



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL
(INFORMATION RIGHTS)**

Appeal No EA/2010/0174

BETWEEN:

MR STEVEN MATHIESON

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

And

DEVON AND CORNWALL CONSTABULARY

Additional Party

Determined on the papers by:
Alison McKenna, Tribunal Judge
Peter Dixon, Tribunal Member
Michael Hake, Tribunal Member
On 31 March 2011

Decision Dated: 11 April 2011

Subject Matter:
Freedom of Information Act 2000
Sections 31(1)(a) and (b)
Qualified exemptions
Public Interest Test

DECISION AND REASONS

DECISION

**The appeal is hereby allowed.
The Information Commissioner's Decision Notice FS50270424 is set aside and
the Tribunal makes the following substituted Decision Notice:**

SUBSTITUTED DECISION NOTICE

- 1. The Public Authority failed to deal with the Complainant's request for information set out in paragraph 2(1) below in accordance with the Freedom of Information Act 2000 in that it should have communicated the requested information to him;**
- 2. The Public Authority is now required to communicate the requested information to him no later than 35 working days from the date of this decision.**

REASONS

Introduction

1. This appeal concerns the Appellant's request to the Additional Party for information pursuant to the Freedom of Information Act 2000 ("FOIA"). His request was refused by the Additional Party. The Respondent upheld the decision to refuse the information in his Decision Notice FS50270424. The Appellant now appeals to the Tribunal, asking it to set aside the Respondent's decision and require the Additional party to disclose the information sought.

The Information Request

2. On 20 July 2009, the Appellant requested the following information from the Additional Party:
 - (1) *The locations of fixed, operating number-plate recognition cameras operated by Devon and Cornwall Police or its agencies.*
 - (2) *The locations of CCTV cameras with ANPR functionality used by Devon and Cornwall Police".*

3. The Additional Party refused the request on 18 August 2009, in reliance upon sections 31 (1) (a) (b) and (c) and section 24 of FOIA. The Appellant requested an internal review which upheld the decision to refuse the information, and this was communicated to the Appellant on 21 September 2009.

The Complaint to the Respondent

4. The Appellant complained to the Respondent on 22 September 2009. During correspondence between the Respondent and the Additional Party, the Additional party confirmed that it did not hold the information referred to in part (2) of the request. The Appellant was informed of this and agreed that his complaint should proceed in relation to part (1) of the information request only.
5. During the course of the Respondent's enquiries, the Additional party withdrew its reliance upon section 31(1) (c) of FOIA and confirmed that it relied upon sections 31 (1) (a) and (b) and also section 24 of FOIA in refusing the information sought. The Respondent therefore proceeded to consider whether these exemptions were engaged and if so to apply the public interest test.

The Decision Notice

6. The Respondent issued his Decision Notice on 23 September 2010, in which he concluded as follows:
 - (i) Section 31(1)(a) of FOIA provides an exemption from the duty of disclosure where the disclosure would or would be likely to prejudice the prevention or detection of crime.
 - (ii) Section 31(1)(b) provides an exemption from the duty of disclosure where the disclosure would or would be likely to prejudice the apprehension or prosecution of offenders.
 - (iii) Section 24(1) provides an exemption for the purpose of safeguarding national security.
 - (iv) The Additional Party had not specified whether it was saying that disclosure "would" or "would be likely to" prejudice the prevention or detection of crime or the apprehension or prosecution of offenders. The Respondent therefore applied the test of "would be likely to".
 - (v) The Respondent adopted a three stage process for the consideration of the exemptions under s. 31(1) (a) and (b): firstly, were the arguments advanced by the Additional Party relevant to the prejudice described in the sections; secondly, whether it was conceivable that the prejudice predicted by the Additional Party would occur as a result of disclosure; and thirdly, whether the likelihood of the prejudice occurring was "real and significant"¹.

¹ This phrase is taken from a decision of the Information Tribunal (as it then was) in 2005: *John Connor Press Associates Limited v The Information Commissioner*.

- (vi) The Respondent concluded that the exemptions in s. 31 (1) (a) and (b) were engaged in this case. This was because the information requested would provide more information than is currently available about ANPR cameras, there was evidence that ANPR cameras are a useful crime fighting tool, and there was a real and significant likelihood that disclosure would allow offenders to evade the ANPR camera network. The Respondent's reasoning is considered in greater detail at paragraph 7 below.
- (vii) The Respondent went on to consider the public interest test. He found that the public interest factors were finely balanced but that in this case the maintenance of the exemption outweighed the public interest in disclosure. The Respondent's reasoning is considered in greater detail at paragraph 7 below.
- (viii) In view of the above conclusions the Respondent did not go on to consider section 24(1).
- (ix) The Respondent also made some findings as to the procedural requirements under FOIA which are not relevant to this appeal.

The Grounds of Appeal

7. The Appellant filed a Notice of Appeal dated 20 October 2010. In his grounds of appeal he argued that:
 - (i) In concluding that the public interest lay in maintaining the exemption, the Respondent had balanced, on the one hand, the public interest that disclosure would serve by contributing to the debate about ANPR cameras against, on the other hand, the risk that disclosure would interfere with the work of the police. The Respondent had found that the argument in favour of disclosure had "considerable weight" and that the issues were "finely balanced". He had then concluded that the public interest lay in non-disclosure. This conclusion was erroneous because disclosure would in fact benefit the cause of effective policing in that publicity as to the location of the ANPR cameras would do no harm and could in fact serve to deter criminals from visiting the protected areas, so as to aid policing;
 - (ii) If the Additional Authority is using the ANPR cameras in an ineffective fashion, disclosure of their location will encourage more effective use of them as a policing tool. The only type of policing which could be prejudiced by disclosure of their locations would be ineffective policing;
 - (iii) The Respondent's conclusion that the use of ANPR cameras was a useful crime fighting tool relied upon evidence that such cameras captured 64 million images in 2008, however, this analysis confuses mere activity with utility; the Respondent should have ascertained how many prosecutions had been assisted by the technology;
 - (iv) The Respondent had accepted the argument that disclosure of the locations of the ANPR cameras would enable persons to evade them, however this argument relied upon a misconception as to the function of ANPR cameras, and in particular the idea that they are used at single

camera locations where they could be easily avoided rather than at strategic locations where they could not be avoided;

- (v) The Respondent had accepted the argument that the ANPR cameras relied upon obscurity for their function, whereas it is widely accepted that overt use of, for example, CCTV cameras acts as a deterrent to crime;
- (vi) There was already some publicly available information about the ANPR cameras in Devon, for example the towns in which they were located. The Additional Party could have offered to provide information without revealing their exact location, for example by providing the 1km by 1km national grid squares within which they are located.

8. The Appellant provided a Reply to the Respondent's Response, dated 3 December 2010, in which he additionally argued that:

- (i) The Respondent's approach to the public interest test would "chill the debate" about effective policing;
- (ii) It would be possible for someone to locate the whereabouts of the cameras on a planned route by visiting it in person or looking on Google Streetview so as to evade the cameras if they wished;
- (iii) There is no independent research to support the view that ANPR cameras are key policing tools;
- (iv) The "1 in 36 hits" evidence in the article referred to in the Decision Notice refers to Sussex Police only and is unreliable evidence for the purposes of this appeal for a variety of reasons;
- (v) In addition to the argument that CCTV cameras act as a deterrent to crime, the disclosure of their whereabouts by signage allows the public to find out more about them and to make applications under the Data Protection Act 1998 ("DPA"). The Additional Party's stance makes it impossible for members of the public to access their personal data in the form of recorded images of individuals and number plates;
- (vi) The Respondent should have attempted to mediate on the issue of "exact" or "approximate" locations rather than allowing the Additional Party simply to offer no information at all in response to the request.

9. The Appellant filed a Reply to the Additional party's submissions dated 11 February 2011, in which he argued that:

- (i) The number of ANPR cameras in use in Devon and Cornwall has now been disclosed in Parliament and reported in Hansard;
- (ii) Another Constabulary has now accepted that ANPR data is personal data for the purposes of the DPA;
- (iii) The cameras are clearly visible on Google Streetview (he supplied a "screengrab" of a location in Devon showing cameras visible on a road bridge) and thus they can easily be avoided;
- (iv) Arguments as to risk of vandalism of the cameras if their locations were disclosed could equally well be applied to speed cameras and yet these are clearly marked on atlases and on satellite navigation

software. In any event, the risk of vandalism is not a valid reason to refuse disclosure under FOIA;

- (v) If the cameras are indeed used in a covert manner, they would be subject to the Regulation of Investigatory Powers Act 2000 regime;
- (vi) The Tribunal must consider this information request on its own merits and the impact on other police forces is immaterial.

The Respondent's Submissions

10. The Respondent filed a Response to the Notice of Appeal dated 22 November 2010. He responded to the Grounds of Appeal as follows:
 - (i) The Grounds of Appeal state that the public interest test was wrongly decided, however the particularised challenges relate to the engagement of the exemptions only;
 - (ii) The Decision Notice was correct and should stand. There is no challenge to the Respondent's approach to the Decision Notice or the findings of fact he made;
 - (iii) It is outside the remit of the Respondent to consider whether the ANPR cameras are being deployed in a competent fashion;
 - (iv) The policy of advertisement of the locations of ANPR cameras said by the Appellant to have been adopted by other police forces (e.g. the "Ring of Steel" in the City of London) does not mean that the exact location of every camera has been revealed to the public;
 - (v) The Appellant's argument as to the alleged confusion of "activity with utility" is misconceived: the number of images captured is a relevant factor in considering the use of the cameras as a policing tool. The evidence relied upon by the Respondent (but not specifically mentioned in the Decision Notice) additionally referred to the cameras providing 1 in 36 "hits" on vehicles of interest to the police;
 - (vi) The parallels drawn with CCTV cameras being used as a deterrent is erroneous because CCTV cameras are used in a small area and the disputed information relates to a large geographic area so could not have the same deterrent effect;
 - (vii) The information request referred to "locations" and it was reasonable for the Additional Party and the Respondent to have understood the request to be for the exact locations rather than the approximate locations of the ANPR cameras.

11. In its submissions for the hearing, the Respondent referred the Tribunal to the decision of the then Information Tribunal in Toms v The Information Commissioner² in which the Tribunal had referred back to the White Paper preceding the enactment of FOIA, which had stated that the FOIA regime should not prejudice the investigation, prosecution or prevention of crime.

² EA/2005/0027

The Additional party's Submissions

12. The Additional Party was joined to these proceedings on 7 January 2011. The Additional Party supported the Respondent's arguments in its Reply dated 31 January 2011. It additionally argued that:
- (i) The number of "hits" referred to by the Respondent demonstrates the significance of the use of ANPR cameras in the prosecution of crime and further that the cameras play a "significant role" in countering terrorism;
 - (ii) Disclosure of the locations of the ANPR cameras would lead to a risk of them being damaged or destroyed;
 - (iii) The Tribunal should consider the impact of a decision to order disclosure on other constabularies as this is an issue of national importance.
13. The Additional Party also submitted a witness statement to the Tribunal, made by Louise Fenwick on 1 March 2011. The Tribunal allowed the witness statement to be filed in evidence even though it was filed after the date given in the Tribunal's directions. Ms Fenwick is the Freedom of Information Officer for Devon and Cornwall Constabulary. This statement contained argument in support of the Additional Party's position but did not provide the Tribunal with any additional evidence to support its case. Ms Fenwick suggested in her statement that the Additional Party still wished to rely on the exemption under s. 24(1) FOIA, however this exemption had specifically not been considered by the Respondent in reaching his decision and it had not been claimed by the Additional Party as a late exemption in filing its Reply. Accordingly, the Tribunal decided that it was not appropriate for it to consider her argument in this regard because the other parties had not been given due notice of it.

The Powers of the Tribunal

14. This appeal is brought under s.57 FOIA. The powers of the Tribunal in determining an appeal under s.57 are set out in s.58 of FOIA, as follows:

"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.

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

15. As noted above, this appeal concerns the application of sections 30(1) (a) and (b) of FOIA. The issue for the Tribunal is firstly whether the Respondent was correct to conclude that these exemptions were engaged in this case and, secondly, whether the public interest conclusion was correct.

Mode of Hearing

16. The Appellant requested that this matter be determined on the papers. The Respondent and the Additional Party agreed with that request. The Tribunal was satisfied that it could properly determine the issues without an oral hearing. The Tribunal had before it an agreed “open” bundle of papers running to over 130 pages. It was also sent one “closed” document which comprised the requested information.

The Tribunal’s Conclusions

17. The exemptions relied upon by the Additional Party are qualified exemptions. It follows that the Tribunal must consider whether the Respondent was correct to find that the exemptions claimed were engaged, and then consider whether the public interest test was correctly applied.
18. The Tribunal considers that the Respondent was correct to find that the exemptions under s. 31 (1) (a) and (b) of FOIA were engaged in this case. The Tribunal concurs with the Respondent’s three stage approach and his conclusions thereon described at paragraph 6(vi) above.
19. In considering the public interest test, the question for the Tribunal is whether FOIA has been correctly applied. The issue of whether the Respondent was correct in his judgement as to the public interest balance is one of law rather than one of discretion. If the Tribunal takes a different view from the Respondent then it may substitute its own judgement for that of the Respondent.
20. The public interest balancing exercise in FOIA is clearly set out in section 2(2)(b) as follows:

“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”.

It is important to remember that, because the statutory test refers to “outweighs”, then if the competing interests are equally balanced, the information must be disclosed. The Decision Notice stated that the issues were finely balanced in this case, however the Respondent ultimately determined the issue in favour of maintaining the exemption.

21. In applying the public interest test, it is important that all relevant factors are taken into account in deciding where the balance lies. Having considered all the evidence carefully, the Tribunal finds that the Respondent did not, in reaching his decision, take into account a number of relevant factors in undertaking the public interest balancing exercise.
22. The Tribunal considers that the Respondent correctly identified the factor in favour of non-disclosure in this case, this being the risk that disclosure of the locations of the cameras would prejudice the work of the police. The Tribunal, however, notes that despite applying to join as a party to these proceedings and being afforded the opportunity to file evidence, the Additional Party did not file evidence that assisted the Tribunal in finding that the ANPR cameras have in fact contributed to crime prevention or prosecution. The Tribunal is not persuaded that it should rely on the evidence produced in relation to the Sussex Constabulary in this regard as the strategic deployment of the cameras clearly varies from police force to police force.
23. The Tribunal finds that the Respondent did not then go on to consider all the relevant factors in favour of disclosure in this matter, although many of them were brought to his attention by the Appellant. The Tribunal has in particular noted the following considerations:
 - (i) The Respondent did not fully consider the impact of the DPA and the rights of access to information captured by the ANPR cameras which (it appears to have been accepted by others, including ACPO) constitutes personal data. It is clearly difficult for members of the public to exercise their rights in relation to the DPA if they cannot know where the cameras are located. The ACPO guidance (referred to below) suggests that a DPA sign should be displayed in the vicinity of the cameras, however there is no evidence as to whether this guidance has been followed in Devon and Cornwall. The ability to exercise legal rights under DPA is a legitimate area for public concern and debate which would arguably be assisted by disclosure of the camera locations;
 - (ii) The Respondent did not fully consider the wider public interest arising in not only knowing where the cameras are located but also, in the light of that information, being able to consider how they are used and whether the use to which they are put by local police forces justifies the undoubted invasion of privacy that they represent. It is clear from the ACPO National ANPR User Group Guidance, which was obtained by the Respondent during his investigation and produced to the Tribunal at pages 86 – 92 of the Hearing Bundle, that there is a recognised need to “[maintain] the public’s confidence that the technology is being used correctly and appropriately.” This public guidance is stated to be for the purpose of ensuring that those deploying and operating ANPR cameras do so whilst recognising and respecting the rights and privacy of individuals. It goes on to advise users of the technology that they must be clear about the purpose of deployment before they can decide whether the interference with

privacy is proportionate. This is clearly a legitimate area for public concern and debate which would arguably be assisted by disclosure of the camera locations;

- (iii) The Respondent was obviously unable to consider the policy on the use of ANPR cameras produced and published by South Yorkshire Police. This was produced to the Tribunal at page 118 – 125 of the bundle but had been submitted by the Appellant for the purposes of the appeal only. The Tribunal is able to consider fresh evidence which was not available to the Respondent in making his decision. This document states that the risk of interference with policing arises not simply from the disclosure of the locations of the cameras but rather from the disclosure of “locations, tactics, data and analytical capabilities.” In other words, that the risk to policing arises from disclosure of the overall policing framework within which the cameras sit, rather than disclosure of their locations only. The South Yorkshire document supports the Appellant’s argument that truly covert deployment of the cameras would require reliance on Regulation of Investigatory Powers Act (“RIPA”) powers. The South Yorkshire document undermines the Additional Party’s reliance on the requirement of covert deployment because, firstly, it is evidence that the disclosure of the camera locations alone would not compromise their effectiveness; and secondly, it suggests that Devon and Cornwall Police may be seeking to deploy the cameras in a manner that ought to have been authorised under RIPA. There is clearly a legitimate public interest in this issue. The Tribunal notes that the Additional Party was provided with a copy of the hearing bundle, which included the Yorkshire document, but chose to make no submissions on its contents;
- (iv) The Tribunal also notes that the Appellant told the Respondent that the exact locations of ANPR cameras had been disclosed to him by Oxfordshire County Council (p 33 of the bundle) however the Respondent did not apparently follow up this information in order to establish whether any of the considerations involved in that disclosure should have been considered in weighing the public interest balance in this case.

24. The Tribunal considers that there was, overall, a weak case made by the Additional Party as to why it thought that disclosure of the information sought would be likely to prejudice policing. The Additional Party sought to rely upon hypothetical argument and evidence produced in relation to other police authorities rather than producing its own evidence as to the material issues. This evidence was sufficient for the Tribunal to find that the exemptions were engaged, however it does not seem to the Tribunal that the argument and evidence before it were sufficient for it to find that the public interest in effective policing outweighed the public interest in disclosure of the requested information. The Tribunal took into account the fact that the requested information concerned a subject in which there has been much public interest and debate (including in Parliament). The Tribunal noted that the requested information concerns the privacy of the individual. The official ACPO guidance recognises that the use of ANPR cameras must be justified to the

public in order to justify this invasion of privacy and so maintain public confidence in their use. The Tribunal considers that in all the circumstances, the public interest falls on the side of disclosure in this case, so as to allow for debate about the strategic use of the cameras and the reasons for their deployment.

25. Having considered all the relevant factors and weighed them into the public interest balancing exercise, the Tribunal has reached a different judgement from that of the Respondent. The Tribunal finds that the public interest in disclosure outweighs the public interest in maintaining the exemptions in the circumstances of this case and accordingly allows the appeal and makes a substituted Decision Notice.

Signed:

Alison McKenna
Tribunal Judge

Dated: 11th April 2011