IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Appeal No. EA/2012/0194

BETWEEN:

TERRY SMITH

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION TO STRIKE OUT

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1. This appeal concerns the use of Automatic Number Plate Recognition cameras operated by Essex Police. The Appellant made a request under the Freedom of Information Act 2000 ("the Act") on 9 November 2011 to Essex Police for:

> *"1. The location of fixed, operating automatic number plate recognition cameras operated by Essex Police or its Agencies including Essex County Council in and around Brentwood, Essex.*
>
> *The location of CCTV cameras with ANPR functionality in and around Brentwood, Essex. …….. "*

2. The request was refused, the Appellant complained to the Information Commissioner who after an investigation upheld the decision of Essex Police not to disclose the requested information. This document sets out my decision on the Appellant's appeal against the Information Commissioner's Decision Notice.

3. In particular, I have considered the Notice of Appeal with accompanying submissions and documents provided by the Appellant. On 22nd October 2012 I issued directions to the Appellant indicating that it may be appropriate for this appeal to be struck out, under rule Rule 8 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rule 2009. He was invited to make representations in this regard, due by 16 November 2012. I have received nothing further from the Appellant. Thus, my task now is to consider whether the

appeal should be struck out under rule 8 or whether it should proceed to a full hearing.

4. Rule 8 provides:

> *"8 Striking out a party's case*
> *…….*
> *(3) The Tribunal may strike out the whole or a part of the proceedings if—*
> *(a ……..*
> *(b)……..*
> *(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.*
> *(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraph (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out."*

5. The test used by the Tribunal in dealing with summary dismissals has been the threshold test developed in Part 24 of the Civil Procedure Rules and considered by the Court of Appeal in *Swain v Hillman and Gay* [2001] 1 All E R 91. Since *Tanner v ICO EA/2007/0106* the Tribunal has adopted the Court of Appeal test from *Swain v Hillman and Gay* that the words in Rule 24.2 "no real prospect of being successful or succeeding" spoke for themselves and meant that the Tribunal had to decide whether there was a "realistic" as opposed to a "fanciful" prospect of success in terms of any appeal before it.

6. My task then is to consider whether there is a realistic prospect of the Appellant showing that, further to section 58 of the Act, the Commissioner erred in law or, if applicable, ought to have exercised his discretion differently in deciding whether or not Essex Police had complied with its obligations under Part I of FOIA.

The refusal to disclose

7. Essex Police and the Information Commissioner in turn have found that the requested information did not need to be provided on account of the exemption in section 31 of the Act. Essex Police also relied upon section 24(1) of the Act. This is not a live issue in this appeal as the Information Commissioner upheld Essex Police's refusal on the basis of section 31 and did not therefore consider the applicability of section 24(1).

8. In so far as is relevant to this appeal, section 31(a) and (b) FOIA states:

> *31 Law enforcement.*
>
> *(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—*

(a) the prevention or detection of crime,

(b) the apprehension and prosecution of offenders;".

9. Section 31 FOIA is a qualified exemption, such that once it had been decided that section 31 is engaged (ie: there is a likelihood of prejudice), by virtue of section 2(2), it is necessary to consider whether the public interest favours either maintaining the exemption or disclosing the information in question (the so-called public interest balancing test).

Is section 31(1) engaged?

10. This appeal first challenges the view of Essex Police and the Commissioner in turn that the exemptions provided by section 31(1)(a) and (b) are engaged. The Information Commissioner was satisfied that there was a likelihood of prejudice to the prevention and detection of crime and the apprehension of offenders if the information was to be disclosed. Having considered the withheld information, the Commissioner was of the view that, detailing as it does the location of ANPR cameras, it would provide sufficient knowledge of the location of the cameras to enable someone wishing to avoid the ANPR camera network to do so. Nothing put forward by the Appellant, in my view, undermines this conclusion.

11. Although Essex Police acknowledged that the location of some ANPR cameras is already in the public domain (through, for example, disclosures at court), they argued that to publically disclose whether that information represented the totality of the information held, or whether such information remained current, would be prejudicial to the detection of crime and apprehension of offenders. It seems self-evident to me that this information would be of some use to criminals such that the exemption is engaged.

12. The essential argument by the Appellant in this regard, as I understand it, is that Essex Police cannot argue that non-disclosure is for the prevention of crime etc. whilst at the same time, relying upon the non-disclosure to maintain what the Appellant perceives to be a 'fit-up', that is, covering up that he was not guilty of the crime for which he has been imprisoned. These are said to be mutually conflicting purposes such that the exemption

cannot be said to be engaged. This however is to miss the point of this first question: is the exemption engaged, that is, is there a likelihood of prejudice were disclosure to be made? This does not require any consideration of whether any perceived prejudice should be ignored on the basis that there is countervailing prejudice to another aspect of policing or crime prevention. Such balancing is to take place at the second stage – the public interest balancing test.

Public Interest Test

13. The remaining grounds of appeal concern the public interest test and assert that the Decision Notice is not in accordance with law, insofar as the Information Commissioner took the view that the balance of public interest was in favour of maintaining the exemption. The Appellant's grounds of appeal essentially arise from the necessity for disclosure in relation to his own personal circumstances and his belief that he has been unfairly convicted. He has argued in detail how information as to ANPR could assist in his challenge to his conviction and imprisonment. I agree with the Information Commissioner that this can be given little weight – as has been explained, disclosure under the Act is disclosure in the public not private interest.

14. The Appellant does however argue that disclosure would uncover corruption/conspiracy amongst Essex police officers and that this is a matter of significant public concern. In this regard I have considered both whether there is public interest in disclosure, in terms of it assisting the interests of the public and also whether it is actually of interest to the public (the two things not always being the same). The Appellant has not adduced evidence which clearly indicates wrongdoing on the part of the police/courts – had he done so it would have been easier to accept that there was some public interest in disclosure. The Appellant has not moreover adduced any evidence to substantiate this as a matter which generates existing public comment or concern (eg: newspaper articles, letters from third parties). I accept that if wrongful conviction is proven, this issue has the capacity to generate public interest, however in the absence of clear evidence of wrongdoing such as to override the likelihood of prejudice to crime prevention etc. or clear evidence of existing and widespread public concern, this is speculative only and should not be weighed significantly in favour of disclosure.

15. The Appellant has maintained that Essex Police and the Information Commissioner should have taken into account his offer to narrow down his request for information to the three streets concerned with his conviction. I am satisfied however that the public interest arguments for and against disclosure of the requested information in the Appellant's slightly more limited "compromise" would be essentially identical. The scale of prejudice may be less, but then so would the benefit to the public interest in promoting understanding and debate around the implications of ANPR. This factor then, insofar as relevant, is neutral.

Conclusion

16. In all the circumstances, it seems clear to me that the section 31 (a) and (b) exemptions are engaged and that there is no real prospect of the Appellant showing, on the grounds of the appeal and evidence put forward, that a Tribunal should interfere with the Information Commissioner's assessment of the public interest balancing test.

17. I have sympathy for the Appellant in that he may be unable to prove that he has been wrongfully convicted without this information and therefore be unable also to raise this as a matter of public concern. To allow the Act however to be used on what is essentially a 'fishing expedition' for his personal purposes, would be to fly in the face of the legislative requirements and the purpose of the Act. There were other more appropriate avenues for obtaining this disclosure vis the criminal proceedings. Frustrating though this will undoubtedly be, given particularly that the Appellant has failed to obtain disclosure through those mechanisms, the above reasoning does mean that his appeal does not have a realistic prospect of success and I accordingly strike it out.

Signed: Judge Carter
26th November 2012