



Neutral citation number: [2024] UKFTT 475 (GRC)

Case Reference: EA/2023/0092

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

**Heard: by CVP  
Heard on: 15 November 2023  
Decision given on: 6 June 2024**

**Before**

**TRIBUNAL JUDGE FOSS  
TRIBUNAL MEMBER TATAM  
TRIBUNAL MEMBER YATES**

**Between**

**IVAN MURRAY-SMITH**

Appellant

**and**

**(1) THE INFORMATION COMMISSIONER**

**(2) THE HOME OFFICE**

Respondents

**Representation:**

Appellant: Not legally represented.  
First Respondent: Did not attend the hearing and was not represented.  
Second Respondent: Represented by Azeem Suterwalla of Counsel.

**Decision: The appeal is DISMISSED.**

## DECISION AND REASONS

### **Introduction**

1. On 20 May 2022, the Appellant requested the following from the National Frontier Approvals Unit (“the Request”):
  - “1) the current Port Approval for the Port of Immingham [“the Port”], and
  - 2) the Port Approval for the Port of Immingham that was force [sic] in 2014.”
2. The Request was handled by the Home Office, Border Force. On 20 June 2022, the Home Office refused disclosure in reliance on s31(1)(a) and (e) of the Freedom of Information Act (“FOIA”). It maintained that position upon internal review. The Appellant complained to the Information Commissioner (“the Commissioner”).
3. This is an appeal against the Commissioner’s Decision Notice drawn in response to the aforementioned complaint, referenced as IC-1192981-Z4H2 and dated 8 February 2023 (“the Decision Notice”). Therein the Commissioner concluded that the Home Office was entitled to rely on s31(1) (a) and (e) FOIA.
4. The Appellant appealed the Decision Notice to the First-tier Tribunal. The hearing of the appeal took place remotely on 15 November 2023.
5. We give our decision in this single, OPEN judgment, and do not consider it necessary to refer to the contents of the disputed information in a separate CLOSED annex or judgment.

### **The Home Office’s response to the Request**

6. On 20 June 2022, the Home Office responded to the Request. It said that the information requested was exempt from disclosure under s31 FOIA, and immediately followed that statement by this sentence, as if justification for its reliance on s31 FOIA: *“It is not in the public interest to disclose the information regarding inflatable boats and evidence collation.”* It transpired subsequently that the Home Office included this sentence in error. It (the issue of inflatable boats) was, and is, irrelevant to the Home Office’s response and the issues before the Tribunal arising from the Request. The Home Office went on to say that s31(1)(a) FOIA *“Law enforcement prevention and detection of crime”* applied so as

make the information exempt from disclosure. It concluded that the public interest lay in favour of withholding the information, as follows:

- a. there is an inherent public interest in the transparency and accountability of public authorities and ensuring confidence in the United Kingdom's border controls of ports approval information.
- b. balanced against that, disclosure of information relating to sensitive ports operations, including the layout of ports, could compromise ongoing Border Force activities, including law enforcement operations, ongoing investigations and evidence collation.

7. On 21 June 2022, the Appellant sought an internal review of the Home Office's decision. He said:

*"... Section 31 of FOIA is a prejudice based exemption, as such in order to satisfy the requirement of section 17(1)(c) of the Act, an explanation needs to be given as to how the prejudice test is satisfied. I refer you in particular to paragraphs 14 to 17 of the ICO guidance at <https://ico.org.uk/media/for-organisations/documents/1207/lawenforcement-foi-section-31.pdf>*

*If it cannot be shown that the prejudice test is met, the public interest test is not applicable and it also becomes somewhat meaningless, as there is no prejudice that can be weighed in the balance.*

*I invite you to review the information request in light of the above."*

8. On 3 October 2022, the Home Office wrote to the Appellant with the results of its internal review. It said this:

*"It may help if I explain that section 31(1) (a) (Law enforcement – the prevention or detection of crime) was applied to prevent disclosure of information which would assist those engaged in criminal activities at the UK's borders. The information would give criminals the ability to build a picture of the work of Border Force and identify any strengths or weaknesses, compromising the integrity of immigration controls.*

*If information about the Port Approval for the Port of Immingham was to be disclosed, it would disrupt the prevention of crime and detection of crime in the areas of smuggling, assessment of tax and duties and disrupt immigration controls.*

*I also find that section 31(1)(e) (Law enforcement - the operation of immigration controls) is engaged to you [sic] request, for the reasons outlined above and in the original response.*

*In conclusion, I have addressed your query about the prejudice test. I am also satisfied that the original response was correct and that the balance of the public interest lies in maintaining the exemption and withholding the information. I also find that section 31(1)(e) is engaged for the same reasons."*

9. On 5 October 2022, the Appellant complained to the Commissioner. Understandably, the Appellant was confused by the Home Office's reference in its initial response to the Request to inflatable boats (it not yet being apparent that that had been included in error). Focusing on the actual subject matter of the Request, he said this:

*"For context, it is widely reported online that up until around 2014 / 2016, it was possible for passengers to travel on the Immingham to Brevik freight ferry. For reasons which I have not been able to establish, this is no longer possible and DFDS (the company that operates the route) cites the Port Approval as being the issue. On this point there are lots of reports one can find online and many have since gone offline, but one such report is here: <https://travel.stackexchange.com/questions/52297/is-it-possible-to-travel-on-the-immingham-brevik-ferry-without-bringing-a-motor>*

*If you've been Googling ways to get over to Norway via Ferry from the UK, you have probably seen some blogs and forums talking about the Immingham to Brevik Freight Ferry. Up until 2016, this ferry did allow general passengers to board with their vehicles. However, this option is now unavailable after UK border agency cutbacks meant they refused to do immigration checks. You can however still load your car onto the ferry, but you cannot travel with it. So you will have to fly and collect it when it arrives.*

*Other reports (sorry I don't have time to look for them) claim that the then Home Secretary Theresa May amended the port approval to stop passenger services, but that is pure speculation. My interest is simply to get to the bottom of what has happened to the Port Approvals that means that the passenger service DFDS used to offer is no longer available. Before going down the FOIA route I enquired with Border Force because one would have thought that for the sake of one or two passengers who would be UK passport holders, immigration checks could be carried out by the Border Force staff who carry out immigration checks on freight drivers (after all it appears illogical that if I want to drive my car onto the ferry then existing border staff cannot check my passport, but if I hire a van and do exactly the same thing then it's fine and I can go through immigration [sic] with no issues).*

*Border Force's answer (which is not directly relevant for FOIA purposes so it is not attached) has been to the effect that there is some legal impediment within the Port Approval document which would (they claim) make it legally impossible for them to carry out passport controls on private vehicle passengers.*

*If such a legal impediment does exist within the Port Approval document, I would like to know what it is. I have zero interest in inflatable boats, which seems to be the focus of the Home Office's response. I have asked for the Port Approval document because Border Force has not been able to give me a meaningful answer, so the sensible way forward would be to obtain the Port Approval document and read it for myself."*

### **The Commissioner's Decision Notice**

10. By his Decision Notice of 8 February 2023, the Commissioner decided that the Home Office was entitled to withhold the disputed information in reliance on s31(1)(a) and (e) FOIA. He reasoned as follows:
  - a. the Home Office's position was that disclosure of the information requested would assist those engaged in criminal activities at the UK's borders; the information would give criminals the ability to build a picture of the work of the Border Force and identify its strengths and weaknesses, compromising the integrity of immigration controls; the information would disrupt the prevention and detection of crime in the areas of smuggling, assessment of tax and duties and disrupt immigration controls; there was a valid argument about how a fuller picture of law enforcement efforts at ports could be built up through disclosures in response to other similar requests, combined with the response to this request.
  - b. While he did not accept that disclosure would prejudice law enforcement operations and the operation of border controls, he accepted that it would be likely to, by virtue of the information in question being combined with existing information, and information disclosed in response to future similar information requests: the mosaic effect picture that would emerge through a number of disclosures could be of significant use to those wanting to build a picture of the work of Border Force to identify strengths and exploit weaknesses.

### **Notice of Appeal**

11. By his Notice of Appeal against the Decision Notice, dated 20 February 2023, the Appellant submitted, in summary, as follows:
  - a. information about inflatable boats and evidence collection could be redacted by the Home Office to enable it to respond to his request.
  - b. the purpose of the Appellant's request was to determine why passengers with non-commercial vehicles were able to enter and leave the United Kingdom via the Port up until 2014, but not thereafter. There was no obvious reason why one could clear immigration via the Port if one were

travelling with a small van but not a large car, but given that the Home Office maintained that this was because of the Port Approval document, it seemed reasonable to want to know what changed after 2014 and what specific provision of the current Port Approval document created a legal impediment to passenger vehicle entry/exit.

12. On 17 April 2023, in response to the Home Office's request to this effect, and in the face of no objections from any party, the Tribunal Registrar directed that the Home Office should be joined as a Respondent to the appeal.

13. The Home Office's Response to the Notice of Appeal, dated 22 May 2023, may be summarised as follows:

- a. the Appellant, rightly, did not appear to dispute the application of s31(1)(a) and/or (e) FOIA to the disputed information.
- b. the Home Office relied on specific facts and matters by way of nefarious examples of potential exploitation of details contained in the disputed information by organised criminals, enabling them to mosaic that and other information to create a risk to national security. The Home Office redacted those facts and matters in its Response.
- c. The Home Office additionally relied on s43(2) FOIA (commercial prejudice) to withhold the disputed information. In this regard, it said that the Port Approval document was a confidential agreement between the Port and the Home Office; it contained information which was commercially confidential both to the Port and to the Home Office, in terms of covering the Port's participation in a commercial activity, and the Home Office being able to secure best terms when granting an approval, and disclosure of the information would prejudice each party's commercial interests.
- d. It was not possible to redact the disputed information to prevent disclosure of information which would have the impacts described.
- e. The public interest plainly favoured the maintenance of the exemptions from disclosure. The Home Office recognised the need for transparency and accountability but the Appellant's particular interest in the disputed information was not particularly weighty or of wider significance for the public more generally. That must be balanced against the real damage that disclosure of the disputed information could do to the government's attempts to prevent crime and enforce stringent border control, as well as its and the Port's commercial interests. The latter prevailed.

14. By his Reply to the Home Office's Response to the Notice of Appeal, dated 4 June 2023, the Appellant submitted that:
  - a. if the Home Office were to confirm that there was no legal impediment within the Port Approval which prevents passers of non-commercial vehicles from crossing the UK border at the Port, he would withdraw his appeal.
  - b. s31 FOIA was likely to be engaged by at least some of the disputed information;
  - c. the "handling" of the disputed information would not set a precedent of releasing Port Approvals into the public domain; each request must be decided on its merits, and what might or might not happen in relation to any future request did not have any bearing on the engagement of the s31 FOIA exemption in this case.
  - d. although he noted that the Home Office did not rely on s41 FOIA (confidentiality) to withhold the disputed information, he did not in any event accept that the disputed information was confidential; the fact that the parties to the Port Approval considered the information to be confidential was immaterial for the purposes of FOIA.
  - e. any of the disputed information whose disclosure might give rise to commercial prejudice (s43 FOIA) could be redacted, and the Home Office had not explained why that was not the case; in any event s43 FOIA would not engage the specific information he requested, namely that which demonstrated the legal impediment to the Port carrying passengers of non-commercial vehicles.
  - f. in any event, it was unlikely that information as to such impediment would engage either exemption (s31 or s43 FOIA).
  
15. The Commissioner's Response to the Notice of Appeal, dated 27 June 2023, may be summarised as follows:
  - a. the public interest in effective law enforcement (specifically crime prevention/detection and immigration control) requires that the full contents of the disputed information should not be disclosed; details as to the layout of, and sensitive operations within, a major port were of obvious value to criminals, and the Border Force is charged with maintaining the integrity of immigration controls at the Port; the work of the Border Force could be compromised if details of its activity at the Port were to be revealed.
  - b. the Appellant, rightly, did not take issue with the application of s31(1)(a) and/or (e) FOIA.

16. On 30 June 2023, the Home Office wrote to the Appellant. It addressed the Appellant's statement in his Reply to the Home Office's Response to the Notice of Appeal, that if the Home Office confirmed that there was no legal impediment within the Port Approval which prevented passengers of non-commercial vehicles from crossing the UK border at the Port, he would withdraw his appeal. The Home Office said that it was unable to give this confirmation as its position was *"that the Port Approval for Immingham (both the current one and the approval which was in force in 2014 – together "the Port Approval Documents") does not, and did not, permit passengers of non-commercial vehicles to cross the UK border at that Port."*

17. The Home Office went on to say this:

*"Without prejudice to the Second Respondent's position that no part of the Port Approval Documents falls to be disclosed under FOIA for the reasons set out in the Information Commissioner's Decision Notice dated 8 February 2023, we have referred to the content of those Documents (in the body of this letter) to evidence the correctness of the Second Respondent's position.*

*The customs port approval process is necessary to ensure that Border Force can exercise customs control of locations at which goods and/or people arrive in or depart from the UK as effectively, efficiently, and economically as possible, for the purposes of:*

- securing revenue due and exercising import and export licensing controls on goods carried as cargo,*
- detecting and preventing the evasion of import and export prohibitions and restrictions,*
- facilitating the clearance of cargo, and*
- facilitating the clearance of travellers including crew members.*

*Once issued, the terms and conditions attached to a port approval are legally binding and the holder of the approval is required to comply with them.*

*The terms and conditions contained within a port approval reflect the activities undertaken at the port and the nature of these activities is a commercial decision for the port operator rather than its users e.g. ferry operators that use the port. Port operators are free to handle passenger traffic if they wish to do so and Border Force will approve them to do so if: (a) the port operator seeks a port approval allowing for the crossing facilities; and (b) the necessary facilities are provided to Border Force to undertake their duties in relation to facilitating the clearance of passengers.*

*If the approval granted to a port operator permits the handling of passengers this will be apparent from the wording in that approval and in the absence of express wording permitting the handling of passengers, this will not be*



*permitted under the port approval. As a result, it is incorrect to say, as you do: "hence the restriction on passenger services appears to be something that has been imposed on the Port of Immingham by the Home Office, rather than a matter of choice made by the port". A port applies for approval from Border Force. As explained above, it has the choice whether to seek a port approval which allows for passengers to travel through the port.*

*Against this background, we can confirm that the current Port Approval Document for Immingham includes the following wording:*

*"3. Approval is given for the loading and unloading of vessels/containers/vehicles/carrying all classes of cargo with the exceptions outlined below.*

**Exceptions**

*d) International commercial passengers. This may be varied subject to specific approval by the Border Force and the provision of Customs declaration and inspection facilities within the port area."*

*We can also confirm that the Port Approval Document which was in force for Immingham in 2014 did not include any wording permitting the crossing of passengers at Immingham. If the Port of Immingham had been approved to handle passengers this would have been expressly stated in the Port Approval Document, which we can confirm is not the case, and there would have been reference to the "embarkation and disembarkation of passengers", which is the wording found in port approvals where passengers crossing at that port is permitted.*

*The content of a port approval can be varied at any time and so, if a port that is not approved to handle passengers decide they wish to do so, they are free to seek an amendment to their approval and Border Force will consider that request. This is a commercial decision for the port operator."*

18. The Home Office considered that the information provided in this letter and, specifically, the wording of the exception provided within the Port Approval relating to the carrying of international commercial passengers, was sufficient to satisfy the Request. On that basis, the Home Office invited the Appellant to withdraw his appeal.
19. On 30 June 2023, the Appellant replied to the Home Office. He said that provision of the information to him in correspondence generated within the proceedings did not equate to publication of the information to the world at large under FOIA. He observed that the information plainly did not engage any

of the FOIA exemptions relied on by the parties to date, so that his position that at least some of the disputed information could be disclosed under FOIA was essentially correct. He invited the Home Office to review the disputed information, redact only that where the applicable exemptions were actually engaged, and disclose under FOIA the resulting redacted copies of the 2014 and current Port Approvals. Consequent upon that, he suggested a Consent Order to the effect that the Decision Notice was not in accordance with the law and be quashed because there was evidently some information in the disputed information which did not engage any exemption (namely, that which the Home Office had provided in its letter of 30 June 202) ; and the Home Office should not be required to take any further action.

20. On 18 July 2023, the Home Office responded to the Appellant. It maintained that no part of the Port Approval documents fell to be disclosed under FOIA for the reasons in the Decision Notice and the Home Office's Response to the Notice of Appeal, save for the limited information contained in the Home Office's letter of 30 June 2023. It said it would be "*disproportionate to require [the Home Office] to provide redacted copies of the Port Approval Documents when the relevant extracts have already been provided and no further information falls to be disclosed.*" It proposed a Consent Order, subject to the Commissioner's agreement, which provided that the Decision Notice be varied to state that: the Commissioner's original decision stood, save in relation to the extract of section 3(d) of the current Port Approval document disclosed in the Home Office's letter of 30 June 2023; the Home Office had disclosed this information and the Tribunal did not require the Home Office to take any further action; the appeal be withdrawn.
21. On 18 July 2023, the Appellant replied to the Home Office. He said that: the Decision Notice could not be varied by the parties' agreement; the Tribunal only had jurisdiction to vary the Decision Notice if the appeal were allowed; the Home Office now seemed to be saying that the Decision Notice was at least partially wrong because the limited disclosure made by the Home Office in its letter of 30 June 2023 was not exempt from disclosure under FOIA; and it followed that the appeal would have to be allowed in any event.
22. On 20 July 2023, the Home Office sought the Commissioner's views on its proposal for compromise of the appeal indicated in its letter to the Appellant of 18 July 2023. The Commissioner responded on 2 August 2023. He said that his understanding was that a variation to the Decision Notice would require a

substituted Decision Notice, and that “*technically*” the appeal would be allowed.

23. On 3 August 2023, the Home Office wrote to the Appellant, reciting the Commissioner’s position as indicated on 2 August 2023, and inviting him to withdraw his appeal.
24. On 3 August 2023, the Appellant responded to the Home Office. He declined to withdraw his appeal. He maintained that the Home Office’s disclosure of limited information on 30 June 2023 did not equate to disclosure to the world at large under FOIA. Additionally, he said that in circumstances where the Home Office was now effectively conceding that it had been wrong to conclude that no part of the disputed information fell to be disclosed under FOIA, he could not have any confidence in the Home Office’s position so that the only safeguard available to him was to have the First-tier Tribunal review all the disputed information.

### **The hearing and matters arising after the hearing**

25. In advance of the hearing, the Tribunal reviewed all the material contained in an OPEN bundle of 101 pages and a CLOSED bundle of 131 pages, which contained the disputed information which is the subject of this appeal.
26. The hearing was listed for 15 November 2023. At 14:54 on 14 November 2023, the Home Office requested the Tribunal’s permission to file and serve its Counsel’s skeleton argument, dated 10 November 2021 (but, presumably, 2023), and its bundle of authorities, consisting of 350 pages. It explained that the Appellant had opposed its request and that the bundle of authorities had not been agreed by the parties. It further noted that the bundle of authorities was different from an earlier version which had been sent to the Appellant on 13 November 2023 (as the bundle which it was now seeking permission to file contained what it described as “s43 FOIA”, which we take to mean a copy of that provision, and that the Commissioner had not had sight of the Home Office’s skeleton argument. The Home Office’s request (and the bundle of authorities and skeleton) was brought to the panel’s attention after 16:00 on 14 November 2023. In advance of the hearing, the Tribunal read the Home Office’s skeleton argument and some, but not all, of the material in the bundle of authorities.

27. The hearing took place remotely on 15 November 2023. It started at 10.00 a.m. Early in the hearing, the Appellant told the Tribunal that he would not be able to participate in the hearing after 12.30 p.m. because he had another hearing to attend at that time.
  
28. At the start of the hearing, we invited submissions from both parties as to whether we should accept the bundle of authorities. The Appellant submitted that we should not. He said that he had received the OPEN bundle in good time, but that the bundle of authorities should be excluded on the basis that it should have been filed a month earlier. He had no objection to the Home Office's skeleton argument having been filed at short notice. The Home Office accepted that the bundle of authorities had been filed late but submitted, by reference to individual items in the bundle, that it contained nothing controversial or anything which had not been aired in written argument between the parties.
  
29. We decided that we should accept the bundle of authorities for these reasons: it was helpful to the Tribunal to have the material to hand; the majority of it appeared already to have been referred to in the course of the proceedings; if the Home Office were to refer to something in the bundle which had not previously been referenced, the Home Office should make that clear in the hearing; to the extent that the bundle contained a First-tier Tribunal decision, that was not binding on the Tribunal in any event; the Tribunal would, in any event, invite final, written submissions from the parties after the hearing so that the Appellant may have a full opportunity to review the material.
  
30. At the start of the hearing, we explained to the parties that the Tribunal would sit in both OPEN and CLOSED session, and that the Home Office would provide to the Appellant an agreed gist of the CLOSED session. Considering time constraints, it was agreed that the Home Office should first call evidence from its witness, with the parties' oral submissions to follow.
  
31. The Home Office gave oral evidence by Mr Ochei, the team leader for the National Frontier Approvals Unit and the Deputy Director in Operational Logistics, Border Force. The Appellant cross-examined Mr Ochei in OPEN session, and then made his oral submissions. In CLOSED session, we put to Mr Ochei, and he answered, questions in relation to certain parts of the

disputed information, including matters which the Tribunal had invited the Appellant to identify in the OPEN session.

32. It became evident in the CLOSED session that there was sufficient material in Mr Ochei's CLOSED written evidence as to make it unlikely that the Tribunal could conclude hearing his evidence before 12.30 p.m. at which point the Appellant needed to leave the hearing to attend another hearing. Accordingly, we broke briefly from Mr Ochei's evidence in CLOSED session to explain to the Appellant in OPEN session that it would continue to hear Mr Ochei's evidence in CLOSED session after 12.30 p.m., and that the Tribunal would issue directions thereafter. The Appellant was agreeable to that approach and left the hearing. We continued to hear Mr Ochei's evidence in CLOSED session, concluding the hearing shortly after 1.00 p.m.

33. After the hearing, on 16 November 2023, the Tribunal directed:

- a. the Home Office:
  - i. by 4.00 p.m. on 17 February 2023 to file with the Tribunal, for the Tribunal's approval, a gist of the CLOSED session of the hearing.
  - ii. to send that gist to the Appellant and the Commissioner within two working days of the Tribunal confirming its approval of the gist.
  - iii. by 4.00 p.m. on 29 November 2023 to file, and serve on the Commissioner, a CLOSED bundle identifying which parts of the disputed information it contended were exempt from disclosure pursuant to ss 21, 31(a), 31(e) or 43(2) of FOIA.
  - iv. by 4.00 p.m. on 7 December 2023 to file, and serve on the Commissioner, any final CLOSED submissions, and file, and serve on the Appellant, any final OPEN submissions.
- b. the Commissioner to file, and serve as appropriate, any final CLOSED submissions by 4.00 p.m. on 7 December 2023.
- c. the Appellant to file and serve any final submissions by 4.00 p.m. on 2 January 2023.
- d. that any CLOSED material provided for by the Tribunal's directions should be withheld from the Appellant and any other party.

34. On 17 November 2023, the Home Office submitted a gist of the CLOSED session to the Tribunal. On 20 November 2023, the Tribunal directed certain amendments to the gist. On 22 November 2023, the Home Office accepted those amendments.

35. On 29 November 2023, the Home Office filed:
- a. a CLOSED bundle identifying those parts of the disputed information it contended were exempt from disclosure pursuant to ss 21, 31(a), 31(e) or 43(2) of FOIA by reference to the most recent Port Approval document dated 2 December 2021;
  - b. a supporting CLOSED witness statement from Mr Ochei; and
  - c. a narrative table entitled “CLOSED Explanation of applicability of FOIA exemptions to the content of the Port Approval Document 2021”;
  - d. CLOSED closing submissions; and
  - e. OPEN closing submissions.

It copied the Commissioner to its filing email by way of service but did not include the Appellant as an addressee to its email.

36. In the Home Office’s OPEN closing submissions, the Home Office submitted that specific items of text within the disputed information fell within the s21 FOIA exemption on the basis that it was already information in the public domain. It redacted that information in its OPEN closing submissions so that all that was visible by way of explanation of what that information might be was that some of it constituted addresses which could be found by way of a Google search, some of it constituted unspecified/redacted information which the Home Office accepted it had not given the Appellant precise directions to locate, and the balance of the information was wholly unidentifiable.

37. On 7 December 2023, the Commissioner confirmed he did not propose to file any final submissions. The Tribunal asked the Home Office why it had not served its OPEN closing submissions on the Appellant as directed on 16 November 2023. On 8 December 2023, the Home Office confirmed that that was an error on its part, and it served them on the Appellant the same day.

38. On 3 January 2024, the Home Office served on the parties the gist of the CLOSED session of the hearing on 15 November 2023. It explained that its delay in this regard lay in uncertainty on its part as to whether the Tribunal, in directing amendments to the gist, had, in fact, approved the gist. To accommodate the delay in service of the gist on the Appellant, the Tribunal directed that the Appellant and the First Respondent might have until 4.00 p.m. on 10 January 2024 to file any further submissions.

39. The gist provided relevantly as follows:

“ ...

2. *The Tribunal made clear that it wanted to understand how the content of the Port Approval documents were said to be covered by a relevant FOIA exemption (i.e. ss. 31(a) and (e), s. 43(2) and s. 21).*
3. *Counsel for the Second Respondent took Mr Ochei to the most recent Port Approval document and took him through a “page turn” of the document asking him to explain which exemption applied to the relevant content and why. The Tribunal members also asked Mr Ochei questions during this process, and in respect of the content which was being referred to.*
4. *The Tribunal specifically put to Mr Ochei the question Mr Ivan Murray-Smith had wanted answered, namely why it was said that the ss. 31(a) and/or (e) FOIA exemption applied to the discrete excerpt which had been disclosed in GLD’s letter of 30 June 2023. Mr Ochei confirmed that it was the Home Office’s, position that s. 31(a) applied to this excerpt and explained why this was the case by reference to other information that was in the public domain.*
5. *It was subsequently agreed that the Home Office were to file within 14 days of this Gist being approved and sent to Mr Ivan Murray Smith the following further documents:*
  - (1) *A table explaining which exemptions were being claimed over which parts of the content of the most recent Port Approval document, and why, and, in particular, which parts were said to already be in the public domain, and why;*
  - (2) *A further Closed Bundle containing the Port Approval document dated 2007 and the most recent Port Approval document, colour coded, showing which exemption was being relied upon in respect of all of the text/content of those documents; and*
  - (3) *Written CLOSED closing submissions; and*
  - (4) *If so advised, written OPEN closing submissions.”*

40. On 3 January 2024, the Tribunal reconvened to consider the appeal further.

41. On 7 January 2024, the Appellant filed a Response to the Home Office’s OPEN closing submissions. He challenged the Home Office’s redaction in those submissions of the information which the Home Office submitted was in the public domain (and therefore exempt from disclosure under s21 FOIA). He

invited the Tribunal to direct that the Home Office refile its OPEN closing submissions with all the information said by the Home Office to be in the public domain unredacted, and the precise directions with which the Home Office said the information could be located. He further invited the Tribunal to direct that the Home Office provide on an OPEN basis the explanation given by Mr Ochei in the CLOSED session of the hearing, as recorded in the gist, for the Home Office's position that s31(a) FOIA applied to the excerpt from the Port Approval provided in the Home Office's letter of 30 June 2023. He submitted that given that Mr Ochei's explanation was described as having been given by reference to "*other information that was in the public domain*", there was no reason why that explanation should not be provided if it was given by exclusively referencing information that had been disclosed and information which was in the public domain.

42. On 13 February 2024, the Tribunal directed that by 27 February 2024, the Home Office should file and serve written submissions responding to the Appellant's Response of 7 January 2024 including, but not limited to, the Appellant's submissions we have recorded above, that by the same date the Commissioner may file and serve written submissions responding to the Appellant's Response, and that by 12 March 2024, the Appellant should file and serve any written responsive submissions.
43. On 26 February 2024, the Home Office filed Revised OPEN closing submissions, an OPEN Response and a CLOSED Response to the Appellant's Response of 7 January 2024. In its Revised OPEN closing submissions, it presented unredacted the information which it said was in the public domain, which had hitherto been withheld in its OPEN closing submissions. It set out the explanation given by Mr Ochei in the CLOSED session of the hearing as recorded in the gist, for the Home Office's position that s31(a) FOIA applied to the excerpt from the Port Approval provided in the Home Office's letter of 30 June 2023, on the basis that the very act of providing that explanation and placing it into the public domain may undermine the prevention and detection of crime.
44. The Commissioner did not file any further submissions.
45. On 3 March 2024, the Appellant filed a Response to the Home Office's Revised OPEN closing submissions and gist of the CLOSED session. He invited the Tribunal to direct that:



- a. the Home Office provide Mr Ochei's explanation in full to the Appellant;
- b. the Appellant be prohibited pursuant to Rule 14(1) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the Rules") from disclosing that explanation to anyone;
- c. the Appellant may file and serve submissions "*on Mr Ochei's explanation*";
- d. The Commissioner and the Home Office may submit a response to the Appellant's submissions; and
- e. The Appellant may submit a final reply.

46. For reasons which will be evident from what follows, the Tribunal has not considered it appropriate to make the further directions invited by the Appellant on 3 March 2024.

### **Applicable Law/Legal Principles**

47. The relevant provisions of FOIA are as follows:

#### **Section 1**

##### ***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.*

#### **Section 2**

##### ***Effect of the exemptions in Part II***

...

(3) *In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that-*

- (a) *The information is exempt information by virtue of a provision conferring absolute exemption, or*
- (b) *In all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*

...

## **Section 21**

### ***Information accessible to applicant by other means***

- (1) *Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.*
- (2) *For the purposes of subsection (1) –*
  - (a) *information may be reasonably accessible to the applicant even though it is accessible only on payment, and*
  - (b) *information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.*
- (3) *For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.*

## **Section 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,*

...

- (e) *the operation of the immigration controls,*

...

## **Section 43**

### *Commercial interests*

...

- (2) *Information is exempt information if its disclosure under this Act would, or would be likely to prejudice the commercial interests of any person (including the public authority holding it).*

...

## **Section 58**

### *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.*

48. The public interest is to be assessed by reference to how matters stand at the date of refusal of the request: see *Montague v Information Commissioner and DIT* [2022] UKUT 104 (AAC), at [86] (overturned by the Court of Appeal on the issue of aggregation of exemptions under Part II FOIA but not in relation to the time (decision on the request) at which the public interest should be assessed (*Department for Business and Trade v the Information Commissioner and Montague* [2023] EWCA Civ 13).

## **Analysis**

### **Section 31 FOIA**

49. Section 31 FOIA is a prejudice-based exemption. The approach to be taken in prejudice cases was set out in the First-tier Tribunal decision of Hogan v Information Commissioner [2011] 1 Info LR 588, as approved by the Court of Appeal in Department for Work and Pensions v Information Commissioner [2017] 1 WLR 1:

- a. First: the applicable interests within the relevant exemption must be identified.
- b. Second: the nature of the prejudice being claimed must be considered. It is for the decision maker to show that there is some causal relationship between the potential disclosure and the prejudice, and that the prejudice is “real, actual or of substance”.
- c. Third: the likelihood of occurrence of prejudice must be considered. The degree of risk must be such that there is a “*real and significant*” risk of prejudice, or there “*may very well*” be such prejudice, even if this falls short of being more probable than not.

50. S31 FOIA is a qualified exemption, which means that it only applies if in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

*The applicable interests within the s31 FOIA exemption*

51. The applicable interests are: (a) the prevention or detection of crime and (e) the operation of the immigration controls. In its CLOSED Response to the Notice of Appeal, dated 22 May 2023, the Home Office provided numerous examples of facts and matters relating to the Port which we accept directly constitute or engage those applicable interests as we find them.

*A causal relationship between the disclosure and prejudice which is real, actual or of substance*

52. It became evident to the Tribunal in the CLOSED session of the hearing that it would be greatly aided by a colour-coded mark-up of the disputed information to show which parts of it the Home Office said engaged which FOIA exemption and why.

53. To that end, and in compliance with the Tribunal’s directions of 16 November 2023, the Home Office filed a CLOSED mark-up of the Port Approval in force at the time of the Request, showing by colour-coding which parts it submitted engaged the s31 (a) and/or (e) FOIA exemption (and/or the s21 and s43 exemption with which we deal with below), together with a CLOSED table called the Explanation of applicability of FOIA exemptions to the content of the

Port Approval (“the Explanation”), referenced in Mr Ochei’s Second Witness Statement dated 29 November 2023.

54. The Explanation sets out in helpful detail the Home Office’s reasons as to how and why each marked-up part of the disputed information engages each, relevant exemption. Armed with this material, the Tribunal has worked through the Port Approval in force at the time of the Request, and the other unmarked-up material in the CLOSED bundle. Taking together Mr Ochei’s OPEN and CLOSED evidence, and the Explanation, the Tribunal is satisfied that disclosure of the disputed information would disclose such operational matters and security details relating to the Port as to be an effective cause of prejudice to the prevention or detection of crime and the operation of immigration border controls, and that such prejudice would be a matter of very real substance.

*The likelihood of the occurrence of the prejudice*

55. The question of the meaning of likelihood in the current context was addressed by the Tribunal in *John Connor Press Associates v Information Commissioner* (EA/2005/0005, 25 January 2006): “We interpret the expression “likely to prejudice” as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk.” In so doing, the Tribunal drew on the judgment of Munby J in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin) (a Data Protection Act case) who said: “Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there ‘may very well’ be prejudice to those interests, even if the risk falls short of being more probable than not.” [100].
56. We adopt the interpretation of “*likely to prejudice*” as meaning that the chance of the prejudice being suffered is more than a hypothetical or remote possibility; there is a real and significant risk.
57. Our assessment of the likelihood of prejudice arising from disclosure of the disputed information is, necessarily, heavily reliant on Mr Ochei’s evidence. We acknowledge that persons in the executive branch of government who are tasked day-to-day with addressing infinite aspects of the prevention and detection of crime and the operation of immigration border controls, will, generally, be best placed to assess what is likely to prejudice those matters and the likelihood of that prejudice arising.

58. Mr Ochei's evidence under cross-examination by the Appellant was to the effect that each Port Approval is unique; a specific item of information in it might not, per se, cause any particular issues, but combined with other information in the hands of criminal enterprises, it could be used to create a mosaic picture of information so as to compromise security (and, in the context of s43(2), with which we deal below, the parties' commercial interests).
59. The Appellant submitted that that is the wrong way to look at it. He argued that the Home Office's position that disclosure in one case makes future requests harder to resist (which is not, in fact, what we understood the Home Office to be arguing) was wrong, and that the opposite was true: the Home Office could refuse later requests on the basis that acceding to them would crystallise the risk of the mosaic effect at that stage, and prejudice would have to be established at that point in time.
60. We disagree. We consider that a public authority is entitled to seek to avert or anticipate prejudice arising from combinations of existing information and disclosures yet to be made, rather than being constrained to approach matters by a retrospective view of what has been previously disclosed, much of which it could not know in any event. The Appellant's approach would mean a public authority slamming the stable door after the horse has bolted.
61. Once Mr Ochei was able to give oral evidence freely in CLOSED session, he was able to elaborate the answers he had provided to the Appellant under cross-examination. In our view, his oral evidence, together with the Explanation, established that publication of the disputed information would be likely to give rise to the prejudice we have identified.
62. Accordingly, the Tribunal finds that s31(1)(a) and (e) FOIA are engaged in relation to the disputed information.
63. We must go on to consider whether the public interest in maintaining those exemptions outweighs the public interest in disclosing the information requested. The Appellant did not articulate (either in relation to s31(1)(a) or (e) or s42(3) FOIA) any public interest in disclosure. He said that he could not do so as he did not know the information. He accepted that his interest in the information in the Port Approval had been limited to the issue of the Port carrying international passengers. He did not consider there was any causal link between disclosure of that information and likely prejudice and, in those circumstances, he did not consider that the public interest test was engaged.

64. We find that there was, at the time of the refusal of the Request, a public interest in the operation of border controls at ports in the UK, and in the transparency and accountability of those tasked with that operation.
65. However, we find that at the time of the refusal of the Request, there was a greater public interest justifying non-disclosure of the disputed information, namely the very real risk that its disclosure would cause significant prejudice to the relevant, protected interests. It may not be possible precisely to articulate the extent of that risk at any given time because it may rest, in part, on that which is not known, namely what information criminal enterprises already have which, in conjunction with either a) information which is already in the public domain and/or b) the disputed information, if published, would enable those enterprises to piece together a mosaic of information to harm the public interest. Assessing that risk necessarily involves a degree of speculation, albeit underpinned by specialist knowledge and/or empirical evidence, but that does not make the assessment unprincipled.
66. The Appellant says that the Home Office's disclosure to him on 30 June 2023 of the limited excerpt from the Port Approval shows that Commissioner must have erred in finding that the entire Port Approval was exempt from disclosure.
67. We disagree. At the time of the Home Office's refusal of the Request, the Appellant had requested the Port Approval in its entirety. We accept that the public interest at that time lay in maintaining non-disclosure in relation to all the information in the Port Approval as a single body of information. It was only after the issue of Decision Notice that the Appellant considerably narrowed the scope of the Request to make clear that his interest was in why the Port did not carry international passengers. The Home Office evidently re-assessed the public interest test at that point in relation to that issue and concluded, reasonably, in our view, that it was appropriate to disclose the limited excerpt in its letter of 30 June 2023.
68. Having considered all the circumstances, the Tribunal finds that the public interest in maintaining the exemptions outweighs any public interest in disclosure of the information, and that the Home Office was entitled to rely on s31(a) and (e) FOIA to withhold the disputed information.

### **Section 43 FOIA**

69. Section 43(2) FOIA is also a prejudice-based exemption.

*The applicable interests within the s43 FOIA exemption*

70. The Home Office has identified that the applicable interests are the commercial interests of the Port and the Government.

71. It asserted that Associated British Ports, whom we understand to be the owners and/or operators of the Port, agreed with the Home Office's position as to the likely prejudice that would be caused to the commercial interests of the Port and the Government by disclosure of the disputed information. There was, however, no evidence before us from Associated British Ports to that effect, and we are not, therefore, swayed by that assertion made on behalf of Associated British Ports.

72. However, having considered both the OPEN and CLOSED material available to us, we are satisfied that disclosure of the disputed information would identify matters which are the subject of commercial confidence and sensitivity between the Port and the Government, for example which model of customs control is being used, specific control terms and conditions, which we understand may vary across all ports, and the content and terms of particular services or facilities provided by the Port to Border Force. We accept that all those matters constitute commercial interests of both the Port and the Government.

73. The Home Office submitted that another relevant commercial interest is that of the Home Office's ability to secure the "best terms" with other ports as part of negotiations when granting approval, which might be damaged by disclosure of the arrangements in relation to the Port. Although it is unclear to us precisely what is meant by "best terms" in this context, we can see and accept that the Home Office has a commercial interest in securing a favourable arrangement in any commercial framework, even if it is not obvious to us which precise commercial interest might be damaged in this context.

*A causal relationship between the disclosure and prejudice which is real, actual or of substance*

74. Again, we have reviewed carefully in the context of s43(2) FOIA, the Home Office's CLOSED written and oral evidence and the Explanation. We are satisfied that disclosure of the disputed information marked as engaging s43 FOIA would disclose matters which are commercially sensitive to the Port. In a context where we are told Port Approvals are agreed in a competitive market, the exact terms and conditions agreed for any given port will vary, and where



the Port Approval for the Port was the subject of confidential negotiations, we find that disclosure of those matters would cause real prejudice to the Port.

75. It is less obvious to us what the causal relationship between disclosure and prejudice to the Government is in this context. It was Mr Ochei's written, OPEN evidence that "*Other ports may choose not to negotiate or drive a harder bargain in these discussions thereby undermining HMG's commercial interests.*" We had little evidence before us of what was meant by this against the backdrop of what we were being told about the commercial arrangements between the Port and the Government in this particular case, but we are prepared to accept that where, as in this case, the Government and the Port engage in confidential negotiations resulting in a contract between them from which each seeks to benefit in a competitive market, it is more likely than not that disclosure would prejudice not just one party but both, even if to different degrees.

*The likelihood of the occurrence of the prejudice*

76. We consider that the chance of such prejudice to the Port's commercial interests as we have identified, is more than a hypothetical or remote possibility; there is a real and significant risk. The features of the arrangements between the Port and the Government to which we have alluded, and which are set out in detail in the disputed information and the Explanation, are undoubtedly those which would be of interest to other ports, and their disclosure likely to be used by the Port's competitors to further their own interests.

77. The Tribunal finds that s43(2) FOIA is engaged in relation to the disputed information.

*The Public Interest*

78. The Home Office submitted that the public interest balance weighs against disclosure given that the commercial interests of both the Port and the Home Office would suffer (the emphasis on "both" being that of the Home Office), and that the likelihood of harm being suffered outweighs any apparent benefits to the public of information being disclosed, none of which had been particularised by the Appellant.

79. We accept that there will be a degree of public interest in the commercial arrangements between port owners/operators and the Government. However, we also accept that the negotiation, agreement and delivery by a port of the types of facilities and services addressed in the disputed information are matters of potentially great commercial sensitivity and value to the port and

the Government. We also accept that disclosure of the disputed information in a specific case (that of the Port) is likely to impact on the prospect of the Government being able to negotiate and procure such facilities and services more generally with other ports, were they to fear the publication of their relevant, commercial arrangements in due course. That indicates to us a strong public interest in maintaining the exemption, which outweighs any public interest in disclosure.

80. Accordingly, we find that the Home Office was entitled to rely on s43(2) FOIA to refuse to disclose the disputed information.

### **Section 21 FOIA**

81. The Home Office submits that certain of the disputed information is reasonably accessible to the Appellant otherwise than under s1 FOIA and thus absolutely exempt from disclosure pursuant to s21 FOIA. In its CLOSED mark-up of the Port Approval, it has marked up those parts which it says falls under this exemption. The information consists of the address of the holder of the Port Approval and the address of the National Frontier Approvals Unit; the name of the Holder of the Port Approval and the address of the Port; the Freight Location Code for the Port; and the Appeal process in respect of the Port Approval.

82. S21 FOIA did not feature in the Home Office's refusal of the Request, the Decision Notice or the Home Office's Response to the Appeal. It did feature in the Home Office's skeleton argument as follows:

*“The Home Office therefore submits that the entire contents of the Port Approvals were exempt from disclosure. Any information contained within them, including pieces of information that might appear insignificant or innocuous, is capable of being combined with existing information and future disclosures to prejudice law enforcement operations and the operation of border controls. Further, some of the information in the Port Approvals is obviously in the public domain (i.e. references to the legislation under which the Port Approvals have been made) and therefore does not fall to be disclosed under FOIA. ... These are matters Mr Ochei will be able to expand upon in his open and closed oral evidence before the Tribunal.”*

83. Reliance on s21 FOIA was, therefore, something of a late entry. There is no timescale under FOIA for the identification by a public authority of the exemptions on which it may rely. That said, Rule 23(3) of the Rules provides that any respondent to an appeal must state any grounds for opposition to the

Appellant's case. The Home Office's Response to the Appeal identified not just s31 FOIA but also s43(2) FOIA. It was, however, silent as s21 FOIA.

84. The Tribunal must consider de novo the decision to disclose or refuse the information requested. A public authority is entitled to lay before the Tribunal all exemptions from disclosure on which it says it was entitled to rely at the time of the decision. Recognising that the Home Office was seeking in advance of and at the hearing to rely on s21 FOIA, the Tribunal exercised its case management powers on 16 November 2023 to issue OPEN directions to the Home Office to file a CLOSED bundle identifying which of the disputed information it contended was exempt from disclosure pursuant to s21 FOIA. The Home Office complied with that direction and at the same time elaborated its position on s21 FOIA in its OPEN closing submissions. The Appellant has therefore had ample opportunity to consider and respond to that, and he has done so.

85. He submits that if any of the information requested is exempt from disclosure pursuant to s21 FOIA, then the Commissioner must have been wrong to conclude in his Decision Notice that the Home Office was entitled to rely on s31 FOIA to withhold the requested information. We reject that submission. We find that the Home Office when faced with a request for the Port Approval as a whole was entitled to view the Port Approval as a body of information as a whole and conclude that it was exempt from disclosure pursuant to s31(1)(a) and (e) FOIA. Absent understanding that the Appellant's interest in the information was limited to the discrete issue of the Port carrying international passengers, it was not required to dissect the document to consider specific and peripheral information in it in isolation, with a view to identifying whether those individual items might engage s21 FOIA.

86. In any event, the Appellant disputes that the information in question was reasonably accessible to him other than under s1 FOIA.

87. By its Revised OPEN closing submissions, the Home Office has identified where this information can be found. It accepts that it has not previously directed the Appellant to these resources but submits that this was unnecessary, for the s21 FOIA exemption to apply, given that it had always been possible for the Appellant to source this information.

88. There is no requirement in s21 FOIA for a public authority to direct a person requesting information to where they might find it (although public authorities are expected to offer reasonable advice and assistance to requesters). In any event, given that the Appellant knew the identity of the Port and that there was an item called a Port Approval (as the Request referred to it in precisely those terms), it was immediately open to him to begin simple internet searches and to broaden and deepen his enquiry by the same means as appropriate to identify all that information identified in the Home Office's Revised OPEN closing submissions as being exempt from disclosure pursuant to s21 FOIA.
89. The Appellant has not indicated that his circumstances are such that the information was not reasonably accessible to him by those means. Indeed, he is evidently well able to conduct extensive and focused internet searches as he made clear in his complaint to the Commissioner, which we have already set out. We find that the information was reasonably accessible to him.
90. We find that the Home Office was entitled to rely on s21 FOIA to refuse to disclose the information it has identified as engaging s21 FOIA. S21 FOIA is an absolute exemption and so no consideration of the public interest in its application is required.

*The Appellant's further arguments*

91. During these proceedings, the Appellant has raised two issues, which we feel we must briefly address. First, he has said that the Home Office's letter of 30 June 2023 was written on a without prejudice basis so that the disclosure by that letter of the limited excerpt of the Port Approval was insufficient to constitute publication under FOIA. Second, he has said that because that excerpt was provided to him in correspondence in the course of the proceedings, he is prevented from publishing it. We disagree with both propositions. As regards the first, the Home Office's letter of 30 June 2023 was written on an open basis, disclosing the limited excerpt without prejudice to its primary position that it had been entitled to rely on s31(1) FOIA to refuse the Request. As regards the second, the disclosure of the limited excerpt in the Home Office's letter of 20 June 2023 was not a disclosure in the proceedings. It was the Home Office's open attempt, in parallel with the proceedings, to satisfy the thrust of the Request under FOIA, once it understood what information the Appellant was driving at.

92. Separately: by his Response to the Home Office's OPEN closing submissions, the Appellant has sought the explanation given to the Tribunal by Mr Ochei in CLOSED session at the hearing, as to why it was that s31(1) FOIA applied to the limited excerpt disclosed by the Home Office on 30 June 2023 by reference to other information that was in the public domain. He submits that if the explanation was given exclusively by referencing information that has been disclosed i.e. the limited excerpt and information that is in the public domain, there is no reason why the explanation should not be disclosed.
93. By its Revised OPEN closing submissions, the Home Office has resisted that, maintaining that Mr Ochei's explanation should not be released to the Appellant, and therefore into the public domain, as the very act of providing that explanation, and placing it in the public domain, may undermine the prevention and detection of crime.
94. The Appellant rejects that proposition. He submits that there is no reason why disclosing Mr Ochei's explanation to the Appellant alone i.e. as distinct from anyone else, may undermine the prevention and detection of crime. And he proposes a solution to address the Home Office's concern in that regard: that the Tribunal should direct that Mr Ochei's full explanation be provided to him, and that pursuant to Rule 14(1) of the Rules he be prohibited from disclosing it to anyone.
95. Disclosure of Mr Ochei's explanation to the Appellant in these FOIA proceedings would place it in the public domain. We are satisfied that Mr Ochei's explanation is an entire explanation, and that it is not possible to divorce what he said about the import of any information in the public domain from the disputed information, including the limited excerpt. To attempt that would likely disclose other aspects of the disputed information and/or give insight into the Port's and Border Force's immigration control and security concerns. In that context, single items of seeming innocuity or self-evidence may have an inner significance to the mischievous or the malevolent in combination with other information already in their possession or in disclosures yet to be made.

96. We reject the Appellant's proposal that he should achieve by the Tribunal's discretionary application of Rule 14(1), what is effectively a private disclosure to him of information whose disclosure we find the Home Office lawfully to have refused under s31(a) and (e), s43(2) and s21 FOIA.

97. The function of the Tribunal, by this Decision, is to determine whether the Decision Notice was in accordance with the law or, to the extent that the Decision Notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, and if we consider that the Decision Notice was not in accordance with the law or that the Commissioner ought to have exercised his discretion differently, to allow the appeal, substitute such other Decision Notice as could have been served by the Commissioner, and in any other case to dismiss the appeal (s58 FOIA).

98. The Tribunal finds that the Home Office was entitled to refuse the Request pursuant to s21, s31(a) and (e), and s43(2) FOIA, and that the Decision Notice was in accordance with the law.

Signed: *Judge Foss*

Date: 16 May 2024

Promulgated on: 6 June 2024