



Neutral citation number: [2025] UKFTT 00847 (GRC)

Case Reference: FT/EA/2023/0493

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

**Heard on the papers on 22 July 2024 and at a hearing on CVP on 02 May 2025.**

**Decision given on 14 May 2025.**

**Panel: Brian Kennedy, Specialist members Naomi Matthews & Kerry Pepperell.**

**Between:**

**CHARLIE SMITH**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**First Respondent**

**and**

**CHIEF CONSTABLE OF WEST MIDLANDS POLICE**

**Second Respondent**

**Representation in writing:**

For the Appellant: Charlie Smith as a Litigant in person.

For the First Respondent: Richard Bailey, Solicitor.

For the Second Respondent: David Messling of Counsel.

**Result:** The Appeal is allowed.

**Substituted Decision:** The Second Respondents within 30 days of this decision, must disclose the requested information i.e. *"1. The total number of response officers on duty in the West Midlands during the night shift of May 8, 2023, and 2. The total number of supporting officers (e.g. those in control rooms, custody suites and other facilities) on duty in the West Midlands during the night shift of May 8, 2023"*.

## REASONS

### Introduction:

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("FOIA") against his decision notice of the Commissioner dated 23 October 2023, Ref. IC-251433- B0G9 ("the DN") which is a matter of public record.

### Factual Background to this Appeal:

2. On 30 June 2023, the Appellant wrote to West Midlands Police ('WMP') and requested information in the following terms: "*...please can you provide data for the following amended request:*  
*"1. The total number of response officers on duty in the West Midlands during the night shift of May 8, 2023.*  
*2. The total number of supporting officers (e.g. those in control rooms, custody suites and other facilities) on duty in the West Midlands during the night shift of May 8, 2023".*
3. In its response dated 18 July 2023, WMP confirmed holding the requested information but refused to disclose the same, relying upon the exemptions under sections 31(1)(a) and (b) FOIA (a position upheld following an internal review). The Appellant complained to the Information Commissioners' Office.
4. After his investigation the Commissioner concluded in the DN that:
  - i) The exemptions under sections 31(1)(a) and (b) are engaged [§ 30];
  - ii) The public interest in maintaining the exemptions outweighs the public interest in disclosure of the requested information [§ 40].
5. Both Respondents oppose the appeal.

### Legal Framework:

Section 31 FOIA: Section 31(1) FOIA provides an exemption for information that would, or would be likely to, prejudice (in so far as is relevant to this appeal):

*"(a) the prevention or detection of crime,  
(b) the apprehension or prosecution of offenders".*

The matters that must be considered in order to establish whether section 31(1) is engaged have been frequently rehearsed in the case-law and are:

- (i) the interest that is protected by the exemption (in this case, the relevant function of the public authority);

- (ii) the nature of the prejudice to that interest;
  - (iii) the chance of prejudice being suffered.
6. In relation to point (ii), the nature of the prejudice, it is necessary to demonstrate a causal link between the disclosure and the harm claimed.
  7. As to the chance of prejudice (point (iii)), it is not necessary to show that the prejudice would be significant (although the extent of the prejudice is relevant to the public interest balance). However, disclosing the information must have "a very significant and weighty chance" of causing prejudice that is "real, actual and of substance" – see *Department for Work and Pensions v Information Commissioner and FZ* [2014] UKUT 0334 (AAC) and *R (Lord) v Secretary of State for the Home Department* [2003] EWHC 2073 (Admin).
  8. In this context, the term "*would prejudice*" means that it has to be more probable than not that the prejudice would occur. "*Would be likely to prejudice*" is a lower test – here, the chance of prejudice must be more than a hypothetical possibility: there must be a "*real and significant risk*" of prejudice. For example, see *Hogan and Oxford City Council v Information Commissioner* EA/2005/0026 and 30 [at 35].

#### **The Commissioners' Decision:**

9. The Commissioner concluded in his DN that:
  - (i) The exemptions under sections 31(1)(a) and (b) are engaged [30]; The public interest in maintaining the exemptions outweighs the public interest in disclosure of the requested information [40].
  - (ii) The Information Commissioner recognises that disclosure of information under the FOIA may have a negative effect in particular on the voluntary supply of information to a public authority in the future.
10. The Commissioner interprets the term "*would prejudice*" means that it has to be more probable than not that the prejudice would occur.
11. The exemption in section 31(1) is a qualified exemption. If a public authority finds that the conditions for applying the exemption are satisfied, it must go on to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2 FOIA).
12. In relation to prejudice-based exemptions, such as the exemption under section 31 FOIA, the Commissioner considers that there is always an inherent public interest in maintaining the exemption. This should be taken into account when the public interest test is applied.

13. The material time to consider the public interest balance is the time of the response to the request – see *Montague v Information Commissioner & Department of International Trade* [2022] UKUT 104 (AAC) ('Montague') which in this case is 18 July 2023 (it would logically follow that the application of exemptions should be considered at the same time – see the decision of the Upper Tribunal in *Keighley v Information Commissioner & BBC* [2023] UKUT 228 (AAC) at [29] regarding derogation).

### **The Appeal:**

14. The Appellant challenges the Commissioner's DN for the following reasons:

- (i) On balance, the factors for disclosure have greater weight than those for exemption and that the public interest lies in disclosing the information
- (ii) The Section 31 prejudice-based exemption was not properly engaged because the prejudice test did not show how the prejudice claimed is real, actual or of substance; or show that there is a causal link between the disclosure and the prejudice claimed, as per ICO guidance.
- (iii) The perceived harm it is claimed that the disclosure of the information would cause has not been properly demonstrated.

15. The Appellant argued further in some detail supporting his reasons (see pages A12 – 17 Open Bundle ("OB")).

### **The Tribunal's powers on appeal:**

16. The Tribunal's powers on an appeal brought under s.57 FOIA are set out in s.58 FOIA:

17.

#### **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.

### **The Commissioners Response to the Appeal:**

18. There is an inevitable overlap under these exemptions between whether or not the exemptions are engaged and any subsequent application of the public interest test because the prevention of crime is in the public interest.
19. The applicable interests in this case are the prevention or detection of crime and the apprehension or prosecution of offenders. These sections do not require the Police to show that disclosure would or would be likely to lead to any increase in crime.
20. The Appellant argues that the Commissioner has not satisfactorily demonstrated that the prejudice claimed is real, actual or of substance or that there is a causal link between disclosure of the requested information and the harm envisaged such that disclosure would be likely to cause harm.
21. The Appellant accepts that disclosure of the withheld information would be of use to some, organised, criminals, but he has not seen the information. It is however irrelevant that other, less organised criminals may not use such information. In order for the exemptions to be engaged, it would only be necessary for the WMP to demonstrate that disclosure would be likely prejudice the prevention or detection of criminal offences by any criminal (organised or otherwise) or their apprehension or prosecution.
22. The Appellant further argues that criminals would have difficulty finding the information on Police Forces' websites. However, this is an arid argument given that, if the withheld information was disclosed pursuant to FOIA, criminals could simply make a separate FOIA request for the same information (whilst the exemption under section 21 may be applicable in such circumstances, the relevant police force would still be expected to direct the requester to where the information is found).
23. The Appellant argues that disclosure would not cause the alleged harm on the ground that the withheld information, being information for just one night, would not be of much use to criminals, supported by the responses he has received from other police forces for the same information.
24. However the Commissioner submits the fact that other police forces have chosen to disclose similar information in response to requests to them does not mean that WMP's response was incorrect in law and in any event whilst the withheld information of itself may not be of assistance, disclosure of the withheld information in combination with other such information would be likely to cause such harm due to the mosaic effect; Further the Appellant argues "*I do not consider that the information I have requested could be pieced together with other disclosed information to 'form a broader picture'*" and argues that despite making internet searches for "*other night shifts consecutive to or close by to May 8, 2023*" - "*no such information is currently in the public domain*".

25. The 'other information' referred to in paragraph 21 of the DN may not necessarily be information already in the public domain. The Commissioner suggests the Appellant's argument ignores that organised criminals could make a number of separate FOIA requests for such information to the same and other police forces. As the Commissioner states in paragraph 22 of the DN, complying with one request for information such as the withheld information in this case, can make it more difficult to refuse requests for similar information in the future. Public authorities are therefore entitled to consider any harm that could be caused by combining the requested information with the information a public authority could subsequently be required to provide if the current request was complied with, described in the ICO guidance as the '*precedent effect*'.
26. It is argued that on the facts of this case, the information disclosed under FOIA, in combination with the withheld information, could build up a picture of police staffing levels, shifts and locations which could lead to targeted crime at certain optimal times and places. The prejudice to the prevention of such crime in such circumstances would clearly be real, actual and of substance.
27. The Appellant argues that the Commissioner's conclusion that: "*...it is not too difficult to imagine criminals using information about the number of police officers on duty at different times or locations to plan their criminal activities and evade apprehension or try to*" is "*vague and appears to be based on guesswork rather than data*".
28. Although there must be a causal link between the disclosure and the prejudice envisaged, the prejudice test inevitably relates to something that may happen in the future, if the information were disclosed. Therefore, it is not usually possible to provide concrete proof that the prejudice would or would be likely to result. Nevertheless, the Commissioner accepts that there must be more than a mere assertion or belief that disclosure would lead to prejudice. There must be a logical connection between the disclosure and the prejudice in order to engage the exemption.
29. In *England v Information Commissioner & London Borough of Bexley* EA/2006/0060 & 0066, the Tribunal stated that providing actual evidence of the link between disclosing a list of empty properties and prejudice to the prevention of crime "*...is a speculative task and as all parties have accepted, there is no evidence of exactly what would happen on disclosure, it is necessary to extrapolate from the evidence available to come to the conclusion about what is likely*".
30. On the facts of this particular case, the Commissioner maintains that, for the reasons set out in the DN and above there is clearly a logical connection between disclosure of the withheld information and the prejudice to engage the exemptions under sections 31(1)(a) and (b).

**On the Public interest test:**

31. The Commissioner considers that where it is established that sections 31(1)(a) and (b) are engaged, the fact that disclosure would (at least) be likely to cause such prejudice is a factor which should be given weight in the public interest balance. As the Court of Appeal recognised in *Willow v Information Commissioner and the Ministry of Justice* [2017] EWCA Civ 1876 at [28] (considering the public interest balance regarding disclosure of information withheld under section 31(1)(f)2): *"The features which justify the engagement of s. 31(1)(f) are equally relevant to the potential prejudice which falls on one side of the balance..."*
32. Accordingly, in the Commissioner's view, significant weight should be given to the likely harm to the public interest as a result of disclosure. It would be counter to the public interest for criminals (organised or otherwise) to be given information which, perhaps in combination with other information, would assist them to target crime. That is contrary to the strong public interest in the prevention of crime which is protected by section 31(1)(a) FOIA.
33. The Appellant argues that:
- (i) "Transparency and accountability;
  - (ii) that there is a public interest "... is a significant reason for disclosing the information, especially at a time of bad press for police forces in England and Wales"; in reassuring "...the public that their local force is adequately staffed";
  - (iii) to correct misconceptions that police forces may not be properly staffed and "to provide the public with a more complete picture both to provide reassurance when forces are adequately staffed and to spark change when forces are not adequately staffed" and finally;
  - (iv) weight should be given to whether "...there are enough police officers on duty for the money that is being spent".
34. Whilst the Commissioner acknowledged in the DN that transparency and accountability was a factor in favour of disclosure, the Commissioner would maintain that this is outweighed by the factors in favour of maintaining the exemptions. If the exemptions are engaged the above prejudice would have been found to be likely to occur which would only make policing harder leading inevitably to greater pressures on the Police and Police staffing levels which would not be in the public interest.
35. Further the Commissioner suggests it is unlikely that disclosure of the withheld information which relates to numbers for a single night shift would necessarily reassure the public on staffing numbers or indeed assist the public in determining whether they are getting value for money from the police in the absence of information on a more widespread or even national scale. There is in any event official information publicly available on the [www.gov.uk](http://www.gov.uk) website regarding police workforce numbers (to which WMP has directed the

Appellant in its response to the request for an internal review) which would go some way to satisfying such a public interest.

36. There is a very strong public interest in protecting the ability of public authorities to enforce the law and in protecting society from the impact of crime. Further, when considering the public interest in preventing crime, it is important to take account of all the consequences that can be '*anticipated as realistic possibilities*' – see *London Borough of Camden v Information Commissioner & Voyias* [2021] UKUT 190 (AAC) [11], such as, for example an increased fear of crime.
37. In light of the above, the Commissioner maintains that he was correct to conclude on balance that the public interest in maintaining the above exemptions outweighs the public interest in disclosure of the withheld information.

### **The Second Respondents Response:**

38. WMP accepts, of course, that it is a public authority for the purposes of FOIA. The starting point is therefore that the Appellant is entitled: (a) by s.1(1)(a) to be informed in writing by WMP whether it holds information of the description specified in the request ("the duty to confirm or deny"); and (b) by s.1(1)(b) to have that information communicated to him.
39. WMP submits that the DN is in accordance with the law. It did not err in its application of the public interest test under s.30(3), and there was no wrong exercise of its discretion, and they argue the appeal should be dismissed.
40. In relation to s.31, it is clear that, as a police force, WMP's public function relate to the law enforcement interests protected under s.31(a) and (b) in the prevention or detection of crime and the apprehension or prosecution of offenders ("*the law enforcement interests*"). The crux of this appeal is the extent to which the disclosure of the requested information is likely to prejudice those interests.
41. WMP submits that it is self-evident that revealing specific information about policing capacity would adversely affect the law enforcement interests. It would very likely assist criminals in the planning of any criminal activity to have knowledge of specific policing staffing levels. It can be no answer to this, as suggested by the Appellant, that only organised criminals will benefit from such information. Logically, any persons engaging in criminal activities will be aided in evading detection and apprehension by the police if they are furnished with information about policing capacity.
42. This, WMP further argue is especially the case in relation to information about particular shifts. Although the Request made was for a '*snapshot*' of one single



night shift on 8 May 2023, a single shift may be enough for persons to make assumptions about staffing levels on similar shifts.

43. WMP argue the resulting harm cannot be said to be trivial. As noted at paragraph 17 of the DN, criminal activity risks the safety of the public. Information that potentially enables criminals to target criminal activities around police resource levels also presents a risk to the safety of police officers involved in detecting and preventing crime.
44. The ICO guidance on the law enforcement exemptions indicates that the '*mosaic effect*' of any disclosed information can be taken into account. WMP submit that in this case, a clear risk arises from a mosaic effect of similar information being disclosed for other shifts and for other police forces, thereby enabling persons to draw conclusions about police resources (a) across shifts in the same force and (b) between different forces at specific times. Compliance with the Appellant's Request would also make it more difficult for WMP to refuse similar request in future.
45. The fact that other police forces have chosen to disclose similar information does not, in itself, render WMP's response to the Request unlawful. Furthermore, it increases the prospect of any information disclosed by WMP being used in conjunction with information from other police force, causing harm from the mosaic effect.
46. WMP argue it can be no answer, as suggested by the Appellant, that the information would be difficult to find on other police force websites. Once provided under FOIA, they argue, it is in the public domain and would fall to be provided in any repeated request for the same information.
47. The Appellant contends that the perceived harm "*has not been properly demonstrated*" and suggests, in effect, that it is speculative to consider that any actual prejudice would result from provision of the information. This WMP suggest fails to acknowledge that necessarily assessing future harm involves consideration of risk and does not fall to be '*demonstrated*' by means of proving that specific persons are or will use such information for criminal purposes. The applicable test, as set out in Department for Work and Pensions v Information Commissioner and FZ [2014] UKUT 0334 (AAC) at §26, following R (Lord) v Secretary of State for the Home Department [2003] EWHC 2073 (Admin), is whether disclosure of the information would have a "*very significant and weighty chance*" of causing prejudice "*real, actual and of substance*".
48. For all these reasons, WMP submits that in the present case there is a very significant chance of real prejudice being caused to the law enforcement interests. The prejudice is not merely hypothetical, especially once taking account of the mosaic effect.

49. In considering whether such prejudice is outweighed by a public interest in disclosure, the relevant time is the time the Request was responded to, in July 2023. Insofar as the Appellant relies upon the passage of time since July 2023 as a reason for disclosure, this WMP suggest is accordingly not a relevant factor. At the time the Request was made on 30 June 2023 for police officer numbers on 8 May 2023, it related to a shift less than two months previously and which there was no reason to think would be irrelevant to policing practice and operations come July 2023.
50. WMP recognise that public confidence in policing and accountability for the effective use of public money is, of course, relevant public interest. They are not, however, assisted by providing information that will for the reasons above adversely affect the ability of WMP to keep the public safe. These interests must also be balanced against the strong public interest in ensuring that the ability of WMP to prevent crime and apprehend offenders is supported.
51. Furthermore, as was noted in WMP's review response of 14 August 2023, there is already national statistical information published by the Home Office on the Gov.uk website, regarding police workforce numbers, which can be broken down to show full-time equivalent staffing and particular police functions. 2 This statistical information also shows numbers by each police force. Insofar as the Appellant relies on a public interest in understanding the numbers of police officers within a particular police force area, this interest is adequately met by the published information. It does not require the provision of police numbers for a particular night shift.

## **Discussion:**

52. WMP accept that the Appellant is entitled: (a) by s.1(1)(a) to be informed in writing by WMP whether it holds information of the description specified in the request ("the duty to confirm or deny"); and (b) by s.1(1)(b) to have that information communicated to him. They have chosen to communicate they have the information sought but rely on the exemption claimed so the Tribunal assume they have the information sought which indicates to that they hold the information sought.
53. As set out in the Tribunal's Case Management Directions of 30 November 2023, the appeal is one of 17 similar appeals brought by the Appellant and while this appeal is to be considered as a lead case for those similar requests by the Appellant, this Tribunal wish to make it clear that each FOIA request must ultimately be decided on its own merits.
54. The Tribunal did not have sight of the withheld and closed material and despite considerable deliberations came to the conclusion that for a fair and proper hearing in all the circumstances, this case should be heard as an oral

hearing which will include a Closed session a full exposition by the Public Authority to this Tribunal in respect to the Closed material pertaining to the facts of this particular case.

55. The Tribunal concluded it was in the best interest of dealing with this case fairly and justly to conduct an oral hearing where the Tribunal could consider the withheld information and submissions from the public authority in a closed session which occurred on 02 May 2025 and inter-alia produced the following Gist.

#### **GISTED SUMMARY OF CLOSED HEARING:**

56. The Tribunal heard submissions from Counsel for the Second Respondent and evidence from Chief Inspector Lynne Griffiths ("the Chief Inspector"), Freedom of Information Manager and Force Duty Manager Resilience for West Midlands Police ("WMP"). The Tribunal also considered the information contained in the Closed Bundle, which consisted of (a) the full unredacted advice provided to police forces by the National Police Chiefs' Council's National Police FOI & DP Central Referral Unit and (b) the withheld material itself.
57. The withheld material consisted of a table of figures, showing the number of West Midlands Police officers on duty on 8 May 2023, broken down by shift and area and by the nature of the duty. The Tribunal asked questions about the material, including seeking clarification on what the exact answer would have been to the Appellant's request for information.
58. The Tribunal asked about the accuracy of the figures and whether the figures included civilian police staff and were informed that the table only included police officers and not staff. The Tribunal asked if there had been clarification with the Appellant about whether or not part 2 of his request was intended to capture civilian police staff and were told that there had not been any such clarification. The Chief Inspector explained that if one included civilian staff in the request, then on duty numbers would be higher, taking account, for example, of those working in custody and in the control room.
59. The Tribunal afforded the Chief Inspector more time to clarify the figures contained in the table who provided further information about officer numbers on other dates and on general policing resources within the West Midlands Police. The Chief Inspector said she was not confident that the figures in the table represented the entire number of officers on duty.

60. The Tribunal received evidence and submissions about the risk which WMP said that disclosure of the material posed, arising from the 'layering' of officer shift numbers on different dates, in particular as regards policing resources at the time of national events.
61. The Tribunal asked WMP various questions as to the reality of the risk that would be posed by the disclosure of night shift numbers on particular dates.
62. The Tribunal asked about what other information, if any, was available to the public to ensure transparency and accountability as regards policing levels. The Chief Inspector explained that there was a large amount of generally available data on the police workforce, but that these were full-time equivalent figures for officer numbers and would not provide the data the Appellant was seeking about a specific date.

### **Conclusion:**

63. Each case must be decided on its merits and the essential causal link which must be clearly demonstrated on the nature and extent of the particular request and disclosure arising. Bearing in mind the request was as follows: *"1. The total number of response officers on duty in the West Midlands during the night shift of May 8, 2023. & 2. The total number of supporting officers (e.g. those in control rooms, custody suites and other facilities) on duty in the West Midlands during the night shift of May 8, 2023"*, and disclosing the information must have *"a very significant and weighty chance"* of causing prejudice that is *"real, actual and of substance"*, the Tribunal gave the Chief Inspector an opportunity to demonstrate the essential conditions for the successful application of s31(1) FOIA in relation to the withheld information, our findings on the evidence provided to us and the outcome was as follows;
64. The interest that is protected by the exemption (in this case, the relevant function of the public authority); The Tribunal were provided with generalised and hypothetical statements inter-alia to the effect that disclosing the number of officers on duty in specific locations/areas and roles at any given time creates a real risk to law enforcement. The tribunal notes that the request was not for specific locations and or roles/area but simply for 2 total numbers in response to questions 1 and 2 of the request for the whole of West Midlands Police force on a specific date, the 8th May 2023 which was the Bank Holiday following the Coronation of King Charles III (a Coronation being particularly rare event and one which would have seen a concentration of Police Officers deployed in the capital), which while it would involve enhanced operational planning was not demonstrated to add to risk in disclosing the specific requested information. We were provided with no material evidence to demonstrate and establish a causal link of real risk arising from the disclosure of the specific information requested in this appeal.

65. The nature of the prejudice to that interest: “...is a speculative task and as all parties have accepted, there is no evidence of exactly what would happen on disclosure, it is necessary to extrapolate from the evidence available to come to the conclusion about what is likely”. The Tribunal probed the witness but were provided with no material evidence to demonstrate and establish a causal link of any prejudice that would be caused with the disclosure of the specific information requested. We were not provided with material evidence that could demonstrate how the actual numbers requested and withheld could or would be likely to create a risk even with a layering effect (as the witness described it) or as was otherwise referred to and described as a “Mosaic effect”. A Mosaic effect has been recognised under other exemptions under FOIA but the Tribunal on the facts in this appeal and relating to. s31 (1) find a real risk needs to be identified, and a cause and effect of any such real risk, has not been demonstrated to this Tribunal. We find the withheld information is completely without context and relates to an extremely rare event (a Coronation).
66. The chance of prejudice being suffered. “Would be likely to prejudice” is a lower test – here, the chance of prejudice must be more than a hypothetical possibility: there must be a “real and significant risk” of prejudice. Once again on careful analysis of the evidence as provided by the Chief Inspector this Tribunal could find no evidence to persuade us that the release of the requested information (two sets of numbers) would present any chance of prejudice being suffered.
67. To demonstrate the prejudice to the interests, protected by s31 would effectively require a granular explanation which might include such matters as the tactics and capabilities of organised criminal behaviours and capabilities of different criminal gangs, their areas of operation and the impact of this particular festive occasion. This evidence if it were available could have been provided in Closed session. While it might be possible that such prejudice could be demonstrated by the disclosure of “some information” about police numbers on duty at certain events or on certain occasions the Second Respondent herein has failed to meet the evidential burden in relation to this particular request in all the circumstances pertaining. We find it difficult, if not impossible to see how that could be in any of those cases which are listed as test cases where this appeal is lead case if the requests in all of those cases are asking precisely the same request of the Coronation weekend, which is our understanding. We will provide a brief Closed Judgment to explain further what we mean by “some information”.
68. Accordingly, the Tribunal must dismiss this appeal (our emphasis)

