



**Appeal Number: EA/2021/0062**

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

**Between:**

**Andrew Preston**

**Appellant:**

**and**

**The Information Commissioner**

**First Respondent:**

**and**

**The Chief Constable West Yorkshire Police**

**Second Respondent:**

**Date and type of Hearing:** 5 October 2021 & 3 March 2022. – GRC – Remote CVP.

**Panel:** Brian Kennedy QC, John Randall CBE and Dave Sivers.

**Representation:**

**For the Appellant:** Andrew Preston as a Litigant in person.

**For the Respondent:** Robert Cohen of Counsel.

**Decision:** The appeal is refused.

## 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 2 February 2021 (reference IC-48664-Y6S4) which is a matter of public record.
2. The Tribunal Judge and lay members sat to consider this case on 5 October 2021 and further to an adjournment application on that date, to join the Public Authority as a Second Respondent a full hearing on the 3rd March 2022.

### Factual Background to this Appeal:

3. 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, the appeal concerns the question of whether, on the balance of probabilities the West Yorkshire Police (“WYP”) held more information (than released) which meets the terms of the request.

### Chronology:

- |               |   |
|---------------|---|
| 20 April 2020 | Mr Preston wrote to West Yorkshire Police and requested information concerning the timing of all FOI requests processed by WYP from 1 <sup>st</sup> June 2014 to 20 <sup>th</sup> April 2020. |
| 18 June 2020  | WYP responded by email, attaching a letter dated 14 May 2020, with the requested information.   |
| 1 July 2020   | Mr Preston requested an internal review.  |

9 Sept. 2020

Following an internal review, WYP wrote to Mr Preston, maintaining its original position.

Relevant Legislation:

S1 FOIA – General right of access to information held by public authorities

*(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.*

*(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.*

*(3) Where a public authority—*

*(a) reasonably requires further information in order to identify and locate the information requested, and*

*(b) has informed the applicant of that requirement,*

*the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.*

*(4) The information—*

*(a) in respect of which the applicant is to be informed under subsection (1)(a), or*

*(b) which is to be communicated under subsection (1)(b),*

*is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.*

*(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).*

S57 FIOA – 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.*

S58 FOIA – Determination of appeals

*(1) If on an appeal under section 57 the Tribunal considers—*

*(a) that the notice against which the appeal is brought is not in accordance with the law, or*

*(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*

*(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

Commissioner's Decision Notice:

4. The Commissioner reminded herself that her duty is to decide whether a request for information made to a public body has been dealt with in accordance with the requirements of Part I of FOIA.
5. In acknowledgment of the Appellant's dispute, the Commissioner recognises the considerable effort vested into highlighting the apparent discrepancies in the disclosed information.

6. The Commissioner's decision is that WYP failed to respond to the request within 20 working days and therefore breached section 10(1) (time for compliance with request) of FOIA. However, the public authority will have complied with their obligations under the FOIA where they have provided the recorded information that they hold in relation to the request, irrespective of its accuracy. The Commissioner further points out that entries published on WYP's FOI disclosure webpage, do not fall within the scope of the request.

#### Appellant's Grounds of Appeal:

7. The Appellant's grounds of appeal concern the validity, reliability, completeness, consistency, and correctness of the information held by WYP. The Appellant details these grounds at paragraphs 2 – 9 of the Grounds of Appeal ("GoA"). The Appellant seeks an admission of liability from the Commissioner and asks that the Commissioner review FOI disclosure in cases which the data content is incoherent. The Appellant requests that WYP obtain the correct data from source records in accordance with section 12 FOIA. Furthermore, the Appellant reminds WYP of their duty under section 16 FOIA.

#### Commissioner's Application:

8. The Commissioner made an application for strike out of the Appellant's case. The Commissioner identified the Appellant's concern in relation to the accuracy of the information provided to him in response to his request. The Commissioner appreciates the considerable effort the Appellant has made in this case. However, the Commissioner reminds the Appellant that WYP will have complied with their obligations under FOIA once the information held has been released, regardless of its accuracy. The Commissioner relies upon the Tribunal's decision in Councillor Jeremy Clyne v IC and London Borough of Lambeth EA/2011/0190. The Commissioner refers the Tribunal to section 58 FOIA, whereby the Tribunal's jurisdiction is limited to whether the DN is in error of law.

Appellant's Response:

9. The Appellant resisted the Commissioner's application on the basis that the Commissioner had misinterpreted the grounds of appeal. The Appellant stated that the appeal concerns the information held by WYP as opposed to the information subject to the request. The Appellant clarified that the appeal is not made on the grounds that WYP failed to comply with their duty under section 1 FOIA but on the grounds that the public authority failed to provide accurate information, which it held at the time of the request.

Commissioner's Response:

10. The Commissioner maintains that the WYP have fulfilled their obligations under section 1 FOIA in that it has provided all the information it holds. The Commissioner is not going to review whether the information is accurate as this is not required by section 1 FOIA. The Commissioner refers to the Tribunal in Councilor Jeremy Clyne v IC and London Borough of Lambeth EA/2011/0190 at paragraph [38] where it was held that the "issue for the Tribunal is not what should have been recorded and retained but what was recorded and retained". The Commissioner submits that the Appellant has advanced no argument of substance and invites the Tribunal to dismiss the appeal.

Appellant's Reply:

11. The Appellant asserts that the Commissioner has repeatedly misinterpreted the grounds of appeal in this case. The Appellant repeats point 4 of his previous correspondence:

*"4. This appeal is not made on the grounds that WYP has failed to comply with some duty to provide accurate information where the only information it actually holds is inaccurate. Nor does it suggest that WYP should create new information to satisfy the request.*

*This appeal is made on the grounds that the authority has failed to provide accurate information which it held at the time of the request*

Appellant's Closing Submissions:

12. The Appellant stated that the appeal concerns the failure to comply with section 1 FOIA. The Appellant referred to the evidence presented on 30/11/21 concerning the closed data. The Appellant posed several questions for the Tribunal's consideration at the hearing of this case. Firstly, the Appellant required an explanation as to why the date on the records supplied under 2355/20 is subsequent to the date closed. The Appellant anticipates each breach of procedure to be a violation of FOIA and it is in the public interest that this position be rectified.
13. The Appellant identified a discrepancy in the volume of FOIA requests in comparison to that reported under 2355/20. Further, in relation to 2355/20, the Appellant sought clarification on why the volume of requests supplied differs from those provided to the Commissioner to be published online. The Appellant questioned which set of data between that supplied to him and the Commissioner is the correct set of data. The Appellant stated that it appears that the Commissioner wished these discrepancies had not been uncovered. The Appellant averred that the Second Respondent has breached section 1 FOIA, and that the data is still held. The Appellant raised the minimum retention period for FOIA request information. The Appellant referred to the Commissioner's guidance on this point.
14. The Appellant averred that public confidence in the Police is "*at an all time low*" and that there is a public interest in matters relating to disclosure failures. The Appellant argued that the Commissioner should have concern for the validity of the data it holds and should investigate the discrepancies identified. The Appellant acknowledged that the Tribunal does not have jurisdiction over the quality of data published by the Commissioner. The Appellant submitted

that the Tribunal should order the Second Respondent to provide an agreed proportion of data within the cost limit.

#### Second Respondent's Closing Submissions:

15. The Second Respondent noted the pattern in respect of entries that have a negative number of days between the closure of the case and the receipt of the request. The Second Respondent explained that this relates to a filter response which filters a request without having to conduct a full review as to what was held. The Second Respondent referred to the Appellant's list of cases with an apparently negative response time.
16. The Second Respondent, with reference to the Appellant's list, stated that the overwhelming majority of a negative results have occurred in cases where a filter response has been given. The Second Respondent noted that the Appellant sought the raw data and did not ask for commentary to be provided. The Second Respondent stated this does not make good an argument that information was held and not lawfully disclosed. The Second Respondent argued that some discrepancies will be attributable to the request being received at the weekend or a bank holiday as the FOI request timescale starts the working day after the request. The Second Respondent submitted that the idiosyncrasies and anomalies are referable to FOIA timetables, the application of filter responses, and the manner in which raw data is recorded in the system.
17. The Appellant had questioned why similar requests made some time apart had resulted in significantly different responses. The Second Respondent explained that the requests sought information at differing levels of granularity thus the comparison was not of like for like.
18. The Appellant had questioned why information supplied to the Information Commissioner as a part of a review of the handling of FOIA requests by Police Forces differed from information supplied in response to his request. The Second Respondent explained that the information had not been supplied



directly to the Information Commissioner but had been collected and collated by the National Police Chiefs Council, thus the format in which information was presented to the Information Commissioner was not in the control of the Chief Constable.

Conclusion:

19. On the explanation given by Counsel at the hearing we can understand how the Chief Constable identified a pattern in respect of entries that have a 'negative' number of days between the closure of the case and the receipt of the request (i.e. where the request is said to have been closed before it was received). Counsel took us carefully through this at the hearing.
20. That pattern, it was explained, is that in a large majority of such cases a so-called 'filter response' was given. This term is used to mean a response, which filtered the request out without having to conduct a full review as to what was held. Examples include '*Directed to website/previous response*', '*Advised of other legislation*' and '*Transferred to another public body*'. Page 326 c.f. is Mr Preston's list of cases with an apparently negative response time. Spreadsheet 3c is WYP's original response to his request.
21. We accept the demonstration given at the hearing that whereby bringing Mr Preston's list together with the '*outcomes*' recorded on WYP's spreadsheet has resulted in the table at the conclusion of this note. It can be seen that the overwhelming majority of negative results have occurred in cases where a filter response has been given.
22. Counsel for the Second Respondent explained that it must be understood that the data gathered from the Second Respondent's system provided to the Appellant was raw data. He did not ask for a commentary on it, and was not entitled to one under FOIA. This means that it may contain apparent inconsistencies or artefacts from the process of data recording, which appear surprising. However, this does not make good an argument that the Second Respondent held material, which they unlawfully failed to provide.

23. Counsel for the Second Respondent further explained that Human error might account for a small proportion of the apparently strange results. But this must not be over emphasised. In the vast majority of cases, the most likely explanation for inconsistencies is that raw data can appear strange until it has been interpreted. It would be wrong to presume that all of the apparently anomalous results are down to poor record keeping.

24. It is also worth noting, the Second Respondent argues, that some discrepancies will be attributable to the request being physically received at the weekend or a bank holiday. This is because the FOI request timescale starts the working day after the request is physically received (to allow counting in full not partial days). This will lead to a discrepancy where the 'filter' request was received before a weekend or bank holiday.

25. In summary, the Second Respondent submits that the idiosyncrasies and anomalies highlighted by the Appellant are referable to FOIA timetables, the application of filter responses, and the manner in which raw data is recorded in the system. The Tribunal accepts the Appellant's criticisms of the methodology and systems used by the Second Respondent in the collation and storage of data. It does appear to be an ineffective way of recording and holding accurate information and probably not in the public interest. However this does not mean that the Public Authority has either falsified records or deliberately withheld information within scope of the FOIA Request and we find there is no evidence to support any such malfeasance. It would make sense if the Public Authority considered devising and enforcing a more transparent system but that does not prove the Second Respondent is holding further information within the scope of the request.

26. On the two issues referred to at paragraphs 17 and 18 above the Tribunal found the explanations provided by the Second Respondent to be wholly credible.

27. Accordingly, addressing the question of the limited issue before us, as to whether, on the balance of probabilities, West Yorkshire Police held more information which meets the terms of the request, we can find no error of Law in the DN nor error in the exercise of any discretion by the First Respondent. The DN must therefore stand and the appeal is dismissed.

Brian Kennedy QC

9 March 2022.

Promulgated: 9 March 2022