IN THE FIRST–TIER TRIBUNAL **EA/2019/0014**

(INFORMATION RIGHTS)

In the matter of an appeal under section 57 of the Freedom of Information Act 2000.

Between:

PROFESSOR TIM CROOK

Appellant:

and

THE INFORMATION COMMISSIONER

First Respondent:

and

THE COMMISSIONER OF POLICE FOR THE METROPOLIS

Second Respondent

Hearing: on 19 May 2021.

Decision: Deliberations (after final submissions received) and Appeal Dismissed on 1 July 2021 and Promulgated on 23 July 2021.

Before: Brian Kennedy QC, Rosalind Tatam and David Cook

Representation: Tim Crook, the Appellant as Litigant in person
John Goss, of Counsel for the Second Respondent

DECISION

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA"). This appeal is against the decision of the Information Commissioner, First Respondent herein ("the Commissioner"), contained in a Decision Notice ("DN") dated 20 December 2018 (reference FS50788439) which is a matter of public record.

The Tribunal have been provided with an Open Bundle ("OB") (comprising of; A) Pleadings and Tribunal Case Management Directions; B) Correspondence Relating to the requests for information; C) Correspondence Relating to the Commissioner's Investigation and D) Witness statements and Appellant's additional submissions, together with Additional Open Documents including voluminous related documentation and extensive lists of Authorities presented by the Appellant.

Background:

[2] Full details of the background to this appeal, the Appellant's request for information and the Commissioner's decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of whether the Public Authority herein and Second Respondent, the Metropolitan Police Service ("MPS") was correct to determine that disclosing whether the requested information was held or was not held, i.e. Neither Confirmed not Denied ("NCND") was exempt from disclosure as it related to matters of national security, pursuant to section 23(5) FOIA. The Appellant may be conveniently summarised in words from a related case citing from EA/2019/00730 as follows; *"historical project about the political affiliations and activities of students and staff at the institution. He understands that the Security Service ('MI5') has historical files (pre-1989 when MI5 became a statutory body) about its surveillance of such students and staff."*

Chronology:

26 Jan 2018	The Appellant's request for disclosure under FOIA of files and information generated / held by its Special Branch (that was absorbed into Counter-Terrorism Command in 2006) regarding certain staff and students at Goldsmith's College in the period 1917 to 1989
23 Feb 2018	MPS refuses request citing ss23 (5), 24(2), 27(4), 30(3), 31(3) and 40(5) of FOIA
24 July 2018	MPS maintains position following an internal review; Prof Crook complains to the Commissioner

20 Dec 2018 Commissioner's Decision Notice accepting that section 23(5) of the FOIA is engaged.

Relevant Legislation:

S2(1) FOIA – Effect of the exemptions in Part II

(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—

(a) The provision confers absolute exemption, or

(b) In all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, section 1(1)(a) does not apply.

S23 FOIA - Information supplied by, or relating to, bodies dealing with security matters

(1) Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in sub-section (3).

(3) The bodies referred to in subsections (1) and (2) are—

(a)the Security Service,

(b)the Secret Intelligence Service,

(c)the Government Communications Headquarters,

(d)the Special Forces,

(e)the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,

(f)the Tribunal established under section 7 of the Interception of Communications Act 1985,

(g)the Tribunal established under section 5 of the Security Service Act 1989,

(h)the Tribunal established under section 9 of the **I**ntelligence Services Act 1994,

(i)the Security Vetting Appeals Panel,

(j)the Security Commission,

(k)the National Criminal Intelligence Service,

(l)the Service Authority for the National Criminal Intelligence Service.

(m)the Serious Organised Crime Agency.

(n) the National Crime Agency.

(o)the Intelligence and Security Committee of Parliament.

(5) 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) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

(27) **International relations.**

(1)Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a)relations between the United Kingdom and any other State,

(b)relations between the United Kingdom and any international organisation or international court,

(c)the interests of the United Kingdom abroad, or

(d)the promotion or protection by the United Kingdom of its interests abroad.

(2)Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

(3)For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.

(4)The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)—

(a)would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or

(b)would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

(5)In this section—

- “international court” means any international court which is not an international organisation and which is established—

(a) by a resolution of an international organisation of which the United Kingdom is a member, or

(b) by an international agreement to which the United Kingdom is a party;

- “international organisation” means any international organisation whose members include any two or more States, or any organ of such an organisation;
- “State” includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom.

(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—

(a)any investigation which the public authority has a duty to conduct with a view to it being ascertained—

(i)whether a person should be charged with an offence, or

(ii)whether a person charged with an offence is guilty of it,

(b)any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

(c)any criminal proceedings which the authority has power to conduct.

(2)Information held by a public authority is exempt information if—

(a)it was obtained or recorded by the authority for the purposes of its functions relating to—

(i)investigations falling within subsection (1)(a) or (b),

(ii)criminal proceedings which the authority has power to conduct,

(iii)investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty’s prerogative or by virtue of powers conferred by or under any enactment, or

(iv)civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and

(b)it relates to the obtaining of information from confidential sources.

(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).

(4)In relation to the institution or conduct of criminal proceedings or the power to conduct them, references in subsection (1)(b) or (c) and subsection (2)(a) to the public authority include references—

(a)to any officer of the authority,

(b)in the case of a government department other than a Northern Ireland department, to the Minister of the Crown in charge of the department, and

(c)in the case of a Northern Ireland department, to the Northern Ireland Minister in charge of the department.

(5)In this section—

- " criminal proceedings " includes service law proceedings (as defined by section 324(5) of the Armed Forces Act 2006);
- " offence " includes a service offence (as defined by section 50 of that Act). **]**

(6)In the application of this section to Scotland—

(a)in subsection (1)(b), for the words from "a decision" to the end there is substituted " a decision by the authority to make a report to the procurator fiscal for the purpose of enabling him to determine whether criminal proceedings should be instituted ",

(b)in subsections (1)(c) and (2)(a)(ii) for "which the authority has power to conduct" there is substituted " which have been instituted in consequence of a report made by the authority to the procurator fiscal ", and

(c)for any reference to a person being charged with an offence there is substituted a reference to the person being prosecuted for the offence.

(31) **Law enforcement.**

(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—

(a)the prevention or detection of crime,

(b)the apprehension or prosecution of offenders,

(c)the administration of justice,

(d)the assessment or collection of any tax or duty or of any imposition of a similar nature,

(e)the operation of the immigration controls,

(f)the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,

(g)the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

(h)any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or

(i)any inquiry held under the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

(40) **Personal information.**

(1)Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2)Any information to which a request for information relates is also exempt information if—

(a)it constitutes personal data which do**es** not fall within subsection (1), and

(b)the first, second or third condition below is satisfied.

(3A)The first condition is that the disclosure of the information to a member of the public otherwise than under this Act—

(a)would contravene any of the data protection principles, or

(b)would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.

(3B)The second condition is that the disclosure of the information to a member of the public otherwise than under this Act would contravene Article 21 of the GDPR (general processing: right to object to processing).

(4A)The third condition is that—

(a)on a request under Article 15(1) of the GDPR (general processing: right of access by the data subject) for access to personal data, the information would be withheld in reliance on provision made by or under section 15, 16 or 26 of, or Schedule 2, 3 or 4 to, the Data Protection Act 2018, or

(b)on a request under section 45(1)(b) of that Act (law enforcement processing: right of access by the data subject), the information would be withheld in reliance on subsection (4) of that section.

(5A)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).

(5B)The duty to confirm or deny does not arise in relation to other information if or to the extent that any of the following applies—

(a)giving a member of the public the confirmation or denial that would have to be given to comply with section 1(1)(a)—

(i)would (apart from this Act) contravene any of the data protection principles, or

(ii)would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded;

(b)giving a member of the public the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene Article 21 of the GDPR (general processing: right to object to processing);

(c)on a request under Article 15(1) of the GDPR (general processing: right of access by the data subject) for confirmation of whether personal data is being processed, the information would be withheld in reliance on a provision listed in subsection (4A)(a);

(d)on a request under section 45(1)(a) of the Data Protection Act 2018 (law enforcement processing: right of access by the data subject), the information would be withheld in reliance on subsection (4) of that section.(6)

S57 *FOIA* – Appeal against notices served under Part IV

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

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

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

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

(b)to a matter which by virtue of subsection (3) or (4) of that section falls to be determined by the responsible authority instead of the appropriate records authority,

subsections (1) and (2) shall have effect as if the reference to the public authority were a reference to the public authority or the responsible authority.

Rule 19(3) The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 – Transfer of charities case to the Upper Tribunal

(3) If a case or issue has been referred by the Tribunal under paragraph (2), the President of the General Regulatory Chamber may, with the concurrence of the President of the appropriate Chamber of the Upper Tribunal, direct that the case or issue

be transferred to and determined by the Upper Tribunal for various reasons including public interest and importance. The Registrar has provided directions and a decision in respect of the same.

Rule 5(2) The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 – Transfer of charities case to the Upper Tribunal – Case management powers

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

Chapter 5 Security Service Act 1989 ("SSA 1989")

An Act to place the Security Service on a statutory basis; to enable certain actions to be taken on the authority of warrants issued by the Secretary of State, with provision for the issue of such warrants to be kept under review by a Commissioner; to establish a procedure for the investigation by a Tribunal or, in some cases, by the Commissioner of complaints about the Service; and for connected purposes.

Section 3 Tribunal, Courts & Enforcement Act 2007

(1)There is to be a tribunal, known as the First-tier Tribunal, for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act.

(2)There is to be a tribunal, known as the Upper Tribunal, for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act.

(3)Each of the First-tier Tribunal, and the Upper Tribunal, is to consist of its judges and other members.

(4)The Senior President of Tribunals is to preside over both of the First-tier Tribunal and the Upper Tribunal.

(5)The Upper Tribunal is to be a superior court of record.

Commissioner's Decision Notice in Summary:

[3] The Commissioner reminded herself that she is not under a specific duty to give effect to any provisions of the Charter of Fundamental Rights of the European Union when making FOI decisions. As Article 51 of the Charter makes clear, the Charter applies to national bodies "*only when they are implementing Union law*".

[4] The Appellant stated that it is a matter of acute public interest to receive and evaluate historical information about the interference of students' Article 8 rights by a public authority, (in this instance MPS). The Commissioner held that "any information held by the MPS falling within the scope of the complainant's request would relate to, or have

been supplied by, a body or bodies listed in section 23(3) of the FOIA." (The Commissioner's conclusion was that section 23(5) of the FOIA is engaged and the Tribunal agrees, endorses and adopts that reasoning).

[5] The Appellant said that the refusal of the MPS neither to confirm nor deny whether or not it holds the information requested under the FOIA amounted to an infringement of his Article 10 rights. However, the Commissioner made the Appellant aware that in the alternative a request could have been made under common law and if refused, a judicial review of that decision would provide an effective remedy. As s.30 and 31 are qualified, there is a need to apply the public interest test as the release of information could be misleading, and could compromise the MPS' relationship with another country or its citizens. Further information of this nature could be manipulated by malevolent intent.

[6] Section 2(1) of the FOIA allows a public authority to refuse to confirm or deny whether it holds the requested information (the neither confirm nor deny exemption or "NCND"). The main focus in this instance is the considerations concerning the consequences of confirming or denying whether or not a particular type of information is held.

[7] In adopting their position, the MPS cited six different exceptions. In essence, the Commissioner considered whether or not the MPS was entitled to adopt this approach when referring to information that may be held by Special Branch about communists / fascists and a visit to the Soviet Union, as they had been requested to do.

[8] In the Appellant's subsequent request for an internal review he argued that the decision and denial is both a "disproportionate interference with … freedom of information rights, a wrong interpretation of the statute, and a wrong application of the public interest balancing exercise". Further, the Appellant argued that neither *Norman Baker MP v IC* [2007] nor *Secretary of State for the Home Department v Rehman* [2001] were relevant precedents justifying the NCND rule.

[9] The Commissioner accepted that for section 23(5) to be relevant, in accordance with the Commissioner's published guidance, the request must be "in the territory of national security". Therefore, a realistic possibility of both the involvement of the security body and the public authority holding information on that involvement must be apparent.

[10] The MPS submitted that in respect of the exemption relied on, if the information specified in the request did exist, it is very likely that it would have been obtained by, or related to, the Security Service who fall under a protected body in accordance with section 23(3) FOIA.

[11] The MPS reiterated the Tribunal's view in *The Commissioner of Police of the Metropolis vs Information Commissioner* (EA/2010/0008), that the balance of probabilities test is the correct test to apply in this instance.

[12] The Commissioner accepted that, on the balance of probabilities, any information held by the MPS falling within the scope of the complainant's request would relate to, or have been supplied by, a body or bodies listed in section 23(3) of the FOIA. Her conclusion was that section 23(5) was engaged and is an absolute exemption.

The Appellant's Grounds of Appeal:

[13] The Appellant moved four grounds of appeal:

i The Commissioner erred in failing to recognise his right under Art. 10 European Convention of Human Rights ("ECHR") to the requested information, as the denial of access to the requested information constituted an interference with his Art. 10 rights and MPS should have read down s.23(5) to give effect to his Art. 10 rights.

ii The application of s.23 (5) of FOIA to security body information that is historical or relating to historical security body information is incompatible with Art.10 ECHR

iii If the Appellant was required to pursue an alternative route for his request for the information under the common law, followed, if necessary, by a judicial review, this would infringe his Art.13 right to a lawful remedy (because he could not afford judicial review).

iv The Commissioner erred in concluding that it was appropriate to apply the absolute exemption under s.23(5) FOIA and that disclosure should instead be determined following the application of a public interest balancing test.

[14] By way of clarification, the Appellant stated that he had incorrectly referenced the fourth section as opposed to the first section in *Times Newspapers Limited and Kennedy v United Kingdom* [2018], which reads as follows;

"*While the Court has now recognised that Article 10 (1) of the Convention might, under certain conditions, include a right of access to information (see Magyar Helsinki Bizottsag v. Hungary [GC], no 18030/11, [149], 8 November 2016) it does not include a right of access to information by a particular legislative scheme What matters, therefore, is whether the legislative framework as a whole satisfies the requirements of Article 10 of the Convention, read in light of the Court's most recent jurisprudence"*

[15] With regard to the Appellant's request, he stated that the legal costs of a judicial review would be prohibitive for a retired academic researcher with no budget for legal fees and would therefore represent a breach of his Article 13 rights.

[16] The Appellant stated that the Commissioner failed to recognise the decision of the Grand Chamber of the European Court in *Magyar Helsinki Bizottsag v Hungary* [2016], which established the right to access information held by public authorities for individuals who wish to apply scrutiny to decisions, processes, and procedures, seeking the furtherance of a democratic society whilst serving the public interest. He submitted that as an academic who specialises in social historical investigations, he falls under the selected criteria in *Magyar.*

[17] The Appellant further argued with reference to paragraph [12] of *The Times Newspapers Limited and Kennedy v United Kingdom* [2018] that he could not avail of a parallel remedy under Article 10. Paragraph 12 reads as follows:

> *"In respect of the [...] case [...] of the European Court of Human Rights referred to by the complainant, although not available at the time that this request was made, the Commissioner notes that the finding in this case has now been promulgated. On that basis, it is her opinion that the complainant's rights under Article 10 are not infringed by the MPS's refusal to neither confirm nor deny (NCND) whether or not it holds the information he has requested under the FOIA. This is because the complainant could alternatively request the information from the MPS under common law and that such a request would satisfy the requirements of Article 10. If a request, formulated in this way, were then refused and the complainant considers that he has been denied access to information in breach of Article 10, a judicial review of that decision would provide an effective remedy."*

[18] The Appellant submitted that it is inappropriate for the "absolute exemption" of section 23(5) to apply and as a result of this appeal he is entitled to "a legal remedy under Article 13".

Submissions on behalf of the Commissioner:

[19] The Commissioner noted that the Appellant's main ground of appeal is that the Commissioner erred in concluding that the Appellant's rights under Article 10 ECHR are not infringed by the MPS' refusal to NCND pursuant to section 23(5) FOIA.

[20] The Commissioner stated that the Tribunal should rely on the authority of *Kennedy v Charity Commission* as opposed to *Magyar,* which, at the relevant time was subject of an appeal to the Upper Tribunal.

[21] The Commissioner recognised the conflicting First-tier Tribunal decisions on this issue - *Moss v Information Commissioner* EA/2016/0250 and *Gibbs v Information Commissioner* EA/2017/0258 & 0275 and recommended that the appeal be transferred and determined by the Upper Tribunal pursuant to rule 19(3) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. This is an administrative matter of process and not an issue raised before for this Tribunal.

Appellant's Reply:

[22] The Appellant endorsed the Commissioner's recommendation that the Upper Tribunal determine this matter in accordance with rule 19(3) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. The Appellant highlighted the importance of his appeal and the effect it will have on future public interest arguments.

[23] The Appellant indicated that he currently has two other appeals to the ICO, both cases in respect of challenging the absolute exemption issue in section 23(5) of FOIA. The Appellant adopted the decision taken by the UK Supreme Court in *Kennedy v Charity Commission* to make the argument that the decision in *Magyar v Hungary* [2016] applies to the case at hand.

Case Management Directions:

[24] The Tribunal Registrar, on 27 February 2019, stayed this Appeal pending the Upper Tribunal's decision in *Moss v Information Commissioner (an appeal against First-tier Tribunal decision EA.2016.0250)*, irrespective of the Appellant's application to reverse this decision.

[25] The stay of this appeal was lifted on 3 September 2020 in accordance with Rule 5(2) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

[26] A further direction was provided on 8 October 2020 that appeals EA/2019/0014, QJ/2020/0013 and QJ/2020/0014 – *Professor Tim Crook v The Information Commissioner and Commissioner of Police for the Metropolis,* be held together as there appears to be a similar preliminary issue to be determined

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Commissioner's Final Submissions:

[27] The Commissioner, with reference to the decisions of *Moss v Information Commissioner & Cabinet Office* [2020], *Kennedy v Charity Commission* [2014] and *BBC*

v Sugar (No.2), stated that Article 10 rights would not necessarily need to be facilitated via FOIA and that Parliament's intentions were expressed in the full knowledge of a citizen's Convention Rights.

[28] The Commissioner noted that the Tribunal would not have the jurisdiction to issue a declaration of incompatibility under section 4 of the Human Rights Act 1998 ("HRA 1998") as such a decree must be issued by a "court" as defined in s.4(5) HRA 1998 which does not include this Tribunal.

[29] The Commissioner reiterated that the Tribunal in this appeal is bound by the Upper Tribunal decision in *Moss v Information Commissioner & Cabinet Office* [2020]. In response to the Appellant's argument that Mr Moss did not meet the criteria established in *Magyar Helsinki Bizottsag v Hungary* App.188030/11, the Commissioner submitted that the Upper Tribunal considered it necessary for Mr Moss to demonstrate that it was open to the Upper Tribunal to apply *Magyar* in domestic law before considering whether Mr Moss met the criteria set down in *Magyar* for Article 10(1) to be engaged. The Upper Tribunal Judge in *Moss* stated that it was only if he was wrong on his conclusion that Magyar does not apply in domestic law that it was then necessary to consider "*whether Mr Moss can show that he had a right of access to the information he had requested which was being interfered with under Article 10(1) on the basis of the criteria laid down in Magyar*". Therefore, the Commissioner did not accept the assertion that the Tribunal must consider whether or not the Appellant meets the criteria set down in *Magyar.*

[30] The Commissioner argued that even if the Appellant in this case were to successfully meet the criteria set out in Magyar to demonstrate that he had a qualified Article 10 right to the information requested, the application of FOIA in this case would not have interfered with such a right.

Response of the MPS

[31] The MPS also opposes the appeal and submits that the Information Commissioner's decision to uphold the MPS's refusal to confirm or deny in relation to the information sought pursuant to s.2(1) of the FOIA was correct. Additionally, the MPS did not depart from their view that NCND was the appropriate approach to adopt in this case pursuant to section 23(5), 24(2), 27(4), 30(3), 31(3) and 40(5) FOIA.

Commissioner's Response to Appellant's Appeal:

Ground I – Application of Article 10:

[32] The Commissioner reiterated that the Tribunal in this case is bound by the Upper Tribunal decision in *Moss v Information Commissioner & Cabinet Office* [2020] and

should accordingly not read down s.23(5) FOIA to give effect to Article 10 as argued by the Appellant.

Ground II – Incompatibility

[33] The Commissioner stated that she relies on her submissions made on 22 October 2020, in which she argued that the Tribunal does not have jurisdiction to issue a declaration of incompatibility under s.4 HRA 1998 as this must be issued by a "court" as defined in s.4(5) HRA 1998 which does not include this Tribunal.

Ground III – Article 13

[34] The Commissioner repeated her view that the Appellant cannot bring a claim based upon an infringement of Article 13 ECHR as this article has not been transposed into domestic law.

Ground IV – Application of s.23(5)

[35] The Commissioner endorses the submissions and the approach of MPS, stating that not using NCND would show some connection to a section 23(3) body and whilst Special Branch are absent from the list of bodies at section 23(3), this does not mean that section 23(5) was not applicable. The Commissioner agrees with the MPS that the historical nature of the requested information is irrelevant to the application of an absolute exemption.

Second Reply by the Appellant:

[36] The Appellant restated his previous submissions that *Magyar* can be wholly distinguished from the case of *Moss v Information Commissioner & Cabinet Office, a*s *Moss v Information Commissioner & Cabinet Office* deals with an entirely different section of the FOIA and Mr Moss was in a separate category to those given the qualified right to information in *Magyar.* The Appellant argued that public interest is central to his appeal and any FOIA requests should be subject to independent appeal and adjudication. He cited *Kennedy v Information Commissioner* and sections 2, 3 and 6 HRA 1998 as the legal basis of his appeal. He referred to the authorities relied upon by the Respondents, arguing that the importance of the ability to receive and evaluate information which requires an FOIA request cannot be undermined.

Tribunal Hearing:

[37] The parties expanded on their earlier submissions. The Appellant adopted his argument in relation to 'Intrinsic versus Instrumental Law' and made additional submissions in respect of the same, e.g. he 'relied on the "direction of travel" in English

law towards positive recognition rights for researchers and non-governmental organisations.'

[38] The Appellant contended that there are three additional arguments to be made for the purposes of undermining the application of an absolute exemption of NCND. He submitted that as the exigencies of national security and privacy could be respected in accordance with the law through the use of redactions, "*a blanket refusal… is unreasonable and disproportionate*" in this case.

[39] The Appellant highlighted that there are several thousand historical TNA files classed as 'Open Documents/Descriptions', which titles have been released into the public domain (less than 200 of which appear to relate to Special Branch). He drew comparisons with the eventual publication of George Orwell's file (after a biography, on the actual individual for whom George Orwell was a pseudonym, wishing to draw on the file, had been published) to argue that there is a pressing social need for the personal archive of Goldsmith College's "*leading academic"* (unnamed) to no longer be withheld. The Appellant was made aware of and presented with the Witness Statement of Detective Chief Super Intendant Kevin Southworth dated 4 May 2021. (The Appellant took no issue with this statement and it has been dealt with accordingly as agreed evidence).

[40] The Appellant contended that the release of this information is of acute public interest as it would inform and assist the Goldsmith History Project in their understanding of the historical nature of Edwards/McLaren as he then was. (The Tribunal reminds itself that any personal *acute interest on behalf of the public* must be distinguished from the public interest to the world at large or to a section of the public).

[41] The Appellant took the view that *Moss* can be fundamentally and effectively distinguished from *Magyar* on the grounds that representations on behalf of the Appellants and FOI requesters central to the appeal in *Magyar* were not before the Judge in *Moss*. The Appellant stated that his status as a FOI requester, an academic historian, commissioned to write a history of the College for publication, should be appropriated from *Magyar.* Therefore, he argued, the interference with the Appellant's Article 10 rights cannot be justified in a democratic society.

[42] The Appellant acknowledged the rulings of the UKSC in *Kennedy* and *Sugar* and their impact on the applicability of Strasbourg jurisprudence to national law. Further, the Appellant relied upon Lord Bingham's ruling in *Kay v Lambeth LBC* [2006] 2 AC 465 and *R (Ullah) v Special Adjudicator* [2004] UKHL 26 to present the exceptionality of his case and the necessity of obtaining recourse under Article 10 ECHR.

[43] In addressing Section 23(1) of FOIA, the Appellant states that; "*The present FOIA 2000 as amended fully supports my interpretation which is as clear as night follows day. There is no ambiguity here"* Further, with reference to the SSA 1989, the Appellant argued that the determining issue is applicability, as SSA 1989 creates a statutorily constituted Security Service, the Security Service 'within' the Home Office that predates the legislation is a separate legal entity. Therefore, Section 23(3) of the FOIA, he argued, does not apply to this case, as the scope of his request is for information prior to 1989.

[44] The Appellant provided an analysis of the Hansard Second Reading of the Security Service Bill 1988 to submit that; the MI5 and covert operational part of the Home Office prior to 1989 "*is certainly not the government security body specified in FOIA 2000 as the security body constituted separately from the Home Office by the Security Service Act 1989. The Section 23 (3)(a) absolute exemption, therefore, does not apply*".

[45] The Second Respondent made four further submissions to develop the arguments laid out in their written documents, and provided an agreed witness statement by Detective Chief Superintendent Kevin Southworth dated 4 May 2021. In this unchallenged evidence before us the witness stated that liaison with security bodies is significant and 'on a daily basis', that it is essential for MPS to always use NCND to prevent any mosaic effect from some FOIA releases, and that any information currently in the public domain which purports to disclose SB activities is 'speculative' and not confirmed by Counter Terrorism Command.

[46] The Second Respondent argued that the scope of the appeal for the Tribunal is limited to whether the decision notice correctly applied the law set out in Part 1 of the FOIA. The Second Respondent pointed out that s.78 preserves other routes of disclosure, however, the principal route of challenge to a decision on a common law request would be a judicial review.

[47] The Second Respondent further outlined the cost implications of this procedure. The Second Respondent reiterated that in accordance with Section 3(5) of the Tribunal, Courts & Enforcement Act 2007 and *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin); [2010] 2 WLR 1012, the Tribunal are bound by the decisions of the Upper Tribunal.

[48] In congruence with the finding in *Moss* the Second Respondent argued that this Tribunal is bound by the Upper Tribunal and as a result Article 10 ECHR does not affect disclosure under FOIA. However, in the alternative, the Second Respondent contended

that if the Tribunal proceed on the basis that the Appellant does meet the second criterion set out in *Magyar*, the other three criteria, which the Appellant cannot relate to also cannot be met as they do not relate to the characteristics of the appellant in any given case. The Tribunal reminds itself that all four criteria referred to in *Moss* must be applied in tandem.

[49] The Second Respondent outlined reasoning for the decisions from *Kennedy* and *Sugar* to address the issues faced by Mr Moss in *Magyar.* The Second Respondent does not accept that there is any conflict in incorporating *Magyar* into domestic law.

[50] The Second Respondent dealt with the Appellant's contentions relating to the applicability of the doctrine of precedent outlined in *Kay;* relying upon Lord Bingham's summation of the doctrine to state that it is not for this Tribunal to depart from settled law. Therefore, the Second Respondent submitted that *Moss* cannot be distinguished in the way the Appellant seeks.

[51] The Second Respondent outlined the authority of *Rosenbaum v Information Commissioner* [2021] UKUT 005 (AAC) – a case also regarding Special Branch and information prior to 1989 - and the principles which form the basis of the Second Respondent's argument. The Second Respondent argued that the pre-1989 Security Service was specified in s.23(3) FOIA. Therefore, pursuant to *Pepper v Hart (Inspector of Texas)* [1993] AC 593, they submitted there is no ambiguity in the statutory language that would allow the Tribunal to consider Hansard in line with the Appellant's case.

[52] In response to the Appellant's argument that there should be a balancing exercise undertaken, the Second Respondent stated that the appeal concerns the application of NCND and the absolute exemption of s.23. Therefore, this is not a case where any public interest balancing exercise can be undertaken.

[53] The Second Respondent submitted that that the question for this Tribunal is whether confirmation that information was or was not held would reveal that MPS had or had not been involved with some manner of Special Branch (a body subject to s.23 (3)) investigation into the topics covered by the request.

[54] The Second Respondent submitted that the appeal be dismissed, save for the concession made during the hearing that the Heinemann file is listed on The National Archives website; thus, it is accepted that a NCND stance cannot be maintained in respect of this circumstance.

Tribunal's Reasons regarding s23:

[55] The Tribunal concludes that any such Special Branch activities, if they exist, would be in the ambit of a s. 23 (3) body prior to 1989. We do not have the power to turn to Hansard unless an ambiguity arises with the legislation, such as with a security body listed under s.23 (3) of FOIA. The Tribunal has concluded that the phrase in SSA 1989 *"…shall continue to be a Security Service"* permitted no ambiguity, thus the Tribunal has nothing further to address in respect of this limb of the Appellant's appeal. In the alternative, if any ambiguity arose, the reference in the Hansard extract referred to does not encompass the nature of the Appeal before the Tribunal in any event.

[56] This Tribunal found, based on the argument presented by the Appellant on an 'intrinsic versus the instrumental' approach, that it is neither for the Tribunal nor the Information Commissioner to take an unconventional course. Further, we are agreed that *Moss* cannot be distinguished as requested by the Appellant. In the first instance, the Tribunal agree we are bound by the precedent set by the Upper Tribunal and also by the decision of the Supreme Court in *Sugar* as interpreted by the Court of Appeal in *Kennedy*. Notwithstanding the above, the Appellant has not persuaded this Tribunal that any element of his appeal can be distinguished. We accept and adopt the argument as presented and set out by the Second Respondent in this respect.

[57] It follows that we find with reference to Lord Bingham's doctrine of precedent in *Kay (*decided subsequent to the case of *Ullah)* that, as the Tribunal are unable to depart from a doctrine handed down by the House of Lords, it is not for the Appellant to misapply the doctrine for the purposes of his Appeal. The Appellant's reference to his convention rights in this case are, in our view misconceived and misplaced and the Tribunal unanimously do not accept any suggestion that these rights are infringed.

[58] We note the Appellant's passion for this area and acknowledge this in the forcefulness of his submissions. However, the exemption under s.23 (5) is, in our view absolute nonetheless, and therefore we find NCND is the appropriate course.

[59] We have not gone on to consider whether it is possible to concede the Appellant's points on s.23 (3) as it is not in the Tribunal's remit. Moreover, the potential wider effect if the Tribunal were to depart from a settled principle should not, in our view, be underestimated.

[60] We reference the cases; *Quayum (acting on behalf of the (Camden Community Law Centre) v Information Commissioner & Foreign and Commonwealth Office* [2012] 1 Info LR (EA/2011/0167) and *R (Binyam Mohammed) v Secretary of State for Foreign Affairs*

[2011] 8 QB 218 cited within the authority bundle, for the purposes of illustrating that these authorities do not assist the Appellant as the Tribunal cannot go behind what the MPS is responsible for.

[61] The evidence before the Tribunal concerning the link between Special Branch and s.23 consisted of a witness statement from DCS Southworth (referred to above). The Appellant accepted this evidence without challenge and the Tribunal has given the appropriate weight to that evidence.

[62] Having considered s.23 (5) and its application to Special Branch we endorse, accept and adopt the arguments put forward by the Second Respondent and their reliance on the case of *Rosenbaum*. The relevant section (except that paragraph 12 is not applicable in this case) is as follows:

> *"1. Section 23 affords the "widest protection" of any of the exemptions:* Cobain *at [19(b)] and [29].*
>
> *2. The purpose of section 23 is to preserve the operational secrecy necessary for section 23(3) bodies to function:* Lownie *at [50].*
>
> *3. It is "Parliament's clear intention that, because of what they do, there should be no question of using FOIA to obtain information from or about the activities of section 23 bodies at all". The exclusion of the section 23(3) bodies from the scope of FOIA was shutting the front door, and section 23 was "a means of shutting the back door to ensure that this exclusion was not circumvented":* APPGER *at [16].*
>
> *4. The legislative choice of Parliament was that "the exclusionary principle was so fundamental when considering information touching the specified bodies, that even perfectly harmless disclosure would only be made on the initiative or with the consent of the body concerned":* Cobain *at [28];* Lownie *at [53].*
>
> *5. Asking whether the information requested is anodyne or revelatory fails to respect the difficulty of identifying what the revelatory nature of the information might be without a detailed understanding of the security context:* Lownie *at [42];* Corderoy *at [59].*
>
> *6. When applying the 'relates to' limb of sections 23(1) and (5), that language is used in "a wide sense":* APPGER *at [25];* Corderoy *at [59];* Savic *at [40].*
>
> *7. The first port of call should always be the statutory language without any judicial gloss:* APPGER *at [23];* Corderoy *at [51];* Savic *at [40].*

*8. With that warning in mind, in the context of 'relates to' in section 23, it may sometimes be helpful to consider the synonyms of "some connection", or "that it touches or stands in some relation to" (*APPGER *at [13], [25]) or to consider whether the request is for "information, in a record supplied to one or more of the section 23 bodies, which was for the purpose of the discharge of their statutory functions" (*APPGER *at [21], [26];* Lownie *at [57]). But the 'relates to' limb must not be read as subject to a test of focus (*APPGER *at [14) or directness (*Lownie *at [59]-[60]).*

9. The scope of the 'relates to' limb is not unlimited and there will come a point when any connection between the information and the section 23(3) body is too remote. Assessing this is a question of judgment on the evidence: Lownie *at [62].*

10. The assessment of the degree of relationship may be informed by the context of the information: Lownie *at [4] and [67].*

11. The scope of the section 23 exemption is not to be construed or applied by reference to other exemptions, including section 24: APPGER *at [17];* Lownie *at [45] and [52].*

12. In a section 23(1) case, regard should be had as to whether or not information can be disaggregated from the exempt information so as to render it non-exempt and still be provided in an intelligible form: Corderoy *at [43].*

13. Section 23(5) requires consideration of whether answering 'yes' or 'no' to whether the information requested is held engages any of the limbs of section 23: Savic *at [43], [82] and [92].*

14. The purpose of section 23(5) is a protective concept, to stop inferences being drawn on the existence or types of information and enables an equivalent position to be taken on other occasions: Savic *at [60]."*

[63] The Upper Tribunal in *Rosenbaum* further held:

"44. I turn then to the FTT's decision. It considered the case law as to the meaning of "relates to", identifying the width of its scope in accordance with APPGER. It found that confirmation or denial by the MPS of whether it held the requested information would reveal that the Security Service had or had not been involved with some manner of Special Branch investigation into the National Front during those specific years. This reasoning has not been challenged and I note that the FTT drew sound inferences based on the context

and evidence. As the information concerned the activities of the Security Service, the FTT correctly concluded that it related to a section 23(3) body. The FTT did not expressly address the question of remoteness, but there was no need to do so: the information was clearly connected with the Security Service. This was supported by the witness statement of a Detective Chief Superintendent Southworth as summarised at paragraph 4 of the FTT's reasons which I have set out above. On that basis, the FTT should have concluded that section 23(5) applied.

45. The FTT's error was that it did not conclude its decision at that point but went on to adopt the approach in Corderoy by asking whether Parliament had intended the information to be covered by the absolute section 23 exemption and, in that context, to ask whether it had intended to exclude all information relating to the work of Special Branch. In the light of my analysis of the meaning and application of "relates to", that was plainly an error of law. The further questions that the FTT asked were irrelevant.

46. The FTT then proceeded to make further errors in identifying Parliament's intention. First, the suggestion that Parliament would have listed Special Branch in section 23(3) if it had intended all of its activities to be included was misconceived. If Special Branch were listed in section 23(3), the effect would be to expand the scope of the exemption by excluding all information related to Special Branch itself, not just its work, and by exempting information held by any other public authority which related to Special Branch activities. As Mr Knight said, "Special Branch is in MI5's orbit; if were a listed NSB [national security body], it would have its own, much larger orbit, significantly expanding the scope of the exemption"; and, I would add, expanding it beyond what is necessary to protect information relating to security bodies.

47. Second, as the case law clearly shows, Parliament had cast the net of section 23 widely so as to avoid the possibility of sensitive information being improperly disclosed and to ensure that the security bodies are not inhibited from collaborating with other bodies which are not listed in section 23(3). To exclude from the scope of section 23 information which relates to a section 23(3) body by reason of its collaboration with a non-section 23(3) body would undermine the purpose and effect of the provision."

[64] FOIA was implemented after the Human Rights Act, when signed into law the draftsmen would have been aware of the existence of the Human Rights Act. The

existence of s.23 is not a breach of the Appellant's Article 10 rights. We do not have the power nor the jurisdiction to provide for the declaration of incompatibility, as is sought by the Appellant. Further, an effective remedy would only be available to the Appellant if the Tribunal were to rely on the case of *Kennedy*, which we do not as there is no domestic law right to an effective remedy under the European Convention of Human Rights. We also raised the inapplicability of Article 13 with the Appellant. That being said, we acknowledge the Appellant's frustration in regards to the previous releasing of files by the MPS, however, each case turns on its own merits and if an absolute exemption applies, which we find it does in this case, the previous releases are irrelevant. Notwithstanding this, the Tribunal and the Upper Tribunal are not bound by the previous decisions of the MPS to release such information as they see fit.

[65] It follows that we accept, endorse and repeat herein the submission presented by the Second Respondent at paragraph 40 – 46 of their closing submissions as follows:

"40. The Appellant also argues that there should be a balancing exercise undertaken. In particular, he argues that historic documents of high public interest ought to be disclosed. He has made a number of points in relation to the substantial public interest he says would favour disclosure of any Special Branch files that fall within his request. The Second Respondent does not engage with those in detail, but submits that (1) this appeal is concerned with the duty to confirm or deny, not the duty to provide information; and (2) that in relation to s.23, an absolute exemption, those arguments simply do not arise.

41. That position is consistent with the third, fourth and fifth Rosenbaum principles.

42. With one exception, the fact that some Special Branch files have been provided to the Public Records Office (i.e. The National Archives) does not alter this position. That is not disclosure under FOIA to the world at large, and the Appellant's own analysis shows how disclosure under the Public Records Acts is somewhat more nuanced and careful than FOIA would permit. The same applies to disclosure via the Undercover Policing Inquiry.

43. The one exception is the file relating to Margot Heineman. Parts of this file have been disclosed in the past under FOIA: the Second Respondent acknowledges that it cannot maintain an NCND stance in the circumstances, and will provide the Appellant with a copy of the material previously disclosed.

44. In respect of the remainder of the Heineman file, the Second Respondent relies on s.23(1), s.24(1) (not in the alternative) and s.31 as justifying exemptions from the duty to provide information, for the same reasons as set out in DCS Southworth's statement.

45. As regards any other material that may be held in respect of the Appellant's request, the Second Respondent submits that the approach to be applied was set out in §44 of Rosenbaum, set out above. The question is whether confirmation that information was or was not held would reveal that a s.23(3) body had or had not been involved with some manner of Special Branch investigation into the topics covered by the request.

46. How to answer that question is set out at §34 of the Second Respondent's Response [A63]:

a. What activity of Special Branch does the nature of the information sought go to?

b. Does that activity habitually concern a close relationship between Special Branch and the s.23 bodies?

c. On the balance of probabilities, would confirming or denying possession of information revealing the involvement or non-involvement of Special Branch in this matter reveal information that, by fact or inference, relates to a s.23 body?

Other exemptions :

[66] For the sake of completeness, we go on to consider the additional exemptions arising under FOIA raised by MPS.

[67] Section 27 of FOIA sets out that information is exempt from disclosure if it would prejudice or would be likely to prejudice relations between the United Kingdom and another State. This exemption, if applicable, is a qualified exemption and depends on whether the public interest in maintaining the exemption outweighs the public interest in the disclosure of the material. In the instant matter, we find that such a prejudice would exist in the circumstances that currently arise, namely that "there is an inherent disservice to the public interest in flouting international confidence" (as per the decision in the *Campaign against the Arms Trade -v- Information Commissioner and MoJ, IT, 26 August 2008*).

[68] Sections 30 and 31 of FOIA are linked exemptions:

1. Section 30 of FOIA sets out an exemption for information held by a public authority if it has been held by it, at any time, for the purposes of an

investigation with a view to it being ascertained whether to charge someone with an offence or which may lead to criminal proceedings. If this exemption could have been said to have applied to any material held, it continues to apply irrespective of whether the decision to prosecute has been made or even if it has been completed (and that was an issue considered in the case of *Prince -v- Information Commissioner and Devon County Council, FTT, 14 November 2007*); and,

2. in the circumstance that information is not exempt under section 30 but its disclosure under FOIA would, or would be likely to, prejudice the prevention or detection of crime or the apprehension or prosecution of offenders, then the exemption under section 31 would apply.

[69] While we did not hear extensive submissions on the application of the exemptions under section 30 and 31, it does appear that the disclosure of this material under FOIA, if held, would disclose methodology with adverse consequences that would cause the section 31 exemption to be engaged, if not the section 30 exemption itself. As s.30 and 31 are qualified exemptions, the public interest test may need to be considered. The release of the requested information could be misleading, and could compromise the MPS' relationship with international relations. Further, we find such information could be manipulated with malevolent intent.

[70] There is an exemption under section 40 of FOIA in relation to the provision of personal data.

We did not hear detailed submissions on the correct data protection regime applicable to the material subject to this application and, in fact, it is not necessary given that the definition of personal data has not materially changed:

1. Section 1(1) of the Data Protection Act 1998 defines the term "personal data" as being: "data which relate to a living individual who can be identified (a) from those data, or (b) from those data and other information, which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual".

2. Section 3(2) of the Data Protection Act 2018 defines the term as meaning "any information relating to an identified or identifiable living individual".

[71] The material, if held, that would form of the subject matter of this appeal - namely all information and files held by (what was then) Special Branch relating to the activities of staff and students at Goldsmiths' College - was personal data at the point of its creation. In that sense the Second Respondent, that is to say, the MPS, is the data controller of that personal data and must comply with the data protection legislation with respect to its processing (including its potential publication under FOIA).

[72] Section 40 of FOIA sets out exemptions with respect to the provision of material constituting personal data. Of particular relevance, section 40(2) and (3) of FOIA provides for an exemption in which the provision of the information would contravene any of the data protection principles. Article 5(1) of the UK GDPR sets out the data protection principles, of which the first data protection principle (set out under Article 5(1(a))) is the most significant: personal data shall be "processed lawfully, fairly and in a transparent matter in relation to the data subject". The publication of the information sought, in the context of any Special Branch investigations into the activities of individuals - irrespective of how well founded or misplaced those investigations were - would not be in the interest of those individuals. It is clear that the potential for distress to those individuals is high and the impact on the privacy of those individuals is a factor that must tend against publication. Of course, this point must be considered in the context of the affected individuals being potentially unaware of the fact of the Appellant's attempts to seek publication of the material to the world at large, and also a lack of the individuals' awareness of the existence of the investigations at all.

In those circumstances we find, not only can it be stated that it would not be fair or lawful for the Second Respondent to publish this material but, in fact, the publication of the material has the potential to constitute a breach of the General Data Protection Regulation 2016/679 as retained in domestic law (“UK GDPR”) by the Second Respondent, which would carry the real risk of a claim for compensation through damages and regulatory investigation as a consequence.

[73] Indeed, Article 10 of the UK GDPR sets out additional provisions relating to "criminal convictions and offences or related security measures" which are then achieved through section 10 of the Data Protection Act 2018 (which is the UK implementation of the GDPR and aligns with and build on the UK GDPR). Personal data of this nature is afforded

additional protections under the data protection legislation, as a result of the heightened risk to the rights and freedoms of the affected individuals through its misuse. It is difficult to foresee how the publication of personal data falling into this category could ever be fair or lawful in this scenario. We therefore conclude that section 40 of FOIA applies and exempts the material held from publication insofar as it represents personal data.

[74] The only aspect of the nature of the information that might change that position is where the individual to whom it relates has now died: the definition of personal data under the data protection legislation relates only to information relating to a living individual. This was a point raised during the hearing by the Appellant. We agree with the Second Respondent's submission in response that the time spent in checking this issue with respect to each individual - being not only to check whether they were still alive, but also to ask and consider their views on publication - would take sufficient time that the exercise would most probably quickly meet the exemption represented by section 12 of FOIA, namely that the cost of compliance would meet and exceed the appropriate limit.

In his submissions, both in writing and orally, the Appellant made reference to material that had been published by way of the website of the National Archives (TNA) and which would or could or may have otherwise been exempt from disclosure under FOIA for the same reasons as are rehearsed in this decision. For the sake of completeness, we conclude that material falling into this bracket is also itself exempt from disclosure under FOIA as a result of the exemption set out under section 21, namely that it is information that is already reasonably accessible to the Applicant otherwise than under FOIA. Indeed, the extent of the references to that material in his submissions demonstrated that the Appellant was aware of the TNA material.

[75] Lastly then, in relation to the additional exemptions set out above, we say they are not only exempt to the requirements on the Second Respondent to provide the information itself, but, in respect of the exemptions under section 27, 30, and 40, there is no obligation on the Second Respondent to confirm nor deny the existence of the information.

Conclusion:

[76] For the reasons given above we find that the appeal must fail in its entirety.

Brian Kennedy QC. 23 July 2021.