section 31(1)(g) and s31(2)(a) and (c) applied to make the information requested exempt from disclosure under the FOIA, as an investigation was ongoing'. However, he argues that that has long ceased to be the case and exemptions ceased to apply before the issue of the decision notice (17 December 2018).

20. However, the Appellant also argues that the ICO would have been informed that the letter had not been admitted in the Mississippi court at the time of the hearing on 5-6 June 2018, and therefore was wrong to rely on the exemptions in the response made on 26 June 2018.

21. The Appellant argues further that at the time of the request, disclosure would not have been likely to prejudice the ICO's functions because, effectively, the litigation in Mississippi had come to an end (although judgment was awaited) and an injunction was in place preserving any information relevant to an ICO investigation, and in any event the ICO's letter had not been admitted by the Mississippi court.

22. The Appellant also complains that although the decision notice sets out the competing public interest factors, it does not explain why the balance of the public interest fell in favour of non-disclosure. The Appellant emphasises the public interest factors in favour of disclosure, and flags up what he sees as the ICO intervening in foreign legal proceedings in support of 'anti-Brexit groups', and argues that there is considerable public interest if, in effect, the ICO has aligned itself with a politically motivated organisation, in relation to a matter which is itself politically charged.

23. In her response the Commissioner says that having been alerted to the Mississippi litigation and the evidence before the Select Committee it was considered appropriate to provide a letter which supported the preservation of any personal data transferred to the University of Mississippi, but it decided it was not appropriate for the ICO to be joined or to play any other role in the case. The Commissioner notes that that the complaint and the requested order were dismissed on 21 June 2018 as there had not been sufficient efforts to establish that any personal data had been transferred. The Commissioner accepts that by the time of the November 2018 report to parliament there was no evidence that UK citizens' personal data had been transferred to the US.

24. The Commissioner notes however that the investigation continues and that, for example, on 1 February 2019 two companies linked to the Appellant were issued with monetary penalty notices 'for breaches of PECR arising out of direct marketing during the referendum campaign and subsequent to it' and that further regulatory action against a variety

of bodies is anticipated.

25. The Commissioner cites the cases of *APPGER v Information Commissioner* [2015] UKUT 377 and *R(Evans) v Attorney General* [2015] UKSC 21 as establishing that the engagement of the section 31 FOIA exemption and the balance of the public interest is to be assessed at the date of the response to the request made under FOIA and not at the time of decision notice or the hearing before the Tribunal.

26. The Commissioner raises a number of points about the ICO's functions as data protection regulator with enforcement powers which require the ICO to ascertain whether data protection law has been broken and whether regulatory action could or should be taken. To perform these functions, investigation will be needed, and this may involve the receipt of information from third parties sometimes on a confidential basis. Disclosure of information collected during the course of an investigation would be likely to prejudice the specific investigation and the ICO's investigatory functions more generally. The Commissioner argues that there would likely to be a decrease in voluntary compliance if information is disclosed, those being investigated would be able to obtain information about lines of enquiry, and a 'running commentary' on aspects of an ongoing investigation could undermine its effectiveness.

27. The Commissioner argues that in the present case the investigation was ongoing at the time of the request and the response (14 June 2018 – 26 June 2018), and this is borne out by the 11 July 2018 report cited above. Disclosure of information about this strand of the investigation is likely to prejudice other strands of the investigation which were still ongoing at the time of the Commissioner's response (February 2019). Disclosure of this type of information in this case would be generally prejudicial to the ability of the ICO to carry out investigations and regulatory functions in other cases.

28. In relation to the public interest the Commissioner emphasises the

importance of avoiding prejudice to regulatory functions, especially where there is a live investigation and the requestor is connected to the investigation to which the information relates. The Commissioner argues that the public interest in accountability and transparency (for example in understanding the decision to write to the Mississippi court) is met by the reports which have been referred to above. The Commissioner rejects arguments of political bias and says that both the 'Leave' and 'Remain' campaigns are covered by the investigation.

29. The Appellant responded to these points on 22 February 2019. He argues that, at least, the public interest balance should be considered at the date of the ICO's review of 25 July 2018 (rather than at the date of the original decision a month earlier), and that as it was the ICO itself that made the decision then, in fact, the last consideration by the ICO was in the decision notice and therefore a different approach should be taken to that set out in the case law which relates to other public authorities. The Appellant also objects to the 'broad brush' approach of the Commissioner to the exemption in s31 FOIA, and submits that there is no cogent link between the Mississsippi strand of the investigation and the rest of Operation Cederberg. He repeats again the perception that the ICO was very clearly supporting litigation brought by those who were in direct opposition to the Appellant.

30. In addition to the Commissioner's response there is a witness statement from Stephen Eckersley, the Director of Investigations at the ICO, dated 24 June 2019, that is, over a year since the request was made. In the light of the service of the witness statement, the Appellant was given the opportunity review his decision not to have an oral hearing of this appeal, but he decided to proceed on the papers. However, we bear in mind that Mr Eckersley has not been questioned on the contents of his statement.

31. Mr Eckersley's statement in OPEN is redacted and we have seen the full statement only in a CLOSED version. We have reached our decision

below on consideration of what is in the OPEN version and confirm that there is nothing in the unredacted version that detracts from what is available in the OPEN version.

32. The OPEN version of the statement explains the ICO's various functions for taking regulatory action, and that these are exercised subject to the ICO's Regulatory Action Policy. The investigation into the use of data analytics during the Referendum campaign was called Operation Cederberg. It is the largest and most complex investigation the ICO has ever conducted, with 172 organisations of interest. The investigation continues (at the date of the statement) to investigate whether or how much there was a disregard for voters' personal privacy. The DCMS Select Committee and the Electoral Commission have also carried out investigations.

33. As noted above, some information about the investigations has been published in reports, and Mr Eckersley states these were carefully drafted to avoid prejudice to the investigation.

34. Mr Eckersley rehearses the background to the Mississippi strand of the investigation as we have described it above. Mr Eckersley approved the writing of the 'letter of the support' with the aim of preventing deletion of any information in fact held by the University of Mississippi servers, and believed it was the best tactical option at the time.

35. At the time of the request and response in June 2019, Mr Eckersley says that the ICO was still trying to ascertain the result of the hearing and whether information was held on university servers. It was difficult to obtain an answer and he says that 'this line of enquiry was still open. It remained the position for some time after the date of the Appellant's request'. However, Mr Eckersley is not more specific than this about when the ICO did receive the updates sought. He does say that Operation Cederberg at the time of the request and into the autumn of 2018 was 'in full swing' and was 'live, dynamic and intense' , and that

at the time of the request and response the ICO was 'actively reviewing' the responses of each one the Appellant's 'entities' to the '11 information notices we had issued some weeks earlier'. Mr Eckersley accepts that the Mississippi strand of the investigation was effectively closed by the time of the November 2018 report to Parliament.

36. In the OPEN version of the statement Mr Eckersley repeats and enlarges upon the arguments in relation to specific and general prejudice as set out in the Commissioner's response to the appeal already set out, and the arguments as to why disclosure would not be in the public interest. The CLOSED statement provides further detail (which we agree should remain withheld in accordance with the Registrar's decision dated 2 July 2019, applying rule 14(6) of the Tribunal Rules) , but does not cast any further light on when the ICO received confirmatory information about the Mississippi court process.

37. In response, the Appellant refers to the lack of detail as to when the ICO learned about the Mississippi court's decision or actually closed this strand of the investigation, and notes that the ICO's review decision was dated 25 July 2018, over a month after judgment in the Mississippi case. He states that his case is that 'the issues in relation to the FOI request were entirely distinct and separate from any other part of the investigations that the ICO were investigating and so the [ICO's] attempts to link it to the wider Project (sic) Cederberg investigations are entirely erroneous'. In any event the Mississippi case had actually been dismissed by the time of the first ICO decision. The Appellant asks the Tribunal to recall that requests under the FOIA are 'motive blind' and are to the world at large.

DISCUSSION

38. In our view the Appellant's attempt to completely separate the Mississippi strand of the investigation from the rest of Operation

Cederberg is misconceived for the reasons set out by the Commissioner. We accept that there was a detailed and complicated investigation in train at the time that the request for information was made and considered, and that the Mississippi strand was only part of this. There were other strands of the investigation involving many other individuals and bodies and that the investigation was ongoing at the time of the response to the request and at the time of the review.

39. We also accept the Commissioner's explanation that the only purpose of writing a letter to the Mississippi court was to attempt to preserve any information transferred to and held by the University of Mississippi, on the basis that this may be of interest to the wider investigation. This step was taken following evidence given to DCMS Select Committee as explained above.

40. Taking into account the breadth of the investigation as described, it seems to us that the Commissioner's arguments about the likely prejudice to Operation Cederberg on a wider basis are well made out. If information had been disclosed about the Mississippi strand of the investigation at or around the time that issues were still being determined, this would have been likely to (a) discourage people from providing relevant information to the investigation if it was thought that it would be disclosed very soon thereafter; (b) reveal significant factors about the leads the investigation was following (and indeed not following) at the time that the investigation was still ongoing; and (c) have the potential to undermine future investigations if those with information were reluctant to engage with the ICO because of the risk of disclosure of information in cases such as this.

41. It seems unreal to argue, as the Appellant seeks to do, that as soon as the Mississippi court gave judgment, then that was the end of the matter. We prefer to see this strand of the investigation as something linked with other aspects of the overall investigation described by the Commissioner in her submissions and the evidence of Mr Eckersley. On that basis we

find that the exemption in s31(1)(g) FOIA is engaged, and that disclosure would be likely to prejudice the exercise by the ICO of its functions for the purpose of ascertaining whether any person has failed to comply with the law, and for the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of the DPA or other statutes exist or may arise,

42. In relation to the time when it should be considered whether the exemption applies and when the balancing of public interest factors should be taken into account, the Appellant raises some interesting points. Although the case law relied upon by the Commissioner states that the consideration should look at the circumstances at the time of the response to the request (and we accept that as the law), the cases do not specifically address the issue of whether the date of a decision made following a review should provide the relevant date when the public interest should be assessed.

43. This is true of the most recent judgment of the Upper Tribunal, *Maurizi v ICO* GIA/973/2018 which confirms that the date of the response is the correct date, applying the cases of *APPGER* and *Evans.*

44. In the absence of direct consideration, it seems to us that support can be obtained for the Appellant's contention that the date of the review (25 July 2018) should be the relevant date. Thus in the *APPGER* case the UT explained that:-

> 52. …the judgment of the Supreme Court confirms and powerfully supports the view that taken as a whole, the language of the statutory scheme indicates that the Commissioner (and the FTT) is charged with assessing past compliance with FOIA, not with monitoring ongoing compliance. That scheme is that a request is made to a public authority and a natural and sensible reading of the language of the provisions relating the application that can be made to the Commissioner and then an appeal of his decisions (see sections 50, 57 and 58) <u>is that they relate to how the public authority dealt with the request</u> and then to whether the Commissioner erred in law on that issue. (<u>underlining added</u>).

45. How the public authority 'dealt with the request' should, in our view, include the review procedure. This approach makes sense: it would be a nonsense if a review led to the disclosure of some of the information which had previously been withheld (as it sometimes does), but the Commissioner's decision notice and the Tribunal hearing were concerned with only the original decision to withhold all the information.

46. However, in our view we do not have to decide this issue in this case. It seems to us that the public interest factors on 25 July 2018 were somewhat less heavily weighted against disclosure because by that time it seems likely that the ICO would have been more fully aware of the situation in Mississippi than it was on 26 June 2018 when the request was first refused (although as noted above the ICO has not provided precise information as to when the position was clarified).

47. But as we explain below, whether the situation is considered as of 26 June 2018 or 25 July 2018, in our view the balance of the public interest is still in favour of non-disclosure.

48. For completeness we note here that we have considered the argument by the Appellant that a different approach should be taken when the ICO is both the public authority making the original decision and also considering the complaint and producing a decision notice. It seems to us that that argument finds no support in the case law, and the procedure in the statutory framework in sections 50, 57, and 58 FOIA has to be applied equally to all public authorities.

49. In relation, then, to balancing the public interests in disclosure and non-disclosure we accept the Appellant's point that the decision notice, although it sets out 'strong' arguments for disclosure and non-disclosure, does not explain why the decision was made in favour of non-disclosure.

50. We accept the argument that there is a public interest in understanding

what the ICO is investigating and why, especially when it takes steps such as writing to a foreign court and asking for preservation of information. However, we also accept the submission that that was all the ICO was doing – it was not otherwise intervening in a case, or applying to become a party. To that extent we reject the argument that there was an increase in the public interest for disclosure as there was an element of political bias (perceived or actual) by the ICO simply because the foreign case in question was brought by claimants with a particular political view. We also note that on 11 July 2018 (as set out above), before the review of the request by the ICO, the ICO had published a report explaining what action it was taking in relation to the Mississippi court case, which in our view went at least some way in assuaging the public interest in further disclosure.

51. In our view the Commissioner's arguments in relation to the public interest in non-disclosure are particularly strong. The ICO has important regulatory functions which require investigation. Investigations require those with information to be able to do so confidentially so far as possible. Those who are the subject of investigation should not be able to learn of the background to lines of enquiries, what is being investigated and what is not. The public interest in non-disclosure extends also to the effectiveness of the wider investigation being carried out (Operation Cederberg) and not just the Mississippi strand. The evidence was that the wider investigation was still ongoing well into 2019.

52. As we have said, we do accept that by 26 July 2018 it appears that the public interest in non-disclosure of the requested information had lessened somewhat (from the original response to the request) as the ICO would by that date have known about the outcome of the Mississippi trial. But in the context of the overall operation, of which the Mississippi strand was only part, it seems to us that consideration of the position at the later date, does not affect significantly the public interest in non-

disclosure.

53. In our view, the balance of the public interest falls heavily in favour of non-disclosure, given (a) the importance and range of Operation Cederberg which was still very much ongoing in June-July 2018, (b) the need to retain confidence in the ICO's exercise of its regulatory powers and (c) the fact that the ICO was explaining its actions, as far as it could, in near-contemporary reports.

54. For those reasons, this appeal is dismissed.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 18 September 2019

Date Promulgated: 19 September 2019