



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

**Appeal Reference: EA/2021/0096V**

**Before**

Judge Stephen Cragg Q.C.

and Tribunal Members

Ms Emma Yates  
Mr Stephen Shaw

**Heard via the Cloud Video Platform on 13 August 2021**

**Between**

**ANDREW PRESTON**

**Appellant**

**and**

**(1) INFORMATION COMMISSIONER**

**Respondent**

The Appellant represented himself

The Commissioner was not represented

## DECISION AND REASONS

### DECISION

1. The appeal is dismissed.

### MODE OF HEARING

2. The proceedings were held via the Cloud Video Platform. The Appellant was able to attend by telephone. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
3. The Tribunal considered an agreed open bundle of evidence comprising 285 pages.

### BACKGROUND

4. The Appellant submitted the following request to the Chief Constable of West Yorkshire Police (WYP) on 8 June 2020 (it can be seen that this was a follow on request from a previous request). The emphasis is in the original request:-

I now wish to raise a further FOI request. This is **in relation to the disclosure you have provided**. Please see below.

“(a) Records relating to the movement of 14 audio tapes shown below indicate tapes have been booked out but not booked back in. Please provide any recorded **information** you hold about where they are now **located** or whether they have been **destroyed**.”

- 1-3. Lines 4-6 on page 7224 (Dated out 10/2/11),
4. Line 8 on page 7224 (Dated out 1/3/11),
- 5-6. Lines 21-22 on page 7225 (Dated out 22/11/11),
7. Line 11 on page 7227 (Dated out 30/11/12),
8. Line 26 on page 7229 (Dated out 25/11/14),
9. Line 22 on page 7230 (Dated out 2/7/15),
10. Line 25 on page 7230 (Dated out 16/9/15),
11. Line 7 on page 7231 (Dated out 27/11/15),
12. Line 18 on page 7231 (Dated out 6/5/16),
13. Line 23 on page 7231 (Dated out 11/4/18),
14. Line 28 on page 7231 (Dated out 11/4/18)

(b) Records relating to the movement of 2 audio tapes shown below indicate tapes have been booked **in** but had **not** previously been booked **out**.

Please provide any recorded **information** you hold about where they were **originally located**

1. Line 10 on page 7226 – Dated in on 21/3/12 but had never been dated out.
2. Line 10 on page 7231 - Dated in on 6/1/16 but had never been dated out.

(c) Records relating to the movement of 5 audio tapes shown below indicate tapes have been booked in **prior** to them having been booked out  
Please provide any additional recorded **information** you hold about the **accuracy** of this data

1. Line 1 on page 7223 - Dated out 31/8/10 but date returned was 10/8/10.
2. Lines 17-20 on page 7225 - Dated out 7/11/11 but date returned was 26/10/11.
3. Line 11 on page 7229 - Dated out 2/4/14 but date returned was 1/4/14.
4. Lines 12-14 on page 7231 - Dated out 15/1/16 but date returned was 6/01/16.
5. Line 22 on page 7231 - Dated out 5/3/18 but date returned was 6/3/17, one year earlier!”

5. WYP responded on 25 August 2020 to say that it denied holding the requested information. Following an internal review, WYP wrote to the Appellant on 14 October 2020, to confirm its original position.

6. In the decision notice of 16 March 2021 the Commissioner explains her approach to the complaint as follows:-

9. As is her practice, the Commissioner wrote to both parties setting out the scope of her investigation. She advised the complainant that the focus of her investigation would be to determine whether West Yorkshire Police handled his request in accordance with the FOIA: specifically, that it would look at whether West Yorkshire Police is correct when it says that it does not hold the information he requested.

...

13. Section 1 of the FOIA states that:  
“Any person making a request for information to a public authority is entitled –  
(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and  
(b) if that is the case, to have that information communicated to him”.

14. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that

may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities.

15. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

16. In this case, the Commissioner has sought to determine whether, on the balance of probabilities, at the time of the request, West Yorkshire Police held the requested information.

17. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, she will consider any other information or explanation offered by the public authority which is relevant to her determination.

7. The Appellant had told the Commissioner that:-

I believe that the retention of garbage data on the 202-master tape register log is very serious. This information is very easily obtainable from readily available records.

8. The Commissioner explained WYP's response as follows:-

23...in its submission West Yorkshire Police explained how tapes are initially held locally before being moved to central long-term storage. West Yorkshire Police advised that, as well as conducting physical searches, following the Commissioner's intervention, a fresh search of the Master Tape Movement Record (202) ("the Record") was conducted.

24. As a result of that further search, West Yorkshire Police confirmed:

"No additional information was held on the Record at the time of the fresh search to indicate where the tapes identified in the request were now or whether they have been destroyed".

25. It also told the Commissioner that West Yorkshire Police do not hold any additional information about the accuracy of the information held on the Record. It explained that there is no audit process for checking the accuracy of information held on the Record.

26. West Yorkshire Police acknowledged that there is a business purpose for holding the requested information. It explained that such records should be held to ensure the integrity of the evidence and for accountability purposes.

27. It also acknowledged that where tapes have been removed and returned

from storage the policy is for the Record to be completed. It accepted, however, that, on occasions, this may not have happened due to human error.

9. The Commissioner concluded as follows:-

28. The Commissioner recognises that the requested information is clearly of interest to the complainant. She acknowledges the comprehensive documentation he submitted in support of his complaint, providing background to the request and his reasons for believing that the requested information is held.

29. She acknowledges that the complainant disputes the accuracy of the information held by West Yorkshire Police.

30. In that respect, the Commissioner acknowledges that West Yorkshire Police acknowledged that it was possible that records were not completely accurate as a result of human error.

...

32. Having considered West Yorkshire Police's response, and on the basis of the evidence provided to her, the Commissioner is satisfied that West Yorkshire Police carried out necessary searches to identify the requested information that was held at the time of the request.

33. Based on the information provided, the Commissioner is satisfied that, on the balance of probabilities, no recorded information within the scope of the request is held. She is therefore satisfied that West Yorkshire Police has complied with the requirements of section 1 of the FOIA in this case.

10. The Appellant filed an appeal dated 12 April 2021. He explained his substantive grounds as follows:-

- (i) WYP failed to carry out the necessary searches to identify the requested information that was held at the time of the request; and as a consequence,
- (ii) WYP failed to provide accurate information which it did hold at the time of the request...

11. The Appellant made the further comments about the way his complaint had been dealt with:-

The ICO caseworker failed to reference or comment on the key sources of evidence, including

- 1> The existence of data relating to the contentious records of interest in the 202 ledger log. The "4-minute" revelation originated from info supplied by WYP, following historical FOI requests;
- 2> The assistance of the ledger log providing data relating to the creation of master audio tapes;
- 3> The regulations as prescribed by Law, for a "clear audit trail" whenever the seals on the master tapes are broken and resealed. One such policy has recently been deleted from the web.

The ICO caseworker further failed to notice that my Internal Review queried information relating to WHEN the master tapes were returned to the stores. This was never acknowledged by WYP, nor was any admission of human error ever made (to me directly). Neither had WYP ever stated to me that any searches had been carried out whatsoever, nor was any comment ever made to me suggesting the time taken to carry out such a search would breach the 18-hour cost limit.

12. The Appellant expands his appeal over a 16 page document. In response to the appeal, the Commissioner sets out the questions asked of WYP in relation to the information sought as follows:-

- What searches have been carried out to check whether information within the scope of the request was held and why would these searches have been likely to retrieve any relevant information?
- Please describe thoroughly any searches of relevant paper/electronic records and include details of any staff consultations.
- If searches included electronic data, which search terms were used? Please explain whether the search included information held locally as well as on networked resources and emails.
- If no, or inadequate, searches were done at the time, please rectify this now and let me know what you have done.
- If the information were held would it be held as manual or electronic records?
- Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?
- If recorded information was held but is no longer held, when did West Yorkshire Police cease to retain this information?
- What does West Yorkshire Police's formal records management policy say about the retention and deletion of records of this type?
- Is there a business purpose for which the requested information should be held? If so what is this purpose?
- Are there any statutory requirements upon West Yorkshire Police to retain the requested information?

13. The responses from WYP are contained in the bundle and it is useful to reproduce some of them here:-

The master audio tapes are initially located at the District where the Custody Interview took place and the recording made and are stored at the District until they are moved into central long-term storage. Master tape movement from Districts is recorded on the Record. Information held on the Master Tape Movement Record (202) (“the Record”) within the scope of this request has been provided to the requester; except where a lawful restriction has been engaged.

Tapes are moved to long term storage when space becomes available. The information held in relation to this movement is contained in the WYP Records Management Policy. This information has been provided to the requester and is set out below.

A fresh search of the Master Tape Movement Record (202) (“the Record”) has been conducted. No additional information was held on the Record at the time of the fresh search to indicate where the tapes identified in the request were now or whether they have been destroyed.

No additional information was held at on the Record at the time of the fresh search to indicate where the tapes identified in the request are now or whether they have been destroyed.

Please be assured that whilst outside of the scope of the requests physical searches have been conducted at the relevant district to locate the tapes identified within the request. This took West Yorkshire Police 18 hours to complete.

When audio tapes were created by Custody they were marked with either a blue dot (retain for 7 years) or a red dot (retain for 99 years). Destruction of audio tapes marked with a blue dot was undertaken manually until approximately 2009. From 2009 onwards destruction was halted pending completion of the Jay Report. No records are held in relation to audio tape destruction.

The Record has been re-examined and no further information is held in relation to the accuracy of the record is held. West Yorkshire Police do not hold any additional information about the accuracy of the information held on the Record. Enquiries have been made and there is no audit process for checking the accuracy of information held on the Record.

West Yorkshire Police no longer record custody interviews using audio tapes. West Yorkshire Police now use digital interview recordings.

West Yorkshire Police acknowledges that the requester disputes the accuracy of the information that West Yorkshire Police has provided however West Yorkshire Police believes that it has complied with its obligations under the FOIA as we have provided the recorded information that we hold in relation to the request, irrespective of whether this information is accurate or not.

The original request was received on 08.06.20. On the 09.06.20 a request for the information was sent to Calderdale Customer Services (CCS). CCS arranged for

the Record to be located and reviewed and then a search of the CCS storage area to be conducted to try to locate any tapes identified by the requester in the request as “not booked back in” (to see if they were back in the CCS storage area) and for tapes identified in the requests as “booked in but had not previously been booked out” (to see where the tapes had originated from by reference to the tape label).

The search involved physically examining over 25,000 audio master tapes from 2010 to 2014. The search took two people over 9 hours to complete (i.e. over 18 hours).

Tapes preceding 2010 have been moved to Master Audio Tape storage. The Master Audio Tape storage location has over 400 boxes of master audio tapes, each containing an average of 300 tapes, therefore over 120,000. A further search of the 52 CSU boxes held in the central location would be required therefore approx. 15,600 tapes would need to be examined. Based on the time taken to search within CSU it is anticipated that a further 12 hours would be required to complete the search. This would be disproportionate and, in any event, falls outside of the scope of the request.

The Records Management Policy has already been provided to the requester [the relevant sections are set out in WYP’s response].

[R]ecords should be held to ensure the integrity of the evidence and for accountability purposes.

WYP are required to manage criminal offence data in line with PACE CODE E and MOPI 2005.

Where tapes have been removed and returned from CSU the policy is for the Record to be completed. It is accepted that on occasion this may not have happened due to human error. WYP does not keep a record of tapes destroyed.

14. The Commissioner noted that the decision notice outlined the searches WYP undertook to locate the information, and that in essence, WYP had explained that information was not held due to human error which the Commissioner accepted.

The Commissioner also noted that :-

*In Councillor Jeremy Clyne v IC and London Borough of Lambeth EA/2011/0190 (at ¶23) the Tribunal accepted that the Commissioner was entitled to accept at face value the response of a public authority, where there was no evidence of an attempt to mislead the Commissioner, or of a motive to withhold information actually in its possession. The Commissioner has not found any evidence of the Police being misleading in this matter and accepts the outcomes and explanations of the searches carried out.*



15. In response (27 May 2021) the Appellant notes that the movement of all audio tapes must be accounted for in compliance of Code E to the Police and Criminal Evidence Act 1984. He therefore argues:-

WYP are bound by PACE law. On the balance of probability, they simply must hold records which dictate the location of those audio tapes, otherwise the integrity of any audio tapes they hold, or even any evidential exhibits are prone to claims of inauthenticity. This would dictate that the Police are not bound by the Law, which most reasonable people would find abhorrent and absurd, the ramifications of which are disturbing, should the findings of my case reach the Media.

### THE HEARING

16. At the hearing the Tribunal heard from the Appellant, but the Commissioner was not represented.

17. The Appellant made a number of succinct points which he argued undermined the Commissioner's view that on balance WYP do not hold the information requested.

18. He showed us the fruits of his original request which was a 12 page log which indicated the movement of master tapes of interviews. The Appellant pointed out that the initial response to his initial request for information about master audio tapes at Halifax police station had led to a response that there would need to be a manual search of 1,320,000 records to established how many tapes had been destroyed, rather than making reference to the log book which was subsequently disclosed. It was from this log that the current request originated, where the Appellant has picked out entries which appear wrong or incomplete.

19. He showed us a document which he had requested which relates to the tapes in his own case, which indicates that there is a 'custody tape book' relating to the creation of master tapes, and which lists both a tape reference number and a store reference number. The Appellant argued that each master tape would have such a store reference number which would enable its location to be identified.

20. The Appellant pointed out that WYP did indeed have a policy for audio tape storage which should create an audit trail which keeps track of audio tapes and who has access to them.
21. The Appellant emphasised the legal duty of the WYP to have a record of movements of tapes.
22. The Appellant's noted that the Commissioner had not addressed the detailed points that he had made about the systems in place to ensure that the movement of audio tapes was documented.
23. The Appellant's case was that, given the records that WYP actually kept and the legal duties to keep such records, then WYP must know what had happened to the tapes about which he had asked, and it could not be right that WYP did not have any further information which would explain the movement of the tapes asked about, or their present location.

## DISCUSSION

24. We understand the Appellant's frustration with WYP's approach to his requests and to its record keeping duties. It is the case that WYP did not respond to the Appellant in the statutory time period, and it also appears that its response to the Appellant's earlier request did not refer initially to the log book which was eventually disclosed. It is surprising, to say the least, that WYP cannot explain the whereabouts of audio tapes used or required by the criminal justice system, and it may be that that is an issue which the Commissioner can follow up with other powers, or a body like the Independent Office for Police Conduct (IOPC) might be contacted. However, it is not the role of this Tribunal to pass judgement on the record keeping abilities (or otherwise) of WYP.
25. WYP have responded to the Commissioner's queries about the searches that have been carried out to address the Appellant's requests. We have no reason to doubt that the searches described have been carried out and did the Commissioner, we take WYP's word that they have been done. Thus we accept that, as WYP says:-

A fresh search of the Master Tape Movement Record (202) (“the Record”) has been conducted. No additional information was held on the Record at the time of the fresh search to indicate where the tapes identified in the request were now or whether they have been destroyed.

The Record has been re-examined and no further information is held in relation to the accuracy of the record is held. West Yorkshire Police do not hold any additional information about the accuracy of the information held on the Record. Enquiries have been made and there is no audit process for checking the accuracy of information held on the Record

26. We note in the second paragraph the reference to ‘an audit process’ relates not to the movement of audio tapes, but to checking the accuracy on the Record.

27. We can see nothing in the WYP’s responses that it knows it has the audio tapes as claimed by the Appellant, or has the information to enable it to locate those tapes. There are, of course, always further searches that can be carried out, but on the basis of the responses we have seen from WYP it appears that it has carried out reasonable searches to locate the additional information requested by the Appellant, and has explained why that has yielded nothing further.

28. What was requested, of course, in all three parts of the Appellant’s request was for further ‘recorded information’ about the location or destruction of tapes, or the accuracy of data. WYP says it has searched for such recorded information but does not have it. We agree with the Commissioner that on the balance of probabilities, WYP does not hold the information requested.

29. On that basis the appeal is dismissed.

STEPHEN CRAGG QC

Judge of the First-tier Tribunal

Date: 16 August 2021.

Promulgated: 16 August 2021.