Appeal Number: EA/2021/0119

First-Tier Tribunal
(General Regulatory Chamber)
Information Rights
Between:

NICKY LAW

Appellant:

and

THE INFORMATION COMMISSIONER

First Respondent:

and

SECRETARY OF STATE FOR JUSTICE

Second Respondent:

Date and type of Hearing: (5 November 2021, 7 & 16 February 2022 on the papers)

Panel: Brian Kennedy QC, Anne Chafer and Suzanne Cosgrave.

Representation:

For the Appellant: Nicky Law as a Litigant in person

For the First Respondent: Will Perry of Counsel.

For the Second Respondent: Conor McCarthy of Counsel

Result: The appeal is dismissed.

REASONS

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA"). The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice ("DN") dated 8 April 2021 (reference IC-41776- L8L8), which is a matter of public record.

Factual Background to this Appeal:

[2] Full details of the background to this appeal, the complainant's request for information and the Commissioner's decision are set out in the DN. The appeal concerns a request for information about offenders over the age of 25 who, whilst on licence committed a serious further offence of murder, manslaughter or rape in 2018 and 2019.

[3] The Ministry of Justice ("the MOJ") have refused to provide the information for the remaining nine months of 2019. The Commissioner does not require the MOJ to take any steps as a result of this notice.

History and Chronology:

[4] On 2 April 2020, the complainant made the following request to the MOJ:

"For the data you currently have, could you please provide me the number of offenders who, whilst on licence and over the age 25, committed a serious further offence of murder or manslaughter or rape in each of 2018 and 2019? What were their index offences?"

[5] The MOJ made the following response on 21 April 2021, confirming that it held the information and citing section 44(1)(a) FOIA in their refusal:

"...the information is exempt from disclosure under section 44(1)(a) of the FOIA, because it is a subset of published data and the information is prohibited from disclosure by the Statistics and Registration Services Act 2007 and the Pre-release Access to Official Statistics Order 2008. We publish information in financial years and the information for 2018/2019 is due for publication in October 2020 while 2019/2020 is due for publication in October 2021. Following publication you could submit a further request for the extracted information under FOIA. The current data can be accessed via the following link:

https://www.gov.uk/government/statistics/serious-further-offences"

[6] The MOJ maintained its original position after an internal review.

Legal Framework:

[7] Section 1(1) of FOIA provides for a general right of access to information:

"(1) 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"

[8] FOIA, section 44 (1) provides that "*Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it – (a) is prohibited by or under any enactment…"* section 44 is an absolute exemption, so is not subject to the public interest test.

[9] The time for assessing the application of exemptions under FOIA is the time of the initial refusal up until the date of the communication of the outcome of

an internal review (see *APPGER v ICO and FCO* [2015] UKUT 377 (AAC), §§48-53; and *R (Evans) v Attorney-General* [2015] AC 1787 (SC), §§72-73).

[10] Section 10 of the Statistics and Registration Service Act 2007 ("the SRS") provides the publication of a Code of Practice for Statistics ("the Code").

[11] Section 11 of the SRS provides for pre-release access to official Statistics. Of particular relevance is section 11(2) of the SRS. It provides that; *"The appropriate authority may for the purposes of the Code by order provide for rules and principles relating to the Granting of pre-release access to official statistics.*"

[12] Section 13(1) of the SRS compels the MOJ, as a *"person producing any official statistics which are designated under section 12 as National Statistic"* to comply with the Code.

[13] Section 11(3) of the SRS provides that; *"The Code shall apply in relation to any official statistics as if it included any rules and principles provided for in relation to those statistics under subsection (2)."* As a result of this provision, all producers of National Statistics must comply with the provisions of the Pre-release Access to Official Statistics Order 2008.

[14] Sections T3.3 and T3.4 of the Code are relevant.

T3.3 Access to statistics before their public release should be limited to those involved in the production of the statistics and the preparation of the release, and for quality assurance and operational purposes. Accurate records of those who have access before they are finalised should be maintained.

T3.4 States Firstly, ***- "****The circulation of statistics in their final form ahead of their publication should be restricted to eligible recipients, in line with the rules and principles on pre-release access set out in legislation for the UK and devolved administrations."* and Secondly – "*The details of those granted access should be recorded, together with clear justifications for access. No indication of the statistics should be made public and the statistics should not be given to any other party without prior permission for access. The list of recipients should be reviewed regularly and kept to a minimum*."

Decision Notice:

[15] In the Commissioner's DN of 8 April 2021, the Commissioner concluded that the MOJ was correct to refuse to disclose the Disputed Information under section 44(1)(a) FOIA. The Disputed Information concerned the data for April 2019 to December 2019.

[16] The Commissioner concluded that having examined the submissions of both parties, including a copy of the withheld information provided by the MOJ, she is satisfied that the withheld information would provide an indication of the statistics in their final form, ahead of the official publication.

[17] Further, the Commissioner contended that it is important to remember that a disclosure under the FOIA is effectively a disclosure to the world at large. In the Commissioner's view, the provision of the requested statistics ahead of the publication of the annual bulletin would allow any member of the public to acquire the statistics in advance of their official publication, and would breach the provision of The Code, the Pre-release Order and by extension the ("SRS").

Grounds of Appeal:

[18] The Appellant argued that the Commissioner erred in her understanding and application of T3.4 of the Code. The Appellant advanced three criticisms of the Commissioner's analysis:

(i) The Appellant averred that the Commissioner misinterpreted what is meant by *"statistics in their final form"*. The Appellant stated that *"Final Form"* should be understood consistently with the *"National Statistician's Guidance – Management Information and Official Statistics"* "NS Guidance".

(ii) The Appellant contended that the Disputed Information is not a subset of the data as one cannot use the information published by the MOJ to derive from the information requested and whilst the MOJ publishes data by financial years, the request for information was for calendar years.

(iii) The Appellant argued that the information did not provide an indication of the statistics yet to published as it is subject to alterations before the time of publication. The Appellant relied upon as example from the NS Guidance of the Internal use of management information.

The Commissioner's Response:

[19] By email to the Tribunal on 2 February 2022, Daniel Rapport, Senior Lawyer – MoJ Public Law & SASO team, Justice and Development Division – Government Legal Department, confirmed that it has been agreed with the Information Commissioner that an unredacted version of the Information Commissioner's Response can be referred to in the same way as if it was Open.

[20] In response to Ground 1, the Commissioner referred to §24 of her DN wherein it stated that the Commissioner's central concern was that the disclosure could provide an indication of the statistics in their final form ahead of publication. This is derived from T3.4 of the Code, which provides "*No indication of the statistics should be made public".* The Commissioner adopted

a neutral stance in relation to the Appellant's timing argument, as it may be that further information is added to the Disputed Information from the date of the internal review to the date the MOJ starts to gather data for publication.

[21] In response to Ground 2, the Commissioner saw some force in the contention that the Disputed Information is not a subset of the MOJ published statistics but nevertheless the Commissioner maintained that the Disputed Information is a subset. The Commissioner stated that the MOJ should shed further light on whether subsets of published data are caught by pre-release rules and whether they might provide an indication within the meaning of T3.4 of the Code. Further, that public confidence in official statistics could be compromised if members of the public obtain seemingly comprehensive rival statistics, which only differ from published statistics by the reporting period.

[22] In response to Ground 3, the Commissioner repeated §29, of the DN however, the Commissioner contended that the Appellant's reliance on the example from the NS Guidance does not improve her arguments. As, NS Guidance states that each case will turn on its facts, the disclosure in this case would be by Central Government to the world at large under FOIA and from the example referred to, it would appear that concerns arose from the specific circumstances of monthly management information for January being exactly the same as what statisticians expected the final form official statistics number to be.

[23] On this basis, the Commissioner considered that the application of section 44(1)(a) is less clear-cut and the Commissioner indicated that the Tribunal would benefit from the MOJ's Response.

Appellant's Response:

[24] The Appellant welcomed the Commissioner's concession that the application of section 44(1)(a) FOIA is less clear-cut than initially anticipated. The Appellant considered the implications of the admissions by the Commissioner that the Disputed Information does not constitute statistics in their final form. The Appellant referred to the explanatory note accompanying the Official Statistics Order 2008 ("the Order"). Further the Appellant noted that pre-release access from section 11(8) of the SRS means access to statistics in their final form.

[25] The Appellant maintained her position that the Commissioner erred in her understanding of section T3.4. The Appellant referred to section 11(1) of the SRS to support her assertion. Further, the Appellant averred that the Commissioner's understanding of extending access to statistics, not in their final form, but providing an indication, is fraught with practical difficulties which will ultimately cause more problems than viewing the data before it is published. The Appellant claimed that you couldn't have advanced sight of what does not exist.

[26] The Appellant refuted the Commissioner's argument that the example relied upon from the National Statistics Guidance does not strengthen her argument. The Appellant reiterated the final paragraph of that example to argue that the example bolsters her argument:

"In supplying January's monthly management information, the data was exactly the same as what statisticians expected the 'final form' official statistics number to be. But following advice from the National Statistician's office, it was agreed that this data, while close to the 'final form' number, was not the same as the final form official statistics release which would be subject to formal pre-release access".

[27] The Appellant contended that her understanding of the Code is that the MOJ are not required to comply. The Appellant cited section 13(1) of the SRS,

which outlines the importance of complying with the Code in relation to any official statistics.

Second Respondent's Position:

[28] The Second Respondent argued that the Appellant's appeal should be dismissed. By enacting the SRS and its accompanying Code of Practice - Parliament introduced a new scheme for the publication and dissemination of national statistics, the overarching purpose of which was to ensure the quality and coherence of statistics which receive the official designation of "National Statistics". An essential part of this scheme was the creation of a detailed regime governing pre-release access to National Statistics in their final form. This regime is contained in the Pre-Release Access to the Order, which sets out highly restrictive rules, which limit access to National Statistics in their final form. As is clear both from the SRS and the Code, pre-release restrictions on access are designed to ensure that National Statistics are subject to rigorous quality assurance prior to publication and, when published, are published in a manner designed to ensure the "coherence" of the published statistics (to use the terminology of the Code). Compliance with the Code is made mandatory by the SRS (section 13 SRS).

[29] The Second Respondent contended that the Code regulates access to National Statistics, which should be in their final form. In particular, Section T.3.4 states that no indication of the statistics should be made public and the statistics should not be given to any other party without prior permission for access. **The list of recipients should be reviewed regularly and kept to a minimum"** (emphasis added). The term "indication" is a deliberately broad term and must be interpreted as such. Moreover, it must be understood in the context of the deliberately restrictive regime for pre-release access to National Statistics in their final form set out in the Order and envisaged by Parliament in Section 11 of the SRS. This restrictive regime on access would be readily circumvented if (as here) an information request (or several information requests) could obtain a sub-set of national statistics or could obtain indication of patterns, trends or the trajectory of national statistics whilst being gathered.

The fact that such an indication may not be entirely accurate or may provide a misleading “indication” of statistics in their final form does not resolve this concern. On the contrary, it reinforces it. The purpose of the SRS and the accompanying Code is to ensure that National Statistics are published in a timely and coherent fashion – an objective which would be undermined by a premature or misleading publication of statistics (including where there had not been opportunity for quality assurance measures to be carried out).

[30] The Second Respondent stated that the requested Information in the present appeal in effect, seeks an “indication” of statistical information published in the Serious Further Offending (“SFO”) Tables within the Proven Re-offending Statistics Quarterly (“PRS”) Bulletin. These statistics are designated by the UK Statistics Authority as “National Statistics”. The request relates to information which, at the time of the request, was being collated (and which will shortly be published in October 2021). It is true that the request relates exclusively to persons “over 25” (which is not a sub-division used in the final form statistics). However, they argue, this is not to the point. This is simply a subset of information to be published in the bulletin and may be taken to provide “indication” of that broader information. In any event, a further information request relating to offenders aged “25 and under” would reveal the totality of information and circumvent the obligation not to provide indication of statistics to be published. The Appellant also relies on the fact that she merely requested data for calendar years and the bulletin publishes information for financial years. Again, this point, the Second Respondent argues is misconceived. Data for calendar years, they argue could readily be regarded as providing an “indication” of the likely content, trends, patterns etc of final form statistics. The fact that this may, or may not, be an accurate impression – is all the more reason why the Code seeks to prohibit this form of publication. The Second Respondent confirmed that at this stage they are content for matters in the appeal to be determined on the papers but this is dependent on any Reply from the Appellant and the Second Respondent will confirm its position once the Appellant has filed her Reply.

Appellant's Response to the Second Respondent:

[31] The Appellant provided a brief history of the development of the Statistics and Service Registration Act and its associated pre-release access to the Official Statistics Order and the Code of Practice for statistics. The Appellant averred that the Code outlines that practice for producing official statistics. The Appellant referred to section T3.4 to indicate that it is clear that this section concerns disclosing statistics in their final form before publication in line with the rules and principles on pre-release access set out in legislation. The Appellant believed that the MOJ have changed their stance on T3.4. The Appellant stated that they clearly understood "no indication" in T3.4 as a reference to pre-release access as defined in the Order and by the Act. However, the Appellant asserted that the MOJ are now implying that T3.4 concerns pre-pre-release. The Appellant submitted that the MOJ's understanding of T3.4 requiring "no indication" would result in their SFO publication being in direct breach of T3.4.

[32] The Appellant contended that this is the first time that the MOJ have included the SFO bulletin as part of the PRS. The Appellant stated that the SFO bulletin was a separate publication. The Appellant questioned why there would be two separate bulletins on the same day for the same publication? The Appellant argued that the proof is in the display of the National Statistics logo inside the bulletin.

Witness Statement of Jo Peacock:

[33] Jo Peacock is a senior civil servant with over twenty years, experience working as a government statistician. As Chief Statistician and Head of Profession for Statistics at the Ministry of Justice, Ms. Peacock has the professional responsibility for all statistical matters including timing and content of statistical publication, and safeguarding the professional integrity of the department's National Statistics and Official Statistics.

[34] Ms. Peacock stated that the information requested is a subset of that published annually on the SFO. The data is published in financial years with a

time lag between the period the data relates to and its publication to allow time for cases to complete. The data is drawn from a live system but this does not mean that earlier data could not give an indication of the trajectory etc. seen in the published figures in their final form. This data is subject to possible errors with entry and processing and this is a normal part of the production process for any statistical publication. These changes are likely to be very limited and are not material enough to mean that the requested statistics would not provide an indication of the published statistics in their final form.

[35] Ms. Peacock indicated that the Requested Statistics are a subset of data, which, from 2014 to 2018, were published as the SFO Annex to the PRS Quarterly Bulletin. Prior to this, SFO statistics were published in July 2012 as part of the Compendium of re-offending statistics and analysis ("the Compendium"). In 2019 and 2020, rather than being referred to as an annex to the PRS bulletin, the SFO statistics were published as the SFO annual bulletin. This change has no impact on their designation as National Statistics. The publication of SFO statistics under the label of Official Statistics rather than National Statistics in 2019 was an error but does not change the fact that the statistics were in effect National Statistics. Further, that the logo on the document does not determine designation, rather the designation is done by the Office for Statistics Regulation as set out in their designation letter.

Appellant's Final Submissions:

[36] The Appellant argued that the MOJ have departed from their long-held interpretation of section T3.4 of the Code. The Appellant referred to the recent MOJ response of FOI – 200624010 dated 20/07/2020:

"The information you have requested is a subset of the HMCTS Tribunals Statistics data held in its final form which we routinely publish. It is intended for publication later in 2020. As such we are required to consider your request in a manner compliant with the Pre-release Access to Official Statistics Order 2008 further to Sections 11 and 13 of the (SRS) Act 2007. The MoJ is obliged

under Section 13 of the SRS Act to continue to comply with the Code of Practice for Official Statistics (the Code) for statistics designated as National Statistics. Section 11(3) of the SRS Act regards the Pre-Release Access to Official Statistics Order as being included in the Code. Protocol 2 of the Code reflects the requirements of the Pre-Release Access to Statistics Order. Specifically, it requires producers of official statistics to ensure that no indication of the substance of a statistical report is made public, or given to the media or any other party not recorded as eligible for access prior to publication. I can confirm that the MoJ does publish information related to Personal Independence Payment Tribunals as part of National Statistics. Therefore, to now disclose as part of your FOI request, will violate the provisions of Section 13 of the SRS Act and the Pre-Release Access Order to Official Statistics 2008 and as such engages the exemption under Section 44(1)(a) of the FOIA." (see below for reference)."

[37] The Appellant referred to paragraph xxiii on page [10] of the Code for the purposes of highlighting that the practices in the Code are not laws but tools to guide behaviours and not a prescriptive list of requirements. The Appellant contended that the MOJ's new interpretation of section T3.4 is not practicable and is unreasonable. Further, that the reading of Section T3.4 seems to suggest that the disputed information should itself be an indication of the statistics in their final form and not simply that it could give an indication of the statistics in their final form. The Appellant asserted that the MOJ have failed to demonstrate that the disputed information could give an indication, let alone is an indication.

Commissioner's Final Submissions:

[38] The Commissioner held the view that when T3.4 of the Code is applied, there must be a context specific analysis of whether or not the information in question provides an indication of statistics in their final form before their publication. The Commissioner submitted that there must be some form of fact-specific comparative exercise. The Commissioner referred to the exercise

carried out by the witness Jo Peacock at §3 entitled “Changes to the Requested Statistics” of her witness statement;

“The data is drawn from a live system, and by its nature will change over time as court cases conclude and offenders are convicted. However, this does not mean that earlier data could not give an indication of the trajectory, trends or patterns later seen in the published figures in their final form. Statistical data regarding serious further offences is drawn from administrative and IT systems which, as with all large-scale recording systems, are subject to possible errors with data entry and processing. As part of the data assurance process ahead of publication, some data may be amended. This is a normal part of the production process for any statistical publication. The changes made are likely to be very limited and are not material enough to mean that the Requested Statistics would not provide an indication of the published statistics in their final form.”

[39] Further, the Commissioner referred to *R (Evans) v Attorney General* [2015] AC 1787 (SC), at §73:

“…facts and matters and even grounds of exemption may, subject to the control of the Commissioner or the tribunal, be admissible even though they were not in the mind of the individual responsible for the refusal or communicated at the time of the refusal to disclose (i) if they existed at the date of the refusal, or (ii) if they did not exist at that date, but only in so far as they throw light on the grounds now given for refusal…”

[40] The Commissioner considered that the MOJ’s evidence throws light on the grounds given for refusal – namely that disclosure of the Disputed Information would provide an indication of statistics due for publication – and is therefore admissible. The Commissioner believed that the Tribunal should compare the Disputed Information with the relevant SFO Bulletin. (See below at para [73] herein.)

[41] The Commissioner indicated that the SFO Bulletin raises the possibility that the appeal is rendered academic, however, both parties wish to proceed. The Appellant has indicated she will be submitting further requests in the future. Therefore, the appeal could resolve an important point of principle rather than through a further set of proceedings. Further, the Appellant does not require the information to be published but rather what the Commissioner and MOJ consider to be a subset of that information. The Commissioner invited the Tribunal to reach a decision.

Appellant's Additional Final Submissions:

[42] The Appellant stated that T3.4 is with regard to the *"full data set from which data tables and statistics will be produced as part of an official statistic*". The Appellant averred that the full data set here refers to the full complement of data or the final form data set from which tables, figures and, commentary will directly be produced for release. The Appellant contended, in relation to "indication", the disclosure must enable the recipient to produce the figures to appear in the publication. The example of a request for daily data from an official statistic quarterly release prior to publication would enable the recipient to produce the figures that would be subsequently published in the release of official statistics.

[43] The Appellant stated she is disappointed with the Commissioner's final submission. The Appellant highlighted that the final form statistics did not exist at the time her request was responded to, which is a requirement of the Order. The Appellant identified that the Disputed Information concerns the information for the remaining 9 months of 2019 and all of the information in April 2020.

Second Witness Statement of Ms Jo Peacock:

[44] Ms. Peacock explained, in relation to indication that, the specific figures which are, in the end, published reflects editorial judgment bearing in mind factors such as clarity, coherence and accessibility. As such, all of the statistics which are produced for the purposes of the Serious Further Offences Bulletin are

National Statistics for purposes of 12 (2) of the SRS and not merely those statistics which are formally published or highlighted in that publication. Once publication occurs, the MOJ will ordinarily provide underlying data where a request is received.

[45] Further, that the Requested Information concerned a subset of National Statistics, which were in the process of being produced and then used for the Serious Further Offences Bulletin. In this sense, disclosure would have provided a very direct "indication" of the National Statistics, – by directly disclosing a subset of those National Statistics prior to them being made publicly available. The fact the Appellant requested the National Statistics in a form, or subset, which was not necessarily the way in which they would eventually be collated and published as part of the bulletin is nothing to the point – the requested subset was itself a component of those National Statistics (See C2 Supplementary Bundle at Paragraph 3).

[46] Ms. Peacock pointed out that had the Requested Information been disclosed, it would have been apparent that the relevant conviction figures for murder, rape and manslaughter would be unlikely to fall materially below the requested figures by the time final form statistics came to be published during the requested period. The completion of further trial processes may have added to the final figures – but it is much less likely that clerical amendments or overturned convictions would have reduced the figures provided. Additionally, the number of manslaughter convictions at the time of the request (7) would have provided approximate indication of the final figure (11)

[47] Ms. Peacock averred that it would be possible via simple extrapolation from past trends to use the Requested Information to form an accurate estimate of the final form statistics. With this approach, disclosure of the Requested Information would have enabled the following estimations: Murder – 27 (actual figure 30); Manslaughter – 12 (actual figure 11); Rape – 28 (actual figure 27); and Total – 67 (actual figure 68).

[48] Ms. Peacock explained that disclosure at the time of the request could have provided the public with a misleading indication of the eventual number of persons who had been convicted whilst on licence for an index offence. In particular, premature (and incomplete) publication of the underlying statistics for the relevant period would have provided a wholly misleading indication to the public as to the number of convictions which occurred during the relevant period, given that many criminal trials will not have been completed by the time of a request such as that in the present case. This would have undermined the care taken by the MOJ statisticians – consistent with the Code – to ensure that data was published in a manner which gave a coherent, accurate and complete picture of the relevant statistics. As Ms. Peacock explains, it is precisely to avoid giving misleading information that there is a deliberate time lag between the publication of the bulletin and the period to which a SFO Bulletin relates.

[49] Finally, in relation to the Tribunal's query on the Second Respondent's interpretation of the Appellant's initial request, Ms Peacock noted that the information could be aggregated into a table Ms Peacock noted that the same information provided as a table with the number of cases in each category, which could be relatively easily disaggregated into the format that was supplied. The SFO Team, according to Ms. Peacock received no response from the Appellant to indicate that the information had been presented incorrectly and did not respond to her request.

Commissioner's Further Final Submissions:

[50] The Commissioner maintained that the Disputed Information is exempt from disclosure by virtue of section 44(1)(a) FOIA. The Commissioner reiterated that the Code may apply where the requested data and published data are subject to different time periods. The Commissioner argued Ms Peacock's Second Witness Statement supports this.

[51] The Commissioner stated that she takes no issue in the way that the MOJ have disclosed some information pursuant to the Appellant's request. The Commissioner referred to *Home Office v IC and Cobain* (EA/2012/0129), at §29 to support the same.

[52] The Commissioner indicated that the MOJ has not relied on section 40 FOIA as it may concern the interests of individual third parties. Further, the Commissioner did not consider it necessary to raise the section 40 FOIA issue with the MOJ. The Commissioner reiterated the Upper Tribunal's position in *Information Commissioner v Miller* [2018] UKUT 229 (AAC), at §28, see also *R (Department of Health) v Information Commissioner* [2011] EWHC 1430 §70. If the MOJ wishes to rely on section 40 at this very late stage, subject to the Tribunal's case management powers, it is able to do so: *McInerney v IC and Department for Education* [2015] UKUT 0047 (AAC), and *IC V Home Office* [2011] UKUT 17 (AAC).

Witness Statement of Ms Chapman:

[53] Ms. Chapman is Head of the HMPPS SFO Team in the Public Protection Group, HM Prison and Probation Service. Ms. Chapman explained that section 40 FOIA was considered in relation the Requested Information sent to the Appellant on 6 November 2020. Ms. Chapman believed that it was possible to provide the Requested information without identifying "personal data" for the purposes of section 3 of the Data Protection Act 2018. Ms. Chapman stated as follows:

"At the time of the original FOI request from the Appellant in April 2020, the MoJ did not initially consider section 40, as the immediate focus was around the issue that the information was exempt from disclosure under section 44. Following the publication of the annual SFO bulletin on 29 October 2020, the MoJ reconsidered the Appellant's request. There were discussions between

Senior Policy Advisers on the SFO Team and the Statistician, on 5 November 2020, which considered the presentation of the information and whether it could result in identification of individuals. Following consideration, the decision was taken to provide the information in anonymised format. It was considered that disclosure of anonymised index offences and SFO conviction details, combined with the requestor's knowledge that the individuals were over 25 and on licence, would ***probably*** (our emphasis) *not lead to accurate identification of specific individuals. The MoJ provided the Appellant with the requested information for 2018 and the first three months of 2019 on 6 November 2020."*

[54] Ms. Chapman noted that the Second Respondent recognised that section 40 issues will require consideration on a case-by-case basis where an information request is made. However, Ms Chapman stated that in future requested the Second Respondent will give careful consideration to the issue of indirect identification and where appropriate, respond to data requests by providing information in aggregated format. Ms. Chapman referred to exhibit **LC1.**

[55] The witness explained that after publication of the annual SFO bulletin on 29 October 2020 the request was reconsidered and this included the presentation of the information and whether this could result in identification of individuals. The outcome was that "*disclosure of the anonymised index offences and SFO conviction details, combined with the requestor's knowledge that the individuals were over 25 and on licence, would probably not lead to accurate identification of specific individuals."*

[56] Following the Tribunal's Directions this was reviewed and the cognate information available to the public, including press reporting, was taken into account. The witness confirmed that they "*remain satisfied that the information does not disclose 'personal data' for the purposes of s3 of the Data Protection Act 2018 or Article 4(1) of the UK GDPR."*

[57] Reference was made to "*one offender whose conviction and licence breach was subject to extensive public reporting. However, this offender is now deceased so indirect identification through press reporting would not provide 'personal data' for purposes of the Data Protection Act 2018."*

[58] The witness stated that the MoJ will consider S40 issues on a case by case basis for future information requests, with careful consideration of indirect identification. Where appropriate, the information will be provided in an aggregated format.

Further Submissions of the Second Respondent:

[59] The Second Respondent stated that Disclosure of the Requested Information would have provided "indication" of the final form statistics produced for the purposes of finalising the 2021 SFO Bulletin. Further, the Second Respondent agreed with the Commissioner's submission from 28 October 2021 whereby the Commissioner stated that the final form National Statistics that informed the 2021 Bulletin could throw light on the grounds now given for the refusal decision.

[60] The Second Respondent submitted that the Commissioner was correct to find that the disclosure of the Requested Information was prohibited by an enactment pursuant to Section 44(1)(a) FOIA for the reasons outlined in its July submissions. The Second Respondent adopted Ms. Peacock's statement on the issue of "indications" outlined in her second witness statement to contend that it is clear that disclosure of the Requested Information prior to publication of the SFO bulletin would have contravened the Code and therefore, been in breach of the statutory duty imposed by Parliament on the Second Respondent via Section 13(1) of the SRS.

[61] The Second Respondent argued further that under the statutory scheme it is the statistics, which are designated as "National Statistics". Ms Peacock stated that since the precise metrics that are published in a bulletin may vary

from year to year it follows that disclosure of a subset of National Statistics, which have not been published is contrary to the code regardless of whether it is intended that those statistics be published in the format requested within the bulletin. The Second Respondent refuted the Appellant's contention that T3.4 of the code is concerned with prohibiting the indication of a full data set. Further that the Appellant, they argue, is mistaken in her view that the disclosure must enable the recipient to produce the figures to appear in the publication.

[62] The Second Respondent echoed the explanation of Ms Chapman in her witness statement on section 40 FOIA. The Second Respondent believed that this issue will always need to be assessed on a case-by-case basis and information may result in an issue under section 40 FOIA. The Second Respondent has now adopted a revised format to provide information to the Appellant in respect of 2019 in a manner, which the Second Respondent considers, still responds properly to the request. In sum. The Second Respondent does not consider it necessary to rely on a section 40 exemption.

Appellant's Further Final Submissions:

[63] In response to Ms. Peacock's second witness statement, the Appellant averred that an indication concerns what already exists and a prediction concerns what does not exist. Therefore, the Requested Data subject to appeal could not have been an indication of a future SFO publication that did not exist at the time of the Appellant's request.

[64] The Appellant reiterated paragraphs 32 and 33 of DN IC-39663-W7C4 for the purposes of outlining the threshold for indication. The Appellant argued that the indication being claimed by the Second Respondent is not of published information but something that is not published. The Appellant stated the claim that the requested statistics are a subset of the final form contained in Table 1, Table 2, and Table 4 of the SFO Bulletin is factually untrue. The Appellant contended that the Second Respondent has failed to demonstrate

how the requested information would be an indication of the information published in the SFO Bulletin.

Information Commissioner Further Response:

[65] The Commissioner responded that it is primarily for the public authority to determine whether information falling within the scope of the request should be withheld from disclosure on the basis of any relevant exemptions (FOIA s17). As s40 concerns the interests of individual third parties there may be instances when the Commissioner asks the public authority to consider the application of this exemption however in this case it was not considered necessary to raise the s40 issue with the MOJ.

[66] The Commissioner stated that the MOJ would need to demonstrate that the information was personal data within the definition in the Data Protection Act 2018 s3:-

(2) "Personal data" means any information relating to an identified or identifiable living individual (subject to subsection (14)(c)).
(3) "Identifiable living individual" means a living individual who can be identified, directly or indirectly, in particular by reference to—

(a) an identifier such as a name, an identification number, location data or an online identifier, or

(b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

[67] The Commissioner referred to *Information Commissioner v Miller [2018] UKUT 229 (AAC)*, at para 28, which confirmed the essential question for the MOJ to ask is "what are the chances of an individual being identified? " The MOJ would also need to address (a) whether, in the past, identification had occurred from published statistical information, and (b) identify what information in the public domain could be used by a "motivated intruder" in

conjunction with the Disputed Information, so as to identify individual offenders: *R (Department of Health) v information Commissioner [2011] EWHC 1430, para 70.*

Conclusion:

[68] The Tribunal welcomes the additional Witness statements herein that are cogent and comprehensive and serve to undermine what we consider to be the flawed arguments made by the Appellant. We are of the view that these are succinctly explained by reference to the Second Respondent's Response generally, and most specifically at page A166 of the OB where at paragraph 16 of the Second Respondent's submissions they state; "*The clear purpose of this regime to establish a strict/rigorous* regime *by which pre-release access to statistics in their final form is controlled. However, as explained below, the Code of Practice also carefully regulates the release of statistics, which are not in their final form. <u>This is equally important since – if this were not done – the very strict rules around pre-release access would be circumvented. Moreover, the policy structures on the release of statistics which are not in their final form – must be seen against the need to ensure the effectiveness of this very strict regime created by Parliament governing pre-release disclosure of national statistics."</u>*

[69] This, we find, demonstrates the Public Authority (MOJ) were correct in their reliance on the exemption provided by s44 of the FOIA in relation to the withheld information, the subject of the Request.

[70] In relation to the first ground of appeal, we agree with the submission that Section T3.4 of the Code of Practice states: "*The circulation of statistics in their final form ahead of their publication should be restricted to eligible recipients, in line with the rules and principles on their pre-release access set out in legislation for the UK and devolved administrations. – No indication of the statistics should be made public and the statistics should not be given to another party without prior permission to access".*

[71] We accept, endorse and adopt the submission that an "indication" of the statistics prior to them taking their final form may not be made. We find the rigorous controls imposed on access to National Statistics would be undermined by a release in the manner envisaged by the Appellant. We find without the time provided for quality assurance measures, there may be a risk of fragmented, incoherent or selective statistics being presented to the public (as the Second Respondent argues) and in the case of a FOIA request to the world at large. We accept the submission that the interpretation of the Code means "- *no indication*" may be given.

[72] We accept the Second Respondent's submission in relation to the Appellant's third Ground of Appeal, that the Code prohibits any indication of statistics in final form, whether accurate or misleading as to statistics in final form. As the Second Respondent has repeatedly indicated, the data is live (appeals etc.), and the data is further subject to quality checks prior to final publication.

[73] At Page A24 – 25 of the Supplementary Bundle the Commissioner believed that the Tribunal should compare the Disputed Information with the relevant SFO Bulletin. Our findings conclude that all the information, not just that published, is covered by s44. In the second witness statement from Jo Peacock dated 10 November 2021, she says "*the designation* [National Statistics] *applies to the entirety of the Bulletin as well as to the underlying data set from which the statistics are produced -*" -------- "*- all of the statistics that are produced for the purposes of the Bulletin are National Statistics –*" The Tribunal accept and agree that the information supplied are National Statistics.

[74] In submissions, on behalf of the First Respondent dated 23 November 2021 at para 3 the reference to " - - - *the Commissioner assumes that the intended reference is to Paragraphs 22 – 23" of the DN in this instance.* The Tribunal wish to indicate that was not the case. Para 75 below shows the submissions given by the Second Respondent on the topic they had sought guidance on. The Tribunal were in fact greatly assisted by the further submissions from the MOJ dated 24 November 2021, at Paragraph 13.1 and 13.2 wherein they drew attention to the evidence given in a DN dated 14 December 2021 on a similar topic with the MOJ involving the application of s44 to National Statistics.

"Para. 13. *The November Directions also invited the parties to address the Full Data Set "mosaic effect" addressed by the Commissioner in the 14 December 2020 Decision Notice IC-39663-W7C4 §§ 32 and 33. In these paragraphs:" 13.1. The Office for Statistics Regulation's Head of Policy and Standards is quoted, making the point that the full data set form part of the official statistics covered by the Code of Practice. The Head of Policy makes the further point that the Code requires that no indication be given of such statistics prior to publication and that providing a subset of the data would compromise the principle of equality of access to statistical data.*

13.2. In addition, at paragraph 33 of the paragraph highlighted by the Tribunal the MOJ are quoted as making the point that the entire data set of statistics comprise the official statistics covered by the Code of Practice.

14. The MOJ agrees with these points, which are consistent with the submissions the MOJ has advanced in the present appeal"

[75] The Appellant gives a lengthy History of the development of the Statistics and Service Act (Act or Bill) and its associated Pre-Release Access to Official Statistics Order and the Code of Practice for Statistics and the perceived lack of independence of producers of statistics from ministers, politicians and

policy officials. Although requests under the FOIA are motive blind, and the aim is to provide Transparency and Accountability on the part of Public Authorities, the legislation includes exemptions (in this case an absolute exemption where there is no Public Interest test) and the exemptions have an important purpose as has been demonstrated by the Second Respondent and evidenced by their witnesses in this appeal.

[76] Further the Tribunal must at all times be cognisant of the use of Public Authority time and resources in dealing with requests. The Appellant has indicated her intention of making this request on an annual basis and the Tribunal consider it important that the matter is clarified as such similar requests in future might be regarded as vexatious. (See Below on S40 considerations).

[77] Having considered and deliberated upon all of the evidence and submissions before us, we find neither Error of Law, nor flawed exercise of any discretion on the part of the Commissioner in the impugned DN. Accordingly, and for the reasons above we dismiss the appeal.

[78] In the course of this appeal it has become apparent that the consideration of s40 (Personal Data) is likely to arise again given the Appellant's indication that similar request will follow. In light of this the Tribunal offer their view on the s40 considerations.

Section 40 Considerations

[79] At the first hearing in November 2021, the panel were provided with the data for 2018 in the format that had been provided to Ms Law in November 2020. This was in the form of a table, which gave for each individual the type of Index Offence for which the person was on licence, and the type of Serious Further Offence committed whilst on licence for which the person had now been convicted. The Tribunal were concerned about the likelihood that an individual might be identifiable and that S40 would be engaged. Taking into consideration that the Appellant has indicated that she will be submitting very similar requests at a similar time in the future, the Tribunal issued Directions which asked the MOJ and the Commissioner what consideration has been given to the s40 implications of the release of the information in this format.

[80] The Tribunal is cognisant of the recent Upper Tribunal decision in NHS Business Services Authority v Information Commissioner & Spivack [2021] UKUT 192 (AAC) which revisited the issue of a database with very small numbers where the use of other publicly available information may make the data subject(s) identifiable. Judge Jacobs held at para 12 that s 3 of the Data Protection Act 2018 "" *creates a binary test: can a living individual be identified, directly or indirectly? If the answer is 'yes', the data is personal data."* This is consistent with the GDPR and "*There is no mention of any test of remoteness or likelihood."* Para 13 states that the *'test has to be applied on the basis of all the information that is reasonably likely to be used, including information that would be sought out by a motivated inquirer."*

[81] This is a reference to Recital 26 of the Regulation which states that "*To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, whether by the controller or by another person to identify the natural person directly or indirectly. To ascertain whether means are reasonably likely to be used to identify the natural person, account should be taken of all objective factors, such as the cost of and the amount of time required for identification, taking*

into consideration the available technology at the time of the processing and technological developments."

Judge Jacobs at paras 20 – 22 considered the cases of *R (Department of Health) v Information Commissioner* [2011] EWHC 1430 (Admin), *Information Commissioner v Miller* [2018] UKUT 229 (AAC), *R (Bridges) v Chief Constable of South Wales Police* [2020] 1 All ER 864 (in the Divisional Court) and Case C-582/14 *Breyer v Federal Republic of Germany* (EU:C:2016:779) and the concept of risk or possibility of identification they had used.

Judge Jacob's discussion of para 46 *Breyer* (which states that '*the risk of identification appears in reality to be insignificant)* and para 45 *Breyer is as follows:*

"20. There was an argument before me whether the Court was talking about means or outcome. What I take from the judgment is this. Means and outcome are inevitably linked. Speaking of one, inevitably involves speaking of the other. The chance of a particular outcome depends on the means that can be employed and the means available controls the potential outcome. By limiting the means that can be employed, the chances of identification are reduced.

21. That is not, though, the same thing as imposing an additional test of remoteness or significance or likelihood. Eliminating those means will exclude any possibility of identification that is insignificant. Similarly, if this is different, any possibility that is extremely remote is also excluded. But the test remains whether it is possible to identify a specific individual solely by relying on the data available.

22. Identifying a pool that contains or may contain a person covered by the data is not sufficient. Saying that it is reasonably likely that someone is covered by the data is not sufficient. Still less is it sufficient to say that it is reasonably likely that a particular individual may be one of the pool. Linking any specific individual to the data in any of these circumstances does not rely solely on the data disclosed and other data available by reasonable means; it involves speculation. This is the point that the tribunal was making when it

referred to guessing. Any break in the chain between the information and the data subject can only be bridged by speculating or guessing. That is especially likely to arise when there is a pool of potential subjects."

Judge Jacobs concluded that para 45 Breyer is consistent with the legislation 'that actual identification is necessary in order for data to be personal data.

[82] Applying this to the statistical information subject to this appeal, we note that contained within the published data for 2018 there are some very specific Index Offences which only occur once in the list as opposed to others such as burglary, rape, wounding for which there are several offenders. In our opinion, there are likely to be individuals who are aware of the name of the offender/offence details in these very specific cases through their involvement with the Index Offence such as the victim, witnesses, family and others providing support to them i.e. teachers, counsellors. By using the information they are aware of they will be able to identify the Serious Further Offence for which the offender has now been convicted thus engaging s40 of the FOIA.

Brian Kennedy QC 16 February 2022.

Promulgated: 17 February 2022