Neutral citation number: [2025] UKFTT 00637 (GRC)

Case Reference: FT/EA/2024/0397

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

**Decided without a hearing.**
**Decision given on: 04 June 2025**

**Before**

**JUDGE TAFT**
**MEMBER DE WAAL**
**MEMBER SAUNDERS**

**Between**

**IAN HUDSON**

Appellant

**and**

**(1) INFORMATION COMMISSIONER**
**(2) DEPARTMENT FOR TRANSPORT**

Respondents

**Decision:** The appeal is Dismissed

**Definitions:**

| | |
|---|---|
| "DPA" | Data Protection Act 2018 |
| "FOIA" | Freedom of Information Act 2000 |
| "IC" | Information Commissioner |
| "ICO" | The Information Commissioner's Office |
| "DfT" | Department for Transport, the Public Authority in this case (as defined by Schedule 1 of FOIA) |
| "Requester" | a person who applied for information – referred to in Section 1 FOIA as the applicant |
| "the Rules" | The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2010/43), as amended[1] |

[1] https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules

## REASONS

*Introduction*

1. This is an appeal against Decision Notice IC-312760-B8V4 of the ICO ("the Decision Notice") that no further steps were necessary to comply with the Appellant's request for information.

2. The Appellant seeks to know information about what he describes as the "Gatwick drone incident" - that is when flights to and from Gatwick airport had to be cancelled in late December 2018 due to reports of drone sightings.

3. On 8 March 2024, the Appellant requested the following information ("the Request"):

> I'm requesting a number of Gatwick drone e-mails identified in F0021336-2, I've deliberately targeted this request to minimise any work for yourselves.
>
> 1) I'd like a copy of the e-mail chain "DfT & Aviation Cyber Security – Potential discussion points" this is to put an end to the conspiracy theories about a cyber attack which is in everyone's interest. 19/12/2018 (plus any earlier parts of the chain if this e-mail began before the 19th)
>
> 2) The e-mail chain: Off Sen: Letter & attachments on Drone Disruption 22/12/2018
>
> 3) The e-mail chain: Horsehill drone photos 23/12/2018
>
> 4) The e-mail chain Update – Drone incident at London Gatwick Airport [DLM=For-Official-Use-O 24/12/2018
>
> Please include any attachments for the above.

4. F0021336-2 refers to a FOIA request made on 26 April 2022 for which the outcome was provided on 11 October 2022.

5. The DfT denied holding email chains 1-3, suggesting that they had been deleted between 11 October 2022 and the date of the Request. It confirmed holding email chain 4 but initially refused to provide it, citing Section 27(2) FOIA (international relations). After an internal review, it disclosed a redacted copy of email chain 4.

6. The Appellant complained to the ICO about the refusal to provide email chains 1-3. He did not challenge the redactions to email chain 4.

7. The ICO decided that, on the balance of probabilities, the DfT had identified all the information falling within the scope of the Request but that they breached Section 10 FOIA in failing to disclose the information within 20 working days. The Appellant appeals against that decision.

8. All parties are content for the appeal to be determined without a hearing.

*The Law*

9. Section 1 FOIA provides:

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

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

(3) …

(4) The information—

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

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

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

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

(6) In this Act, the duty of a public authority to comply with subsections (1)(a) is referred to as "the duty to confirm or deny".

10. FOIA defines "Information" at Section 84 which provides:

"information" (subject to sections 51(8) and 75(2) means information recorded in any form;

11. There is a process of challenge set out in Section 50:

(1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.

12. Part I of FOIA encompasses Sections 1 – 20.

13. If either side (the Requester or the Public Authority) wishes to challenge the ICO's Decision Notice, they are entitled to appeal to this Tribunal (FOIA, section 57). This Tribunal's powers are found in Section 58 FOIA which provides:

(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.

14. In *Preston v IC and CC West Yorkshire Police* [2022] UKUT 344 (AAC), the Upper Tribunal confirmed that in determining whether the information is in fact held, both the ICO and this Tribunal should apply the civil standard of proof, i.e. the balance of probabilities. The Upper Tribunal also approved of the decision of the First Tier Tribunal in *Clyne v IC and LB Lambeth* EA/2011/0190 that

> *"the issue for the Tribunal is not what should have been recorded and retained but what was recorded and retained."*

*ICO's findings*

15. The ICO was satisfied that the searches the DfT undertook were likely to yield the information held that was within the scope of the Request and accepted the DfT's account that because email chains 1-3 were not identified, this meant that they had been deleted in line with the DfT's retention policy.

16. The ICO observed that whilst it was important for public authorities to prevent the deletion of information subject to an ongoing request for information, there is no requirement for public authorities to retain all information that relates to or has been the subject of a request for information or to extend the retention period for information because it suspects it might be the subject of a future request for information.

*Grounds of Appeal*

17. The Appellant says that there was a time gap between request F0021336-2 and the Request because the DfT had responded to a different request to say that they considered him to be vexatious and would treat any further FOIA requests on a similar subject matter to be vexatious. He made the Request only after a complaint to the ICO that was resolved in the summer of 2023 and then waited for the responses to other FOIA requests before making the Request on 8 March 2024.

18. The Appellant describes his practice of asking for a summary of emails before following up with a second request for specific emails in order to avoid a public authority refusing a request on the basis of cost (Section 12). He asserts that the DfT were aware of his practice, and in that context were on notice that he was very likely to be making a further request for email chains 1-3.

19. The Appellant further asserts that the DfT can retrieve the emails from back-ups, but they only searched against live data on the server. He refers to another FOIA request F0021663 in which he says the ICO decided that the DfT could retrieve emails sent by an individual who had left the department some years previously.

20. The Appellant asserts that Outlook does not enforce a retention period and that the default retention period is indefinite. He accepts that organisations set their own retention periods but says that these are commonly 6 or 7 years.

21. The Appellant also refers to a request made to the Home Office, to whom he says the emails were copied. The Appellant suggests that the DfT could retrieve the emails by asking the Home Office for them.

22. The Appellant suggests that there is a trend in respect of FOIA requests made to various public authorities around the Gatwick drone incident.

*Response - IC*

23. The IC relies on the Decision Notice but concedes that given the background to the Request, and the fact that the information was held in April 2022 (to enable the DfT to respond to the earlier FOIA request), it would have been "beneficial" for the DfT to confirm whether emails were held in the archives or alternatively to consider whether such a search would exceed the costs limit referred to in Section 12 FOIA. However, he goes on to assert that it is reasonable for the information to have been deleted because the Request was outside the 6-month timeframe referred to in the ICO's *"Retention and destruction of information"* non statutory guidance. That guidance suggests that information should be kept for a minimum period of 6 months from the last communication concerning a request.

24. The IC invited the Tribunal to join the DfT as a Second Respondent so that evidence could be considered on whether the information was held outside Microsoft Outlook and whether the information had been permanently deleted in line with IT or retention policies.

*Response - DfT*

25. The DfT says that the Decision Notice is correct. It says that it cannot disclose documents that it does not hold. It relies on its retention policies, which it says are contained in the Code of Practice on the management of records issued under Section 46 FOIA and the National Archives Records Collection Policy.

26. It asserts that it does not operate any formal information retention policies in relation to emails but that emails containing information of corporate value are saved to its corporate information management system, TiME SharePoint. Other information is retained by users until they decide to delete it. It says that emails manually deleted from an active user's email account are retained in archive for 30 days before being permanently deleted after which there is no retrieval capacity. It says there is an exception where an individual user's account data is manually placed on "legal hold" where all data is then retained. The DfT says that data held on the mailboxes of users who have left the DfT is retained. Prior to 2022 this was on a Google Cloud Server and later M365.

27. The DfT says that it conducted searches on its email databases, including in the Google Cloud Server and M365. It says that it searched every mailbox within M365 for emails containing the subjects that were specified in the Request within the time period 19 December 2018 to 25 December 2018 but that search returned zero hits. It suggests that the most likely explanation is that the user(s) who held the emails in mailboxes at the time of the F0021663 request had deleted them by the time of the second search. Another possibility is said to be data corruption.

*Appellant's Reply*

28. The Appellant suggests that the Decision Notice fails to critically assess the adequacy of the DfT's search efforts and improperly accepts speculative explanations without sufficient evidence. The Appellant says that there is a lack of transparency about the extent and adequacy of the searches. In particular, the Appellant suggests that the DfT had not confirmed whether or not it searched TiME SharePoint.

29. The Appellant complains that the DfT did not engage with a request for further information made in correspondence during the course of these proceedings. He suggests this was not in accordance with the overriding objective. He goes on to say that the Decision Notice does not address the DfT's failure to engage constructively and that this is an error of law.

30. The Appellant further complains that the DfT's lack of formal email retention policies and reliance on individual users is contrary to the principles outlined in the Code of Practice and that this constitutes a breach of its statutory obligations. He says that the ICO failed to consider whether the deletion of emails was lawful.

31. The Appellant again says that the DfT should have preserved the information in anticipation of further requests from him. He says that the ICO's failure to consider this was an error of law.

32. The Appellant suggests that there is an inconsistency between the DfT's positions in this case and in IC-217423-X7S9, in which he says the DfT cited the burden of searching both live and archived email accounts when asserting that the request was vexatious. He says that the ICO failed to consider this inconsistency.

33. The Appellant says that the deletion of the emails would be an offence under Section 77 FOIA that the ICO did not investigate.

34. The Appellant says that reliance on Section 27(2) FOIA in respect of email chain 4 "must be carefully scrutinised" and that the ICO failed to adequately weigh the public interest factors favouring disclosure.

35. The Appellant "reluctantly accepts" that if the DfT genuinely cannot recover the emails, they cannot be disclosed but seeks assurances that they are not held elsewhere and that procedures are put in place to prevent similar issues in future. It says that the ICO should have considered making recommendations under Section 48 FOIA for the DfT to improve its records management practices.

36. The Appellant refers to a number of first instance decisions in his Reply, which are discussed below.

*Submissions – IC*

37. The IC made further submissions after the Appellant's Reply. He submits that the application of Section 27(2) FOIA to the response to the request for email chain 4 was not raised in the Appellant's original complaint to the ICO, nor during the investigation of that complaint, so was not an aspect of the Decision Notice. The IC further points out that it was not raised in the Grounds of Appeal.

38. The IC further submits that various aspects of the Appellant's Reply do not fall within the Tribunal's jurisdiction:

    (a) Whether or not the DfT complied with the Code of Practice;

    (b) Whether or not the ICO should have considered compliance with the Code of Practice when deciding whether the DfT held the requested information;

    (c) Whether or not the Respondents have complied with the overriding objective;

    (d) Whether or not the the DfT breached Section 77 FOIA; and

    (e) Whether or not the DfT should be required to provide assurances.

*Submissions - Appellant*

39. In response, the Appellant submits that the Tribunal does have jurisdiction to consider all aspects of his Reply including in respect of Section 27(2), the Section 46 Code, the Overriding Objective and Section 77.

*Submissions – DfT*

40. The DfT was ordered to provide further information in response to specific questions from the Tribunal in a Case Management Order on 30 April 2025. It did so by making further submissions.

41. It confirmed that when it referred to *"archived data on Google Cloud and M365"* in its Response, it was referring to both deleted emails of active users retained for 30 days and retained data of ex-employees.

42. It confirmed that it followed its standard practice by searching the Aviation Security Team's SharePoint area and then asked the eDiscovery team to search emails. It says that OneDrive, Teams and TiME SharePoint were not searched because these would not be locations where the information requested would be stored.

43. It confirmed that it conducted a search across the entire estate against every mailbox currently live or archived. The DfT originally re-ran the original search before repeating it using the latest version of Purview eDiscovery Premium.

*Jurisdiction and Issues*

44. Before identifying the issues to be determined, the Tribunal has considered the parties' submissions on jurisdiction.

45. The Tribunal's powers are limited to considering whether or not the Decision Notice is in accordance with the law. The Tribunal has no jurisdiction to consider whether or not the DfT should be required to provide assurances.

46. The alleged failure to comply with the Overriding Objective in Rule 2 of the Rules postdates the Decision Notice. Any failure to comply cannot be relevant to whether or not the Decision Notice was in accordance with the law. This does not therefore form part of the issues to be considered.

47. The sole issue for the Tribunal to determine in respect of email chains 1-3 is whether by finding that the information sought was not held by the DfT, the Decision Notice was not in accordance with the law. The factual issue for the Tribunal is to determine therefore is whether, on the balance of probabilities, the DfT holds the information requested. However, in order to determine that factual issue, the Tribunal must also consider whether additional searches would be likely to reveal the information.

48. The Tribunal is not concerned with what should have been retained, but what was actually retained. Whether or not DfT employees breached Section 77 FOIA or the Code of Practice might be relevant to what should have been retained, but it is not relevant to the issue before us and therefore not something about which we have jurisdiction to consider.

49. The DfT did not rely on Section 27(2) in respect of email chains 1-3. The sole issue in respect of email chains 1-3 is whether or not, on the balance of probabilities, the DfT holds the information. The Appellant's Grounds of Appeal do not reference the redactions from email chain 4 but complain about the refusal to provide email chains 1-3. The Tribunal can only consider the Section 27(2) redactions from email chain 4 if it treats the Reply and Submissions as an amendment to the Appeal.

50. The Tribunal has considered whether or not it should treat the Appellant's Reply and Submissions as an amendment to his Grounds of Appeal such that we should also consider whether or not the Decision Notice should have considered the redactions from email chain 4. The Tribunal does not allow an amendment because:

    (a) No application for an amendment has been made.

    (b) Allowing an amendment would prejudice the Respondents, who have not been given opportunity to make submissions on the point.

    (c) Refusing an amendment prejudices the Appellant only if he has a realistic prospect of establishing that the Decision Notice was not in accordance with the law because it failed to consider the Section 27(2) redactions. The Appellant's Section 50 complaint to the ICO did not reference the Section 27(2) redactions

from email chain 4 but focused on the allegedly deleted email chains 1-3. It cannot be an error for the ICO to fail to consider a complaint that had not been made. The Appellant is not therefore prejudiced by refusing an amendment that has no realistic prospect of success.

51. Section 27(2) is not therefore in issue in this case.

52. Neither the DfT's response to the Request nor the Decision Notice suggested that the Request was vexatious. This is not an issue in this case.

53. Finally, the Tribunal is not able to look at any FOIA requests other than that to which the Decision Notice relates or whether or not there is a trend in respect of responses made to FOIA requests on a particular subject. The Tribunal cannot determine a request for the same emails made to a different public authority. Our powers are limited to considering whether or not this Decision Notice (about the Request to the DfT) was or was not in accordance with the law.

*Evidence*

54. The Tribunal considered a bundle of 129 pages, which included documentary evidence filed by the DfT in the form of its internal Information Management Policy and Principles, internal email exchanges regarding the search carried out for the information and a form headed "Request for an eDiscovery Search".

55. By order of 4 April 2025 Registrar Bamawo refused the Appellant's application for a direction that the DfT provide specified further evidence. No application having been made to vary that order within 14 days, the Tribunal considered only the evidence available in the bundle.

56. The Tribunal did however seek further information from both the Appellant and the DfT by Case Management Order of 30 April 2025. It has considered the submissions made pursuant to that Order.

*Discussion*

57. The Appellant's Reply referred to a number of decisions of the First Tier Tribunal. The Tribunal made a Case Management Order requiring the Appellant to file an authorities bundle and identify the passage(s) relied upon in respect of any of the case law relied upon.

58. The Appellant did so in respect of *Betts v IC and Department for Business Enterprise and Regulatory Reform* EA/2007/0109. The Appellant's Counsel, Mr Ryan, refers to paragraphs 32, 33, 40 and 60-61, which he says held that a public authority must provide clear evidence of thorough searches to establish compliance with FOIA. Only paragraphs 32 and 33 represent the majority decision. They do not establish what Mr Ryan suggests – there is no finding within those paragraphs about the adequacy or otherwise of the public authority's searches or the evidence provided. Paragraph 40

does no more than explain that a lay member disagrees with the majority decision. Paragraphs 60-61 refer to Section 14, which is not an issue in this case.

59. The Tribunal therefore considered the whole judgment. It concerns an appeal against a Decision Notice upholding a decision of a public authority to treat a request for information as vexatious under Section 14. That is not relevant to the issues before this Tribunal. Neither the majority nor the minority views are at all concerned with the adequacy or otherwise of searches. The case is simply not relevant to the issues before this Tribunal.

60. The Appellant supplied a copy of *Yallop v IC* EA/2023/0471 and referred to paragraphs 1, 32-33 and 42-43, in which he says the public authority was held not to have carried out adequate searches. The Tribunal agrees that this case is relevant, the most pertinent passage being paragraph 33:

> *A public authority should conduct an appropriate and reasonable search for information. This should include, as a minimum, searching in the places where it is reasonable to expect that the public authority would find the information, if it existed.*

61. The Appellant further relies on *Bromley v IC and Environment Agency* EA/2006/0072 paras 4, 12-13 and 31-33. This too is relevant, particularly paragraph 13, which says:

> *There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information. However, it argued (and was supported in the argument by the Information Commissioner) that the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner's findings of fact are reviewed. We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.*

62. The Tribunal is not bound by these decisions but considers that they correctly identify the task at hand.

63. The Appellant did not supply copies of the other case law referenced in the Reply, nor did he identify which passage(s) of those decisions he relies upon. The Tribunal notes that *APPG on Extraordinary Rendition v IC and Ministry of Defence* EA/2011/0049 concerns whether a public authority could rely on Sections 23, 27, 35, 40(2) and 42 FOIA to withhold information. It is not relevant to this case.

64. The Tribunal was not able to find a case with the citation *University of Central Lancashire v Information Commissioner* [2015] UKUT 564 (AAC). There is a First Tier Tribunal case involving University of Central Lancashire and the Information

Commissioner with citation EA/2009/0034 but it concerns whether a public authority could rely on Sections 36 and 43 FOIA and is not relevant to this case.

65. *Keiller v IC* EA/2011/0152 is relevant in that it resolved an issue of whether it was more likely than not that a public authority held information but other than referring to the passage from *Bromley* detailed above, the Tribunal does not consider it assists us in making our decision.

66. *Harper v Information Commissioner* (EA/2005/0001) also resolved an issue of whether it was more likely than not that a public authority held information and found as a fact that the public authority did not hold the information requested. It is on all fours with this case in that it concerns information that had been deleted. The Tribunal discussed to what extent information could be held if it had been deleted but was potentially retrievable, finding (at paragraph 20) that

> *It will thus be a matter of fact and degree, depending on the circumstances of the individual case, whether potentially recoverable information is still held, for the purposes of the Act*

And at paragraph 21 that

> *it may be incumbent on a Public Authority to make attempts to retrieve deleted information. Accordingly, the authority should establish whether information is completely eliminated, or merely deleted. In the latter case, the authority should consider whether the information can be recovered and if so by what means. There is computer software available that can be used to recover information that has been deleted from a computer system. If information has been deleted but can be recovered by various technical means, is that information still held by the public authority? The Tribunal finds that the answer to this question will be a matter of fact and degree depending on the circumstances of the individual case.*

And finally at paragraph 28 that

> *The extent of the measures that could reasonably be taken by a Public Authority to recover deleted data will be a matter of fact and degree in each individual case. Simple restoration from a trash can or recycle bin folder, or from a back-up tape, should normally be attempted, as the Tribunal considers that such information continues to be held. Any attempted restoration that would involve the use of specialist staff time, or the use of specialist software, would have cost implications, which could be significant. In that event, the exemption arising from exceeding the appropriate limit, set from time to time under Section 12 of the Act, might be relied upon by an authority. Also, it is relevant that the 20 day time limit itself gives an indication of the period for which an authority should strive diligently to comply with a request.*

67. The Tribunal agrees that whether or not deleted data can or should be retrieved is a matter of fact and degree depending on the circumstances of the individual case. Those circumstances must include the technology being used to store data, most particularly whether data is stored locally and backed up or held in cloud-based storage.

*Tribunal's Findings of Fact*

68. We make these findings on the balance of probabilities.

69. The DfT's emails are held in cloud-based storage – currently M365, previously Google Cloud Server. As such, it is unlikely that emails would be saved on "back-up tapes", which are generally used to back up data hosted on an organisation's own servers.

70. Emails deleted by users are retained in archive for 30 days after which they are permanently deleted. Emails held in this way cannot be restored from a trash can or recycle bin. It is unlikely that they are held on a back-up tape. It is therefore unlikely that the DfT would be able to recover emails after they have been deleted by a user beyond the period of 30 days for which they are retained in archive.

71. The DfT searched the Aviation Security Team's SharePoint before conducting a search on live emails, emails deleted within the last 30 days, and archived emails of ex-employees - firstly by re-running the search done in 2022 and secondly by using the most up-to-date version of the software it had to perform that search. It did not find the requested information.

72. The DfT searched in the places where it is reasonable to expect they would find the information requested. The Tribunal accepts its explanation as to why it did not search the TiME SharePoint, namely that this is not somewhere that it is expected the requested emails would be saved. The Tribunal finds as a fact that it is not likely that the requested information is held on OneDrive, Teams, personal storage or the TiME SharePoint.

73. On the balance of probabilities therefore, the emails are no longer held by the DfT.

*Conclusions*

74. The adequacy or otherwise of the DfT's searches is relevant only in determining by reference to the evidence, on the balance of probabilities, whether or not the information was actually held. The Tribunal has found as a fact that the DfT conducted an appropriate search - using the software available to it - to search the locations where the information was likely to be held, but that search did not locate the requested emails. The Tribunal has therefore found as a fact that the requested information is no longer held.

75. As is detailed above, the Tribunal is not concerned with what should have been retained, but what was actually retained. Whether or not DfT employees breached Section 77 FOIA or the Code of Practice is not relevant to the issue before us and therefore not something we have considered.

76. A Decision Notice concerns only whether or not a request for information has been dealt with in accordance with the requirements of Part I FOIA. Section 48 does not

appear in Part I. A failure to make a practice recommendation in a Decision Notice cannot therefore be an error.

77. The Decision Notice was therefore correct and in accordance with the law.

**Signed** **Date: 4 June 2025**

**Judge Taft**