Neutral Citation Number: [2025] UKUT 105 (AAC)
Appeal No. UA-2024-000250-GIA

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

Mr Aaron Walawalkar

Appellant

- v -

The Information Commissioner

First Respondent

and

The Maritime and Coastguard Agency

Second Respondent

Before: Upper Tribunal Judge Wright
Hearing date: 11 December 2024

Representation:
Appellant: Jack Castle of counsel
First respondent: Ben Mitchell of counsel
Second respondent: Heather Emmerson of counsel

On appeal from:
Tribunal: First-tier Tribunal (General Regulatory Chamber Chamber) (Information Rights)
Tribunal Case No: EA/2023/0096
Tribunal Venue: Remote video hearing
Decision Date: 29 December 2023

SUMMARY OF DECISION

This appeal is about a request for information (distress calls from people at sea) which was held in audio form by the second respondent. The appellant argued that the information could be transcribed and that would amount to his preferred means of having the information communicated to him under section 11(1) of the Freedom of Information Act 2000 (FOIA). Other, and logically prior, grounds for refusing the request had been relied on by the MCA, but at the Information Commissioner and FTT stage the focus was solely on section 11(1) of FOIA (in relation to transcripts of the

audio calls). The MCA was required to give effect to the appellant's preferred means of communication "so far as reasonably practicable" under s.11(1). The appellant argued that this involved a 'sliding scale' test of providing transcripts of at least some the information requested up to the point that it was no longer reasonably practicable for the MCA to do so.

The decision rejects this argument. It holds that section 11(1) involves an 'all or nothing' test which involves asking if it was reasonably practicable for the MCA to provide all of the information in the preferred means (i.e. transcripts of all the audio calls falling within the request). The ICO had applied an 'all or nothing' approach and the FTT, although its reasoning was perhaps less than clear, therefore made no material error of law in dismissing the appellant's appeal against the ICO's decision.

The decision also comments on the correct order of adjudication of issues under FOI, and suggests that section 11 should only be considered if and when no exclusion or exemption applies to the information under FOIA. The decision in addition rejects an argument that the preferred means of communication under section 11(1) of FOIA is relevant to whether information is held for the purposes of section 1 of FOIA. The latter is a logically prior and separate issue under FOIA.

Information Rights (93) – Freedom of Information – right of access (93.1)

***Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.*]**

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

REASONS FOR DECISION

Introduction

1. This appeal is about section 11 of the Freedom of Information Act 2000 ("FOIA") That section, as its heading sets out, is concerned with the means by which communication of the information requested is to be made to the requestor.

2. In particular, the appeal raises the issue whether the words (and most relevantly the words I have underlined) in section 11(1) "[w]here the [requestor] expresses a preference for communication by any one or more…..means… the public authority shall so far as reasonably practicable give effect to that preference", encompass a 'sliding scale' test or an 'all or nothing' test in terms of meeting the requestor's preferred means of communication.

3. A 'sliding scale' test is one which allows for the requested information to be provided in the preferred means up the point that it is no longer reasonably practicable for the public authority to do so. The 'all or nothing' test, on the other hand, is one which focuses on the totality of the information requested and asks

whether it is reasonably practicable to provide all of that information in the preferred means.

4. The relevant preferred means of communication of the information requested in this appeal was transcripts of the audio recordings held by the public authority.

Factual background

The request

5. Mr Walawalkar made a request, on behalf Liberty Investigates, for information to the Maritime and Coastguard Agency ("the MCA") on 12 August 2022. The request was about distress calls made to HM Coastguard over a period of a week from people in the English Channel, and was in the following terms:

> "Please can you provide me the following under the FOI Act:
>
> [1] A copy of the recorded audio of all calls between people at sea in the English Channel and HM Coastguard between 00:01am on 15 November 2021 and 23:59pm on 22 November 2021...Please provide as many of these recordings as is retrievable within the cost limit.
>
> [2] If retrievable within the cost limit, for each audio recording disclosed in response to point 1 - please specify which HM Coastguard control room handled the distress call (eg Dover Maritime Rescue Coordination Centre).
>
> [3] If retrievable within the cost limit, please also provide a transcript of audio recording of all calls requested in point 1.
>
> [4] For each call requested in point 1, please provide the HMCG GIN incident number it relates to."

The MCA's decision

6. The MCA in refusing this request on 25 October 2022 relied on section 40(2) of FOIA to withhold the audio recordings of the calls between the people at sea in the English Channel and HM Coastguard. As for the transcripts of such recordings, the MCA said that providing transcripts would "create a new dataset and would exceed the cost cap [under section 12 of FOIA]".

7. Following an internal review, the MCA upheld its original decision in respect of the audio recording of the calls and stated that it considered that the transcripts were also personal data under section 40(2) of FOIA and so were exempt from disclosure under FOIA.

The Information Commissioner's Decision Notice

8. Mr Walawalkar complained about this refusal to the Information Commissioner ("the ICO") under section 50 of FOIA.

9. In a Decision Notice dated 24 January 2023 the ICO gave the following decision.

> "1. The complainant has requested audio recordings of distress calls made from the English Channel and transcripts of those recordings. The above public authority…relied on a number of different exemptions as its reasons for not providing the information.
>
> 2. The Commissioner's decision is that it would not be reasonably practicable in the circumstances to expect the public authority to provide the information as transcripts and therefore it has complied with its obligations under section 11. The Commissioner considers that the public authority is entitled to rely on section 40(2) of FOIA to withhold the audio recordings. The public authority breached section 17 of FOIA in responding to this request.
>
> 3. The Commissioner does not require further steps."

10. The ICO's decision in paragraph 2 of the Decision Notice treated the transcripts of the distress calls differently to the audio recording of those calls. This difference may have reflected the way in which the ICO understood the MCA to be arguing its case before the ICO.

11. In terms of the audio recordings, the MCA argued (or so the ICO understood), in the alternative, that (i) the audio recordings were exempt from disclosure under section 40(2) of FOIA, or (ii) it could rely on either section 12 or 14(1) of FOIA, or (iii) if none of sections 40(2), 12 or 14(1) applied, it could rely on sections 31 and 38 of FOIA to withhold the audio recordings.

12. Turning to the transcripts of those audio calls, the MCA argued before the ICO, again in the alternative, that (i) the transcripts were also exempt under section 40(2) of FOIA, or (ii) that under section 11(1) of FOIA it was not reasonably practicable to provide the transcripts, or (iii) complying with the transcripts request would either exceed the cost limit in section 12 of FOIA or impose a grossly oppressive burden contrary to section 14(1) of FOIA; or (iv) section 31 or 38 of FOIA would apply to the transcripts.

13. It is only the transcripts of the audio calls with which this appeal is concerned. Paragraph 13 of the ICO's Decision Notice said this about the transcripts of the audio calls:

> "In the case of the transcripts, the Commissioner notes that the public authority's arguments rely on the burden that would be incurred if it were required to carry out the work of transcribing the audio recordings. Therefore, the Commissioner considers that, before he can decide whether the request is burdensome, he must first decide whether the public authority is obliged to communicate the information in this manner. If it is not obliged to communicate the information in this form, there would be no burden as the request could be dismissed out of hand. Therefore the Commissioner will consider the application of section 11 of FOIA first, before going on to consider sections 12 and 14. If the public authority is obliged to communicate the information in this format and the Commissioner considers that neither section 12 nor 14 applies, he will finally consider whether any of the Part II exemptions apply."

14. The ICO considered there was a circularity to the arguments about the transcripts of the audio calls. On the one hand, the MCA's case was that it need not consider whether it was required to communicate the information it held (the audio recordings) in the form of a transcript as that information was subject to at least one exemption from disclosure. On the other hand, as the ICO characterised it in the Decision Notice, the MCA "need not cite an exemption from disclosure if it could demonstrate that it is not required to comply with this part of the request". The Decision Notice continued (at paragraph 15):

> "The Commissioner could arguably have started anywhere within this circle. However, the issue of whether the public authority is required to communicate information in this manner is a novel one (the Commissioner has issued decision notices where a requester sought an audio recording, but was given a transcript instead – but not the other way around) and would benefit from a regulatory decision."

In other words, as far as transcripts of the audio records of the distress calls were concerned, the ICO chose to focus only on the terms of section 11 of FOIA.

15. The ICO accepted in principle that a requestor has the right to ask for an audio recording to be communicated to them in the form of a transcript. Creating such a transcript did not involve creating new information. It is simply the process of taking information held in one form (audio) and converting it into another form (a written document). Some of the information (such as a speaker's tone of voice) would not be transferred into the transcript, but no new information was being created. Accordingly, in the ICO's view, section 11 of FOIA would require the public authority to communicate the information in the form of a transcript, "unless it [was] not reasonably practicable".

16. Consistently with what the ICO said in paragraph 15 of his Decision Notice, the ICO's consideration was solely in respect of whether section 11 of FOIA supported the MCA in not providing Mr Walawalkar with the information he had requested in the form of transcripts. The Decision Notice does not, for example, address whether the transcripts were exempt under section 40(2) of FOIA. It does not do so because the Decision Notice concludes that the MCA came to the correct decision under section 11 of FOIA that it was not reasonably practicable to supply the transcripts to Mr Walawalkar.

17. The ICO's reasons for coming to this conclusion in the Decision Notice were as follows:

> "25. The public authority noted that, based on previous experience, it took, on average, around 45 minutes to produce an accurate transcript of one call. Given that the request encompasses 55 calls, communicating all the information in this format would require more than 41 hours of staff time.
>
> 26. In addition, the public authority noted that many of the calls are quite distressing to listen to and that transcribing such a large amount of calls would be likely to have an adverse impact on the wellbeing of the staff assigned to such a task.

> 27. Having given consideration to the matter, the Commissioner is of the view that, in the circumstances of this case it was not reasonably practicable for the public authority to give effect to the complainant's preference to have the information communicated to him in this form.
>
> 28…….A transcript does not contain [the tone of the caller's voice] and the conversation itself is only likely to contain a relatively small amount of identifiable information – which can be easily redacted. The Commissioner considers that it will generally be more reasonable to give effect to a requester's preference if doing so results in the disclosure of information which might otherwise have been exempt.
>
> 29. The complainant's request covers a large number of distress calls. Had it been for just one or two, then it would have been more reasonable to expect the public authority to give effect to this preference, but the public authority is entitled to take account of the amount of time it would need to spend in order to give effect to the complainant's preference.
>
> 30…..given the potential for such calls to involve sections that are either in a foreign language, heavily accented or barely audible due to the environment or the quality of the phone line, the process needs to be carried out by individuals with a certain amount of skill and experience – meaning that the burden would be concentrated on a relatively small number of the public authority's staff…….
>
> 32…… the Commissioner… accept[s] that such resources will be finite and that, in dealing with the request, the public authority will be having to divert them away from its frontline services. Therefore the Commissioner recognises that this does have a small amplifying effect on the burden as a whole – which, as he has outlined above, is already considerable.
>
> 33. For these reasons, the Commissioner considers that, in the circumstances, it was not reasonably practicable for the public authority to communicate the requested information in the format sought by the complainant."

18. It is noteworthy that Mr Walawalkar in his appeal to the FTT characterised this part of the Decision Notice as adopting an "all or nothing" approach to section 11(1) of FOIA. This can be seen from paragraph 4 of Mr Walawalkar's skeleton argument before the FTT which stated:

> "The IC's DN, issued on 24 January 2023, concluded it is "not reasonably practicable" for the MCA to transcribe this entire batch of 55 distress calls, due to the volume of work involved, and therefore no further action was required."

19. It is inherent in Mr Walawalkar's appeal to the FTT that if the "all or nothing" approach is the correct test under section 11(1) of FOIA, the ICO's Decision Notice was correct and was in accordance with the law. This can be seen from paragraph 44 of the same skeleton argument where Mr Walawalkar invited the FTT to conclude it was reasonably practicable for "the MCA to disclose at least 32 of the 55 distress call transcripts". (It appears from later correspondence that the number of distress calls may have been 112. This does not affect the analysis that for Mr Walawalkar's case to succeed, section 11(1) of FOIA has to involve a "sliding scale" test.

20. The rest of the ICO's Decision Notice is concerned with disclosure of the audio recording of the distress calls. The ICO decided that the audio calls were the personal data of both the caller and the call handler and were exempt from disclosure under section 40(2) of FOIA. This part of the ICO's decision was not appealed by Mr Walawalkar.

21. Translating both aspects of the ICO's Decision Notice into the language of section 50 of FOIA, it held that Mr Walawalkar's request for information (including his request to be proved with transcripts of the distress calls) had been dealt with in accordance with Part I of FOIA.

The First-tier Tribunal's decision

22. Mr Walawalkar was dissatisfied with ICO's decision and appealed to the First-tier Tribunal ("the FTT") under section 57 of FOIA. The FTT's task under section 58(1) of FOIA was, relevantly, to decide whether the ICO's Decision Notice was not in accordance with the law. That included the law in Part I of FOIA.

23. It is settled by case law that the language of "not in accordance with the law" in section 58(1)(a) does not import a secondary judicial review test of legality. Instead, the FTT has a full merits jurisdiction on an appeal: see paragraphs [45]-[46] of *Information Commissioner v Malnick and the Advisory Committee on Business Appointments* [2018] UKUT 72 (AAC); [2018] AACR 29 and paragraph [21] of *Lin v ICO* [2023] UKUT 143 (AAC).

24. The FTT correctly identified that the ICO's Decision Notice on the transcripts was founded (only) on section 11 of FOIA, and that the ICO had held that it would not be reasonably practicable in the circumstance to expect the MCA to provide the information as transcripts.

25. Mr Walawalkar's appeal before the FTT related only to his request to be provided with transcripts of the distress calls. The FTT recorded that there was no dispute between the parties that section 40(2) of FOIA meant the audio recordings were not disclosable under FOIA.

26. The FTT understood Mr Walawalkar's arguments in relation to the transcripts to be:

    (i) that section required 11 disclosure in the preferred format 'so far as is reasonably practicable' and this required disclosure of as many transcripts as could be provided within the appropriate costs limit. It is this view of the test in section 11 which is described as the 'sliding scale test';

    (ii) there was a significant public interest in the information requested as it related to a time before a tragedy that had occurred in the English Channel on 24 November 2021 and there was a suggestion the UK and French authorities were both shirking their responsibility in that time; and

(iii) the MCA's response was inconsistent with its response to a previous request in which it had provided Mr Walawalkar with transcripts of distress calls.

27. It is fair to say that, even if it was appropriate to consider compliance with section 11 of FOIA first in terms of whether the MCA had acted in accordance with Part I of FOIA, the arguments before the FTT on section 11 were in my view clouded unnecessarily (for reasons I will explain shortly) by considerations about cost under section 12 of FOIA and considerations of the public interest (per paragraph 22(ii) above). Thus the FTT considered the issues before it on section 11 were:

(i) firstly, the extent of the duty under section 11(1) to comply with a requestor's expressed preference for the means by which information is communicated, and in particular

(a) whether a public authority is obliged to comply with such a preference up to the limit provided for the costs exemption in section 12 of FOIA, and
(b) whether it is necessary to have regard to the public interest in disclosure of the underlying information; and

(ii) secondly, whether in the circumstances of Mr Walawalkar's case, the ICO was correct to conclude that it was not reasonably practicable for the MCA to provide any transcripts to Mr Walawalkar.

28. This framing of arguments before the FTT may have contributed to the less than clear reasoning of the FTT on what section 11 of FOIA requires in terms of meeting a requestor's preferred means of communication.

29. The internal structure of the FTT's decision did not assist with this process either. A sub-heading of the FTT's decision "The Issues for the Tribunal", which appears before the sub-heading "Conclusions", contains on its face parts of the FTT's dispositive reasoning. Thus, the FTT says, at paragraph 11 of its decision:

> "On the issue as to whether a public authority has to comply with an expressed preference as to format, in our view, it must clearly do so, but only as "*far as reasonably practicable*" per s.11(1)."

With respect, this at seems to be no more than a restatement of the critical words in section 11(1) of FOIA, but with the word "as" used instead of the word "so". It does not say what the section 11(1) test involves, just that whatever the test might be the MCA had to apply it.

30. The FTT went on to find – again under "The Issues for the Tribunal" - that section 12 of FOIA should not be used as a guide to whether it is reasonably practicable to comply with a requestor's expressed preference under section 11. It also in the same section of its decision rejected Mr Walawalkar's argument that the public interest in disclosure was relevant under section 11 of FOIA. The "Issues for the Tribunal" section of the FTT's decision then ended with this paragraph:

> "14…..the Tribunal accept that the Commissioner was correct to conclude that it was not reasonably practicable for the MCA to provide any transcripts. The transcripts do not currently exist. If the Tribunal were to require MCA to disclose some, firstly they would need to be transcribed, incurring the very burden that MCA say prevents them from reasonably practicably doing so. The MCA would also need to address redactions in order to account for the s.40(2) exemption which the parties agree should apply. Secondly, the Tribunal would need to find a mechanism under FOIA to draw a line at a certain number or amount of time. As previously argued, that cannot be the mechanism under s.12. The short answer is that no mechanism is provided under FOIA for the time a public authority must spend complying with a requested format. The only mechanism that does exist is a decision on whether or not it is reasonably practicable to provide any at all."

31. It is arguably difficult to read the final sentence in this passage as showing the FTT adopted a 'sliding scale' test to section 11.

32. The FTT's decision then sets out what it terms its "Conclusions", as follows:

> "15. In relation to the Grounds of appeal; Ground 1 relates to the Appellant's submission that the MCA should have transcribed as many calls as possible within the costs limit in section 12 of FOIA and that section 11 had been misapplied when the Commissioner considered the issue. But section 11 is distinct from section 12, in law and in subject matter, and should not be conflated. The approach set out in respect of section 12 cannot be imported into section 11. A broader approach is permitted when assessing what is reasonably practicable under section 11 FOIA. MCA have reviewed the exercise of transcribing the call recordings and have concluded that it would be time consuming, burdensome, and difficult (given the subject matter). MCA have concluded the conversion of the information from one form to another is not reasonably practicable. The Court of Appeal considered an analogous scenario in the Innes case and Underhill LJ noted that, "I doubt if it was part of the purpose of the Act to oblige authorities to input information into a spreadsheet when it does not already exist in that form". While the format differs as to the form that the information existed in and was to be converted to is different in Innes, the conclusion is instructive.
>
> 16. Ground 2 is that there is a significant public interest in the disclosure of the call records given the tragedy of 24 November 2021. Section 11 does not include a public interest assessment, simply an analysis of whether it is "reasonably practicable" for the MCA to provide the transcripts of the calls. The argument made by the Appellant is, in our view wrong in law. While he suggests that an assessment of what is "reasonable" must include an analysis of public interest - with, he submitted, a sliding scale depending on the level of public interest, for which the conclusion was that something of an extreme public interest would require a greater effort in order to be "reasonable" – We find this is not only beyond the spirit and wording of the legislation, but a flawed argument. We find the correct analysis of what is reasonably practicable requires an assessment of a myriad of issues which are independent of and do not relate to what is in the public interest. The Appellant is right to say that the incident of 24 November 2021 is of significant public interest, and we would not want to suggest otherwise in any way. However, that great public interest has

> no impact on or relevance to the assessment of whether it is reasonably practicable for MCA to transcribe the call recordings in question.
>
> 17. Ground 3 is that MCA previously provided transcripts of calls in response to a FOIA request and so should do so again in this instance. We are persuaded by the arguments submitted on behalf of MCA. MCA is not obliged to provide transcripts of distress calls for all of the reasons set out above. It may voluntarily do so and has done so previously, but this does not undermine MCA's position as to why it is not obliged to do so or, in some way, fetter its ability to raise such an argument. MCA's previous conduct of voluntarily providing transcripts of call recordings does not and could not bind its future conduct and approach or disapply section 11 in some way. The Appellant argues the conduct of other public authorities also release similar material under FOIA and therefore the MCA arguments must be flawed. The Tribunal will judge each case on its merits and we find the conduct of other public authorities in this regard has no bearing on another. This conduct that may occur in some instances does not impact upon the assessment specific to this information in these particular circumstances.
>
> 18. Further or in the alternative, we accept the reasoning in the DN and find no error in law or in the exercise of his discretion by the Commissioner therein."

33. It is not clear from these "Conclusions" what the FTT considered was the correct test under section 11 of FOIA.

34. Nor is it apparent to me why the FTT considered (in paragraph 18 of the decision) that the ICO's Decision Notice not being in error of law and not involving a mis-exercise of the ICO's discretion was an *alternative* basis for dismissing the appeal under section 58 of FOIA.

Permission to appeal

35. After a contested oral hearing which was attended by counsel for Mr Walawalkar and for the MCA, I gave Mr Walawalkar permission to appeal under one of his grounds of appeal. My grant of permission to appeal reads as follows:

> "Ground 1
>
> 3. The first ground of appeal ("Ground1") is that the First-tier Tribunal ("the FTT") erred in law in its approach to section 11 of the Freedom of Information Act 2000 ("FOIA) by (wrongly) construing it as providing an "all or nothing" requirement. It is argued that the correct approach in law is that section 11 of FOIA provides a 'sliding scale', which requires compliance with the requestor's preference up to the point that it is no longer reasonably practicable to do so.
>
> 4. The Maritime and Coastguard Agency ("MCA") argues that the FTT applied a 'sliding scale' test under section 11 of FOIA, and was correct to do so, and the FTT in fact found that it was not reasonably practicable for the MCA to provide any (i.e. even one) transcript of the audio calls sought by Mr Walawalkar.

> 5. I give permission to appeal to Mr Walawalkar under Ground 1 on the following two bases.
>
> 6. First, if the FTT applied an "all or nothing" approach under section 11 of FOIA then it was arguably wrong to do so.
>
> 7. The MCA relies on paragraph 11 of the FTT's reasons as showing it did not apply an 'all or nothing' test. The difficulty with that submission may be (a) that that paragraph appears under a sub-heading "The Issues for the Tribunal" and before its "Conclusions"; and (b) it may be said that paragraph 11, if it is the FTT's answer about the legal effect of section 11, is unclear as an answer as it arguably may amount to no more than a summary of the wording of section 11. Moreover, if the "The Issues for the Tribunal" section of the FTT's reasons does contain (at least part of its) dispositive reasoning, the closing sentence in paragraph 14 of its reasons may arguably point in favour of the FTT having adopted an 'all or nothing' test under section 11.
>
> 8. A subsidiary aspect of this first part of Ground 1 may be that the FTT's reasoning is confused, and thus inadequate, as to what it considered was the correct legal construction of section 11 of FOIA.
>
> 9. Second, if the FTT applied section 11 of FOIA as a sliding scale (as Mr Walawalkar and the MCA say is the correct construction of its wording), it failed to reason out adequately, and provide sufficient and clear findings of fact, for why under that sliding scale it was not reasonably practicable for the MCA to provide any (i.e. even one) transcript of the audio calls Mr Walawalkar had requested. A possible arguable difficulty with the FTT''s reasoning is that it seemingly accepted (per para. 14 of its reasons) that the Information Commissioner had been correct to conclude that it was not reasonably practicable for the MCA to provide any transcripts. It is arguable that, although this was the result of the Information Commissioner's Decision Notice, the analysis in that Notice only concerned the reasonable practicability of the MCA providing transcripts of all the calls requested (see paragraphs 13, 25-27 and 29-33 of the Decision Notice), and the Notice arguably did not engage with any sliding scale analysis. It may be further arguable that the approach of the Information Commissioner in the Decision Notice was to tie the section 11 preference to the request for the information and all the information requested under that request: see, again, paragraph 29 of the Notice. Whether the Information Commissioner was to correct to do so, if this was his approach, may fall for consideration under the first aspect of Ground 1."

36. I refused Mr Walawalkar permission to appeal on his remaining two grounds of appeal. It is worth setting out my reasons for refusing permission to appeal on those grounds as they explain why, in my judgement, the 'section 12' and 'public interest' arguments taken before the FTT were of no merit.

> "<u>Ground 2</u>
>
> 10. The second ground of appeal is that the FTT erred in law in not taking account of the costs limit in section 12 of FOIA as a relevant guideline in considering when it may no longer be reasonably practicable to meet the requestor's preference under section 11 of FOIA.

> 11. I refuse permission to appeal on Ground 2. I do so because I cannot find any properly arguable basis for section 12 being relevant to section 11 given that section 11 expressly includes, in section 11(2), the cost of meeting the stated preference of the requestor. Once cost has properly been taken into account under section 11 of FOIA, and no criticism is made of the FTT in that regard, I cannot see what section 12 would usefully add to the section 11 test. Moreover, nothing in section 11 or section 12 ties either section to the other, and their statutory effects are different. Section 11 is about the means by which communication of the requested information is to be made under section 1(1)(b) of FOIA. It is thus predicated on the request not being refused or otherwise affected by anything in sections 2, 9, 12 or 14 of FOIA. Section 12 provides an exemption from the section 1(1)(b) obligation if the costs of compliance are too high. Such an exemption was not in issue in this case. Furthermore, on the structure of FOIA consideration of such an exemption arises before consideration of the section 11 means of communication. This is because if the exemption is made out, the obligations under sections 1(1)(b) and 11 simply do not arise.
>
> Ground 3
>
> 12. The third ground of appeal is that as matter of law the public interest can be taken into account when considering the application of section11 and the FTT was wrong to conclude otherwise.
>
> 13. I refuse permission to appeal on Ground 3. The test under section 11 is concerned with whether meeting the requestor's stated preference is reasonably practicable. A test of practicability in terms of the mode of communication of information has nothing to do with evaluating the public interest in providing the information. Like the section 12 argument under Ground 2, considerations of the public interest arise at a different, and earlier, stage in the consideration of the request. Once the section 11 stage has been reached, considerations of the public interest are no longer relevant under FOIA."

Legal framework

Statutory provisions

37. Part I of FOIA is about "Access to information held by public authorities".

38. Section 1 of FOIA falls within Part I of FOIA and provides the core duty under FOIA. Section 1 sets out, insofar as relevant, the following:

> "**General right of access to information held by public authorities.**
> **1**(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….

> (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 or 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)."

39. Section 2 of FOIA is about the "Effect of the exemptions in Part II [of FOIA]" and, per section 1(2) of FOIA, qualifies the effect of section 1(1). Section 2 provides as relevant:

> "**Effect of the exemptions in Part II**
> **2**(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—
> (a) the provision confers absolute exemption, or
> (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,
> section 1(1)(a) does not apply.
> (2) 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."

40. Section 3(2) of FOIA identifies when information is "held" by a public authority, as follows:

> "**Public authorities.**
> **3**. (2)For the purposes of this Act, information is held by a public authority if—
> (a)it is held by the authority, otherwise than on behalf of another person, or
> (b)it is held by another person on behalf of the authority."

41. Section 11 also appears within Part I of FOIA. It is worth emphasising at this stage that, unlike sections 2, 12 and 14 of FOIA (and section 9), the general right of access to information conferred by section 1(1) of FOIA is not made subject to section 11. This is no doubt because, as the terms of section 11 make plain, it is about the *means* by which the information under section 1(1)(b) is to be communicated. Section 11 of FOIA cannot, therefore, alter or affect the right of access conferred by section 1. However, by contrast and per section 1(2) of FOIA, the provisions in sections 12, 14 and the exemptions under section 2 and Part II of FOIA, may cut down or remove that section 1 right.

42. Ignoring the parts of section which deal with "datasets", which are not relevant to this appeal, section 11 provides as follows:

> "**Means by which communication to be made.**
> **11**(1) Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely—
> (a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,
> (b) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and
> (c) the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant,
> the public authority shall so far as reasonably practicable give effect to that preference…..
> (2) In determining for the purposes of this section whether it is reasonably practicable to communicate information by particular means, the public authority may have regard to all the circumstances, including the cost of doing so.
> (3) Where the public authority determines that it is not reasonably practicable to comply with any preference expressed by the applicant in making his request, the authority shall notify the applicant of the reasons for its determination.
> (4) Subject to subsection (1)…., a public authority may comply with a request by communicating information by any means which are reasonable in the circumstances."

43. For completeness, I set out the relevant parts of some of the other provisions (sections 12, 14 and 40 of FOIA) on which the MCA relied in refusing Mr Walawalkar's request.

> "**Exemption where cost of compliance exceeds appropriate limit.**
> **12**(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.
> (2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.
> (3) In subsections (1) and (2) "the appropriate limit" means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases….
>
> **Vexatious or repeated requests.**
> **14**(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.
> (2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

> **Personal information.**
> **40** (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
> (2) Any information to which a request for information relates is also exempt information if—
> (a) it constitutes personal data which does**]** not fall within subsection (1), and
> (b) the first, second or third condition below is satisfied.
> (3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act—
> (a) would contravene any of the data protection principles, or
> (b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.
> (3B) The second condition is that the disclosure of the information to a member of the public otherwise than under this Act would contravene Article 21 of the UK GDPR (general processing: right to object to processing).
> (4A) The third condition is that—
> (a) on a request under Article 15(1) of the UK GDPR (general processing: right of access by the data subject) for access to personal data, the information would be withheld in reliance on provision made by or under section 15, 16 or 26 of, or Schedule 2, 3 or 4 to, the Data Protection Act 2018, or
> (b) on a request under section 45(1)(b) of that Act (law enforcement processing: right of access by the data subject), the information would be withheld in reliance on subsection (4) of that section."

44. Pausing at this point, as they both set out, sections 12 and 14 of FOIA remove the obligation otherwise imposed on a public authority by section 1(1) of FOIA, and so, if applicable, would remove the section 1(1)(b) obligation (here) on MCA to communicate the information of the description specified in the request to Mr Walawalkar. If the obligation to communicate the information requested has been removed by either of sections 12 or 14 being met, the preferred means of communicating the information under section 11(1) does not arise. Putting this point another way, the section 11(1) test only becomes relevant if (and once) the public authority is under the section 1(1) obligation to communicate the requested information to the requestor.

45. Likewise, if the information requested (or any part of it) is exempt information under section 40 of FOIA, the effect of section 2 of FOIA is that the section 1(1)(b) obligation also does not apply. If the public authority is therefore not under an obligation to communicate the information requested, the preferred means of communicating the information has nothing on which to bite.

46. Section 16 of FOIA is about the advice and assistance that public authorities are required to give to requestors in relation to their requests. It provides:

> "**Duty to provide advice and assistance.**
> **16**. (1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.
> (2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case".

47. Sections 1, 2, 3, 11, 12, 14, and 16 all fall within Part I of FOIA.

48. Section 50 of FOIA falls within Part IV of FOIA which is concerned with "Enforcement". Section 50 governs complaints to the ICO about a public authority's decision on a request for information and provides (insofar as is relevant) as follows:

> "**Application for decision by Commissioner.**
> **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.
> (2) On receiving an application under this section, the Commissioner shall make a decision unless it appears to him—
> (a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,
> (b) that there has been undue delay in making the application,
> (c) that the application is frivolous or vexatious, or
> (d) that the application has been withdrawn or abandoned.
> (3) Where the Commissioner has received an application under this section, he shall either—
> (a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or
> (b) serve notice of his decision (in this Act referred to as a "decision notice") on the complainant and the public authority.
> (4) Where the Commissioner decides that a public authority—
> (a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or
> (b) has failed to comply with any of the requirements of sections 11 and 17,
> the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken."

49. It is noteworthy that section 50(4) on its face draws a distinction between a failure to communicate information under section 1(1) of FOIA and a failure to comply with a preferred means of communication under section 11 of FOIA. It thus retains the distinction identified above between the right to be communicated the information requested under section 1(1) of FOIA and the means by which that communication is to made in section 11 of FOIA. As will be seen later, this distinction was emphasised by the Court of Appeal in paragraph [51] of its decision in *Independent Parliamentary Standards Authority v Information Commissioner and Leapman* [2015] EWCA Civ 388; [2015] 1 WLR 2879.

50. Sections 57 and 58 deal with appeals to the FTT against the ICO's Decision Notice under section 50. Sections 57 and 58 provide, relevantly, as follows:

> "**Appeal against notices served under Part IV.**
> **57** (1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice….

> **Determination of appeals.**
> **58** (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."

51. The last piece of the statutory architecture to which I need refer is section 84 of FOIA. Materially, this provides as follows:

> "**Interpretation.**
> **84**. In this Act, unless the context otherwise requires—
> "information"….means information recorded in any form."

Relevant case law

52. Three main cases were referred to in the arguments before me. I will take them in the date order in which they were decided

53. The first case is the decision of the House of Lords in *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 74; [2008] 1 WLR 1550 (*CSA*). The decision in *CSA* concerned the interaction between the provisions of the Data Protection Act 1998 and the Freedom of Information (Scotland) Act 2002 ("FOISA"). In particular, it concerned what would be section 40 of FOIA and how the protection against processing of individual's "personal data" aligns with the right to information found in FOISA (and FOIA). For ease of understanding and relevance, I will use the equivalent FOIA provisions when describing the decision in *CSA*.

54. The Common Services Agency (the CSA) was a special health board in Scotland. One of its functions was the collection and dissemination of epidemiological information from other Health Boards. A Member of the Scottish Parliament asked it for details of all incidents of childhood leukaemia for both sexes by year from 1990 to 2003 for certain postal areas broken down by census ward. It was not doubted that there was a genuine public interest in the disclosure of this information. Equally, however, the CSA considered there was a significant risk of indirect identification of living individuals if the data was disclosed due to the low numbers resulting from the combination of the rare diagnosis, the specified age group and the small geographic area comprised in the request. It therefore refused the request under what would be section 40 of FOIA.

55. Following a complaint to the Scottish Information Commissioner (under what would be section 50 of FOIA), the Scottish Information Commissioner ("SICO") issued his decision on the complaint. The SICO accepted that a living individual could be identified from the data at census ward level, that that data constituted

"personal data", and it could not be released (under what would be section 40 of FOIA) as to do so would breach the first data protection principle under Schedule 1 to the Data Protection Act 1998. However, the SICO did not consider that this meant that the MSP should not have been provided with any information. The SICO had before him guidance describing a process by which, through a disclosure control method called "barnardisation", statistical information in small counts could be made less likely to disclose personal information. Based on this, the SICO concluded that the provision of information to the MSP in this barnardised form would have provided the closest fit to meeting the MSP's request. The SICO further decided that the CSA could have offered this option to the MSP under its "advice and assistance" duty (found in what would be section 16 of FOIA), and accordingly the CSA had not dealt with the MSP's request in accordance with Part I of FOISA. The SICO ordered the CSA to provide the MSP with the census ward data in a barnardised form.

56. The SICO's decision was upheld by the Court of Session on the CSA's appeal. On a further appeal by the CSA to the House of Lords, Lord Hope identified a series of six questions that needed to be addressed on the appeal. The first question was whether the information which SICO had ordered the CSA to release in barnardised form to the MSP was "held" by the CSA at the time of the request. The remaining five questions posed by Lord Hope in *CSA* only followed on if the CSA held the information requested in barnardised form. Those remaining questions concerned, in effect and recasting the decision to FOIA provisions, whether the information in barnardised form would be exempt from disclosure under section 40 of FOIA. The decision in CSA did not therefore turn on, nor was it about, the application of the equivalent provision in FOISA to section 11 of FOIA.

57. In answering the first question, Lord Hope rejected CSA's argument that the process of barnardisation would require information to be created and until that was done the barnardised information was not "held" by the CSA. In rejecting this argument, Lord Hope said, at paragraph [15], the following:

> "15. It seems to me that the position that the [CSA] has adopted to the request in this case is an unduly strict response to what FOISA requires. This part of the statutory regime should……be construed in as liberal a manner as possible. The effect of barnardisation would be to apply a form of disguise, or camouflage, to information that was undoubtedly held by the [CSA] at the time of the request. It would amount to the provision of that information in a form that concealed those parts of it that have to be withheld but which would nevertheless, to some degree, convey to the recipient information that was undoubtedly held by the Agency at the time of the request. The process is similar to that of redaction, which involves doing something to information in the form in which it was held so that those parts of it which are not private or confidential can be released. It would not amount to the creation of new information, nor would it involve the carrying out of any research. It would be to do no more than was reasonable in the circumstances, having regard to the need for the form in which the information was disclosed to comply with the data protection principles."

58. This analysis accords with the ICO's analysis in this case that recording the information in form of transcripts would not involve the creation of new information.

59. However, it is important in my judgement to recognise that what the above passage from *CSA* is concerned with is whether the information in one form was "held" by the CSA. Under FOIA, this is an issue under section 1(1) of FOIA and not section 11.

60. The *CSA* decision goes on to address whether, even if the information was held by the CSA in the barnardised form, it would be exempt from disclosure as personal data (under what would be section 40 of FOIA). CSA's appeal was allowed by the House of Lords on the basis that the SICO had not made findings showing why the information in barnardised form "was not personal data in the hands of [the CSA]….. or, if it was, that disclosure of the information in this form would not contravene any of the data protection principles". Again, it needs to be noted that this aspect of the decision in CSA was not about the FOISA equivalent to section 11 of FOIA.

61. Mr Walawalkar sought to rely on remarks made by Lord Hope in paragraph [16] of the *CSA* decision as showing that section 11 was in play at the stage of considering whether information is "held" for the purposes of section 1(1) of FOIA. That paragraph [16] reads as follows:

> "16. The latitude which should be given to a request which cannot be met in the form requested is indicated by section 11(2)(b) FOISA which provides for the provision of a digest or summary of the information, and by section 11(4) which provides that information may be given by any means which are reasonable in the circumstances. No hard and fast rules can be laid down as to what it may be reasonable to ask a public authority to do to put the information which it holds into a form which will enable it to be released consistently with the data protection principles. Protection against the excessive cost of compliance is provided by section 12 FOISA. But it has not been suggested that the process of barnardisation which the Commissioner said should be adopted in this case would be excessively costly. In my opinion information in that form would contain information that was "held" by the Agency at the time of the request and, unless it was "personal data" and its disclosure would contravene any of the data protection principles, it would have to be released in response to it."

(Section 11(4) of FOISA equates to section 11(4) of FOIA and section 11(2)(b) of FOISA to section 11(1)(c) of FOIA.)

62. I make the following observations at this stage about the remarks of Lord Hope in paragraph [16] of *CSA*.

    (i) first, as I have already said, they are at most about whether the information in barnardised form was in fact "held" by the CSA. The heading Lord Hope used for paragraphs [14]-[16] of his speech in *CSA* was "*Was the data to be barnardised information held by the [CSA]?*";

(ii) second, they are not about the FOISA equivalent to section 11(1) of FOIA;
(iii) third, they only refer to section 11 of FOISA as providing an "indication" of the latitude that should be taken to whether information is held by a public authority; and,
(iv) fourth, they are not a legal binding statement as to when section 11 of FOISA (or FOIA) applies or what test section 11(1) of FOIA contains.

It is worth nothing as well that Lord Rodger at paragraph [73] of *CSA* located the obligation on the public authority to consider giving the information in another form (so as to avoid breaching data protection principles by giving the information in the requested form) in what would be section 1(1) of FOIA.

63. The second case is *Innes v ICO* [2014] EWCA Civ 1086; [2015] 1 WLR 210. The issue in *Innes* did concern section 11(1) of FOIA. It was not, however, about whether section 11(1)'s "so far as reasonably practicable" wording provides a sliding scale test or an all or nothing test.

64. The public authority in *Innes* held the information requested and communicated it to Mr Innes. The key issue was whether by providing the information to Mr Innes in electronic form but not in a particular software format suitable to Mr Innes's needs, the public authority met section 11(1)(a) of FOIA. In allowing Mr Innes's appeal the Court of Appeal held: (a) that section 11(1)(a)'s wording 'provision of a copy of the information in a permanent form or another form acceptable to the applicant" entitled the applicant "to request more than simply "permanent" or non-permanent" (paragraph [36]); and (b) the applicant's right (so far as reasonably practicable) in section 11(1) to choose to have information provided to him in electronic form extended "to a right to choose the software format in which it is embodied" (para. [37]).

65. Three passages from paragraphs 31, 39 and 40 of *Innes* were referred to by the parties and I set these out below.

> "[31]….Although the argument before us, as below, appeared to proceed on the assumption that the purpose of section 11 was to give applicants a choice of the "form" in which information is supplied, the only question being what that meant, it does not seem to me as straightforward as that. The subject-matter of section 11 is not the *form* in which the requested information is supplied but the "*means*" by which it is communicated….."
>
> [39]…. Citizens are given the right of access to public information at least in part so that they can make use of such information. A construction of the Act which makes it easier for them to do so effectively is to be preferred.
>
> [40]…..it is hard to see any policy objection to a construction which enables an applicant to specify a preferred software……If an authority is asked to provide information in a software format in which it is not already held (or into which it cannot readily be converted) it would be entitled to seek to rely on the reasonable practicability qualification; I doubt if it was part of the purpose of the Act to oblige authorities to input information into a spreadsheet when it does not

> already exist in that form (though that was not of course the case here). The authority could likewise invoke the reasonable practicability qualification if the provision of information in the way sought would be inconsistent with the licence governing its use of particular software."

66. The third case is the decision of the Court of Appeal in *Independent Parliamentary Standards Authority v Information Commissioner and Leapman* [2015] EWCA Civ 388; [2015] 1 WLR 2879 ("IPSA"). The information request in this case was for the original invoices submitted by three Members of Parliament for expenses claims they had made. What was supplied to the requestor had certain parts of what was in and on the invoices redacted. The redactions covered, inter alia, logos and letterheads, handwriting and manuscript comments, and the layout and style of the invoices. The ICO decided that all the redactions which I have just identified had also to be disclosed to the requestor as information held by IPSA. IPSA's challenges to the ICO's decision were dismissed by the First-tier Tribunal, the Upper Tribunal and the Court of Appeal.

67. The following passages from *IPSA* were relied on before me.

> "[33] As already noted, the entitlement under section 1(1) relates to recorded information but "information" is not further defined. It is an ordinary English word and there is nothing to suggest that it is being used in an unusual or narrow sense. In *Common Services Agency v Scottish Information Commissioner* [2008] UKHL, [2008] 1 WLR 1550, a case under the materially identical Freedom of Information (Scotland) Act 2002, Lord Hope said that "[t]here is much force in Lord Marnoch's observation in the Inner House … that, as the whole purpose of the 2002 Act is the release of information, it should be construed in as liberal a manner as possible" (paragraph 4). He went on to state that that proposition must not be applied too widely, observing that "while the entitlement to information is expressed initially in the broadest terms that are imaginable, it is qualified in respects that are equally significant and to which appropriate weight must also be given. The scope and nature of the various exemptions plays a key role within the Act's complex analytical framework". As it seems to me, the very fact that detailed exemptions are provided within the complex analytical framework of FOIA shows that "information" itself does not need to be narrowly construed: on the contrary, there is no reason why effect should not be given in this respect to the purpose of the statute by construing it in as liberal a manner as possible. It is, moreover, common ground that "information" is not limited to words and figures but extends to visual and aural information (photographs, drawings, CCTV or audio footage, etc).
>
> [34] A central position in the argument before us was occupied by the opinion of the court, given by Lord Reed, in *Glasgow City Council v Dundee City Council* [2009] CSIH 73. This was a decision of the Inner House of the Court of Session on two appeals under the Freedom of Information (Scotland) Act 2002. One of those appeals concerned emails from a firm of solicitors stating that, on behalf of a client, the firm "would like to (and hereby does) make an Information Request that we be provided with a copy of [a specified document or documents]" held by Glasgow City Council. The original requests related to a number of statutory registers, notices and orders, but the matter came down to 28 categories of notice. The Council's response to the requests was to the effect that all the information requested was available for purchase in the form of

Property Enquiry Certificates ("PECs") under the Council's publication scheme. The Council was evidently concerned that the request under the 2002 Act was an attempt to circumvent the charging regime it had established by way of PECs. The Commissioner decided, however, that the Council had not dealt with the requests in accordance with Part I of the Act.

[35] In considering the appeal against that decision, Lord Reed stated at paragraph 42 of the opinion that the first question was whether the emails were requests for information within the meaning of the Act. He continued:

> "43. As we have noted, section 1(1) of the Act creates an entitlement to be given information; and section 73 defines 'information', for the purposes of section 1, as meaning 'information recorded in any form'. That terminology, which reflects that of the Freedom of Information Act 2000, was carefully chosen: most earlier freedom of information legislation in other jurisdictions confers a right of access to documents (as in the Commonwealth of Australia Freedom of Information Act 1982) or to records (as in the Canadian Access to Information Act 1982, the Irish Freedom of Information Act 1997 and the United States Freedom of Information Act 1966); and the New Zealand Official Information Act 1982, which requires 'official information' to be made available on request, is not restricted to recorded information. The word 'information' is itself of wide range, as has been emphasised by courts construing the New Zealand and Australian legislation (as, for example, in *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, *R v Harvey* [1991] 1 NZLR 242 and *Kwok v Minister for Immigration and Multicultural Affairs* [2001] FCA 1444). The definition in section 73 is therefore wide in scope, but it is not unlimited. In the first place, it does not include unrecorded information. Secondly, it is implicit in the definition that a distinction is drawn between the record itself and the information which is recorded in it. That is consistent with section 11(2)(c), which implies that 'information' is capable of being contained in a record. The distinction is also reflected in section 65(1) of the Act, which, as we have explained, makes it an offence to alter a record with the intention of preventing the disclosure of information. What a person can request, in terms of section 1(1), is the information which has been recorded, rather than the record itself. The right conferred by section 1, where it applies, is therefore to be given the information, rather than a particular record (or a copy of the record) that contains it. Put shortly, the Act provides a right of access to information, not documentation."

[36] The correctness of that statement of principle is common ground before us, and it is acknowledged in particular that there is a conceptual distinction between the record and the information contained in it and that the statutory entitlement relates specifically to the latter. The point is made by Mr Hopkins on behalf of the Commissioner, however, that there will be cases (of which the present case is said to be one) where it is necessary in practice to disclose the record itself, whether by providing a copy of it or by providing an opportunity to inspect it, in order to communicate the entirety of the information contained in it. The fact that disclosure of the record may be necessary in order to give effect to the entitlement to the information does not undermine the conceptual distinction between the record and the information and does not confuse the statutory entitlement to recorded information with an entitlement to the record. This point did not arise for consideration in the Glasgow City Council case, since

there was not alleged to be any shortfall in that case between the information provided and the information contained in the record. As appears from paragraphs 50-51 of the opinion of the court, in relation to the question whether the information fell within a statutory exemption as being obtainable from PECs under the Council's publication scheme, the Commissioner had proceeded on the basis that the information contained in the PECs was not materially different from the information contained in the copy notices requested, and the court declined to hear argument to the effect that the information contained in the notices was not in fact derivable in its entirety from the PECs and that the Commissioner's decision, properly construed, proceeded on that basis.

Issue (1): was there a failure to communicate recorded information to which Mr Leapman was entitled?

[46] [IPSA] advanced an argument to the effect that the Commissioner's approach, as upheld by the tribunals, would leave section 11(2) and (4) of FOIA with no work to do. Those provisions are concerned with the means by which information is communicated. I will look at them in detail when considering the next issue. It suffices to say here that I do not accept that the Commissioner's approach affects the operation of section 11 or deprives it of practical utility. There may be cases, as here, where the available means of communication are limited by the need to disclose a document itself in order to communicate all the information recorded in it. Even then there may be a choice in practice between providing the applicant with a copy of the document and providing him with an opportunity to inspect the original document. But even if in the particular circumstances there is only one available means of communication, the result is consistent with the scheme of the legislation and cannot be said to undermine the legislative purpose.

Issue (2): were the means of communication adopted by IPSA sufficient to comply with Mr Leapman's request?

[49] The finding that IPSA failed to communicate recorded information to which Mr Leapman was entitled might be thought to be dispositive of the case against it. [IPSA] submitted, however, that IPSA had communicated information by means that satisfied the requirements of section 11 and had thereby fulfilled its duty in respect of Mr Leapman's request even if there was a shortfall between the information communicated and the information to which Mr Leapman was entitled under section 1(1). This brings in an issue that I have touched on already but that needs now to be considered in greater detail.
[50] [IPSA's] argument appeared to proceed along the following lines:

> (1) The manner in which a section 1(1)(b) entitlement is satisfied is prescribed by section 11: section 1(1)(b) states the right, whilst section 11 states the correlative obligation on the public authority.
>
> (2) The correct meaning of a request for information is a question of law. On the proper interpretation of his request, Mr Leapman expressed a preference for an opportunity to inspect the original documents. If the First-tier Tribunal had approached the matter correctly, it ought so to have found.
>
> (3) IPSA was entitled to determine that it was not reasonably practicable to give effect to that preference, having regard to "all the circumstances,

> including the cost of doing so" (see the tailpiece to section 11(1) and the language of section 11(2)). The First-tier Tribunal erred in interpreting "all the circumstances" in a limited way, as referring only to the circumstances of the particular request for information.
>
> (4) If it was not reasonably practicable to give effect to Mr Leapman's preference, it was open to IPSA, under the terms of section 11(4), to comply with the request by any means which were reasonable in the circumstances, and the means adopted by IPSA satisfied that provision.
>
> (5) If, contrary to (2) above, Mr Leapman expressed no preference as to the means of communication, then section 11(4) applied directly, and again the means of communication adopted by IPSA satisfied the provision.
>
> (6) Accordingly, IPSA satisfied the requirements of section 11, and by so doing it fulfilled its duty in respect of Mr Leapman's request even if the means of communication adopted resulted in a diminution or shortfall in the information communicated, as compared with the information to which Mr Leapman was entitled under section 1(1).

[51] In my judgment, the argument breaks down at the first step and produces an untenable conclusion. I do not accept that section 11 has the role ascribed to it by [IPSA]. The duty correlative to the section 1(1) entitlement is inherent in section 1(1) itself. Just as the person making a request for information has a two-fold entitlement under the subsection, namely (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; so the public authority to which the request is made has a correlative two-fold duty, (a) to inform the person in writing whether it holds information of the description specified in the request, and (b) if that is the case, to communicate that information to him. That the subsection imposes a duty on the public authority is clear from related provisions of the statute. For example, section 1(3) provides that where a public authority reasonably requires further information in order to identify and locate the information requested, and has informed the applicant of that requirement, "the authority is not obliged to comply with subsection (1) unless it is supplied with that further information". By section 1(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)". By section 1(6), "in this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as 'the duty to confirm or deny'". Section 50(4), in the context of a complaint to the Commissioner, provides that where the Commissioner decides that a public authority "has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1)", the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken. The same subsection draws an express distinction between (a) a failure to communicate information where required by section 1(1), and (b) a failure to comply with the requirements of section 11.

[52] Thus, there can in my view be no doubt that section 1(1) imposes a requirement or duty, with which a public authority is obliged to comply, to communicate the information to which the person requesting it is entitled, and

> that such duty is independent of section 11. The entitlement and the correlative duty are qualified by section 1(2), which provides that section 1(1) has effect subject to the other provisions of section 1 and to the provisions of sections 2, 9, 12 and 14. I have already mentioned some of the other provisions of section 1. Section 2 deals with the effect of the exemptions in Part II of the Act. Section 9 concerns fees. Section 12 provides for an exemption where the cost of compliance exceeds "the appropriate limit" as prescribed by regulations. Section 14 provides for an exemption in respect of vexatious or repeated requests. None of those qualifications brings in section 11.
>
> [53] The function of section 11(1) is separate. First, the provision imposes an additional duty on the public authority where, on making the request for information, the applicant expresses a preference for communication by any one or more of the means specified. The public authority is required, so far as reasonably practicable, to give effect to that preference. Where it is not reasonably practicable to give effect to the preference, or where no preference has been expressed, the public authority may, by section 11(4), comply with the request by communicating information by any means which are reasonable in the circumstances. That provision gives the public authority a discretion as to the means by which the information required by section 1(1) is communicated, but it does not empower the public authority to communicate less information than section 1(1) requires. It does not qualify the entitlement or the duty under section 1(1). If the chosen means of communication results in a shortfall as between the information communicated and the information to which the person is entitled under section 1(1), the public authority is in breach of its duty under section 1(1).
>
> [54] It follows that the Commissioner was correct to state at paragraph 16 of the decision notice, and the First-tier Tribunal was correct to hold at paragraph 25 of its determination, that section 11 cannot operate to limit the information that a public authority is obliged to disclose…."

Analysis

The order of decision-making under FOIA

68. Although not a ground of appeal before me, the resolution of this appeal and the arguments on it has not been assisted by the back-to-front approach to the order of decision making adopted by the ICO in his Decision Notice, an approach which then continued on the appeal to the FTT.

69. From a purely forensic point of view, one answer to Mr Walawalkar's section 50 complaint was for the ICO to focus on section 11 of FOIA in relation to the transcripts. The difficult with this approach, however, was that it put in reverse order the decision making steps required by the FOIA statutory scheme, a difficulty which has been exemplified by the arguments on this appeal. It is clear in my judgement that the section 11 consideration of the *means* by which the requested information was to be communicated to Mr Walawalkar arose only when (and if) the obligation to communicate the requested information under section 1 of FOIA applied. On the arguments before the ICO on Mr Walawalkar's section 50 complaint, that section 11 stage had not been reached both in relation to the audio calls and transcripts made of those calls.

70. Even assuming, as appears not to have been contested by the MCA before the FTT, that the MCA also "held" the information requested in the form of the creation of transcripts of the audio calls, a number of stages needed to be gone through before the MCA was obliged under section 1(1)(b) of FOIA to communicate the information to Mr Walawalkar, and thus before section 11 had any application. Here, those stages involved, on the case the MCA made to the ICO, first that the transcripts were exempt under section 40(2) of FOIA, second that sections 12 or 14 of FOIA applied to exclude the MCA from the section 1(1) obligation, and third that sections 31 or 38 of FOIA applied to the transcripts. None of these stages were considered or determined. I struggle to identify a proper basis for not considering any of these exemptions or exclusions as it was only if none of them applied that the MCA ought to have come under the section 1(1)(b) obligation to communicate the information to Mr Walawalkar, and thus for section 11 to come into play.

71. It is only fair to MCA in this regard to record that it made this very point in its initial response to the ICO's investigation of Mr Walawalkar's section 50 complaint, when it said:

> "The MCA notes the ICO's own guidance highlights that "if you are not providing the information because of an exemption, section 11 is not relevant." The MCA consider that section 11 is engaged at the point the public authority has decided in principle that information must be disclosed and informs the question of "how" it should be provided. For the reasons explained above, the MCA consider that the information contained in the distress calls should not be disclosed as it is exempt under section 40 and therefore section 11 does not arise."

72. The MCA still contend that the transcripts of the audio calls would themselves contain personal data and so would be exempt under section 40(2) of FOIA. Moreover, as I understood the MCA's and the ICO's arguments on this point, they were that if the information in the audio calls is exempt under section 40(2) of FOIA (and this part of the ICO's Decision Notice was not appealed by any party to the FTT), that information remained exempt when put in the form of a transcript. Both respondents before me argued in addition that section 11 could not be used to change this consequence as, per paragraph [53] of *IPSA*, section 11 has a separate function from section 1 of FOIA and does not qualify the entitlement or duty under section 1(1).

73. I accept and agree with these submissions as a matter of principle. However, their purchase on the facts of this case would seem to be limited because there has been no adjudication by either the ICO or the FTT on whether if transcripts of the calls were made, those transcripts would be exempt from disclosure under section 40 of FOIA. And contrary to the argument I understood the ICO to make at the oral hearing before me, nothing in paragraphs 6, 28 or 59 of the ICO's Decision Notice makes a finding, let alone decides, that the transcripts of the audio calls would contain personal data such that the exemption in section 40(2) of FOIA was made out.

74. The argument made here by both respondents was that even if the FTT had erred in law in its approach to section 11 of FOIA, that error of law was not a material error because the information whether in the form of transcripts or audio records was exempt under section 40(2) of FOIA. For the reasons I have just given, I do not accept this argument.

Sections 1 and 11, "held" and CSA

75. The above issues about the order of decision making under FOIA touch on another area of debate on this appeal. This is the role, if any, section 11 of FOIA has in determining whether information is "held" by a public authority under section 11 of FOIA.

76. Mr Walawalkar argued, relying on paragraph [35]-[36] of *IPSA* and paragraph of [43] of *Glasgow City Council v Scottish Information Commissioner* [2009] CSIH 73; 2010 SLT 9, that a distinction is drawn under section 1 of FOIA between the information which has been recorded and the record in which that information appears, with it being the former to which the requestor is entitled. An immediate difficulty for Mr Walawalkar's argument, as I see it, is that if the information requested is that which is held in the audio record of the distress calls (i.e., the voices and the words used in those calls), that information has been held to be exempt under section 40(2) of FOIA and Mr Walawalkar has not challenged that aspect of the ICO's Decision Notice. If this is Mr Walawalkar's case then the appeal would seem to fail at this point because, notwithstanding the points I have made above about the section 40's application to the transcripts not having been adjudicated upon, Mr Walawalkar has not challenged that the information is exempt.

77. As I understood it, Mr Walawalkar's answer to this was to rely on paragraph [16] of the House of Lord's decision in *CSA* as being about section 11 of FOIA and that it had the legal effect of tying section 11 to section 1 of FOIA. On this reading of *CSA*, it was argued for Mr Walawalkar that (i) the MCA, per section 1 of FOIA, "held" the information he requested as audio files, and (ii) per section 1 and section 11 of FOIA read together, in so far as reasonably practicable it also held that information in the form of transcripts. Whether the information was exempt, say under section 40(2) of FOIA, would depend upon looking at the form in which the information ended up being "held". Unlike the audio calls, the transcripts of the calls could remove certain personally identifiable information such as the tone of the voices used in the calls and thus make it less likely that the information in the transcripts would be exempt under section 40(2) of FOIA.

78. I do not accept that sections 1 and 11 of FOIA are tied together in this way. This is for three key reasons. First, for the reasons I have given in paragraph 62 above, the decision in *CSA* does not have this legal effect. Second, the argument that sections 1 and 11 of FOIA are tied together in way for which Mr Walawalkar contends is contrary to paragraphs [51]-[54] of *IPSA*. *IPSA* is binding authority that the function of section 11 is separate from section 1 of FOIA and does not qualify the entitlement or the duty under section 1(1) of FOIA: per para. [53] of *IPSA*. And even within section 1(1) itself, the duty to communicate information in

section 1(1)(b) of FOIA is only in respect of the information which the requestor is entitled to under FOIA: *IPSA* at [52]. Third, I accept the respondents' argument that, following *IPSA* and given the structure of FOIA, section 11 cannot confer a *greater* entitlement to information than applies under section 1 of FOIA. That would be to allow the section 11 tail, the *means* by which the section 1(1)(b) information is to be communicated, to wag the dog of whether under section 1(1) the requestor has an entitlement to the information requested.

Section 11(1) – 'all or nothing or 'sliding scale'?

79. Having cleared the above points out of the way, I turn to address the main ground of appeal. In my judgement, in agreement with the ICO, when read properly in context the test in section 11(1) of FOIA of giving effect to a requestor's preference for communication of the information "so far as reasonably practicable" is an "all or nothing" test.

80. This conclusion is dispositive of this appeal and all the grounds of appeal. I say this because the appellant's appeal before the FTT turned on the section 11 test being a sliding scale one, such that some transcripts of the audio calls could be disclosed to him. In addition, the reasons challenge to the FTT's decision in paragraph eight of the grant of permission to appeal was subsidiary to this question of statutory interpretation and was only about what the FTT considered the correct legal test was. If, as in my judgement is the case, section 11(1) of FOIA contains an 'all or nothing' test, I can identify no material error of law in the FTT's dismissal of Mr Walawalkar's appeal, notwithstanding the lack of clarity in the FTT's reasoning. And the second ground of appeal only arises if the correct legal test the FTT had to apply under section 11 was a sliding scale one.

81. The issue of the meaning of "so far as reasonably practicable" in section 11(1) of FOIA is an issue of statutory construction. This requires the Upper Tribunal to construe the words of section 11(1) in their statutory context: *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255 at paras; [29]-31]. The parties before me, with different emphases and to different ends, referred me to the ICO's guidance on "*Means of communicating information (section 11)*". That, however, is only the ICO's, and thus one party's, view about the meaning and scope of section 11. As such, I am not sure it has even a secondary role in deciding the intended scope of a legal provision: see para. [30] of *R(O)*. I have therefore concentrated on the statutory wording within its context in FOIA.

82. I accept that the phrase "so far as reasonably practicable" may in some contexts cover a sliding scale test, though clearer language could have been used if that was what was intended. For example, section 11(1) does not say "provide the applicant with as much of the requested information in accordance with their preference so far as reasonably practicable". Mr Walawalkar's reading of the phrase "so far as reasonably practicable" taken in isolation is, therefore, a tenable one. The key consideration, however, is to construe the relevant phrase within the context of FOIA as a whole. It is only when that statutory context is understood that that the otherwise abstract concept of FOIA providing a

constitutional right to information and being liberally construed may have concrete meaning. In any event, section 11 is in my view one stage removed from the (constitutional) right to information found in section 1 of FOIA. Section 11 is not about the substance of the right or even the right to be communicated with the requested information (see IPSA at [51]-[52]), but simply the means by which the information is to be communicated. And, I would add, the "apparent philosophy" of FOIA vouched for in paragraph 39 of *Innes* was limited to making it easier to use the information to which the requestor was entitled, which has no real application to this case.

83. The touchstone for determining the meaning of the phrase "so far as reasonably practicable" within its statutory context is, in my judgement, to identify its object. In FOIA that object is the request for information in respect of which the requestor has expressed a preference as to the means of its communication. Read in terms of section 11(1)(a), (b) or (c) of FOIA and section 1 of FOIA, the object of the request is the information which has been requested. It is, per section 1(1)(a) and (b) of FOIA, the information of the description specified in the request which has to be communicated, and, per section 1(4) of FOIA, "the information in question held at the time he request is received". In Mr Walawalkar's case the information requested was "all calls between people at sea in the English Channel and HM Coastguard between 00:01am on 15 November 2021 and 23:59pm on 22 November 2021". It was that information which by section 1(1)(b) of FOIA the MCA was obliged to communicate to Mr Walawalkar (assuming for present purposes no other arguments arose in respect of it under FOIA), and not just a part or subset of that information.

84. The ICO referred in argument to "the information" being a unitary concept throughout FOIA. I think this is a helpful perspective. The point may be tested by considering the application of section 12 of FOIA and its costs cap. Assuming the information would otherwise be disclosable under section 1 of FOIA, section 12 of FOIA only makes sense, in terms of calibrating the cost of complying with the request for information, if the section 12 estimate is based on the cost of providing all the information requested. Were it otherwise and section 12 involved a sliding scale of compliance, estimating the cost of complying on the basis of as much of the requested information up to the "appropriate limit", section 12 would have no useful application as it would always oblige a public authority to comply with the request in respect of as much of the information requested up to the appropriate limit. That is not a tenable reading of section 12. It has no 'sliding scale' language within it. Moreover, on the face of it Parliament plainly intended that section 12 would apply so as to allow a public authority to refuse the request if complying with it exceeded the appropriate limit. A sliding scale (that is, as much of the requested information as is within the appropriate limit), is not consonant with that statutory intention. The costs estimate in section 12 is about complying with "the request" and that is a request for (all) the information of the description specified in the request.

85. Where the amount of the information requested breaches, or is likely to breach, the costs cap in section 12, the advice and assistance duty in section 16 of FOIA might apply to require the public authority to advise the requestor to make a less

wide-ranging request. However, the starting point for that advice would be grounded in section 1 of FOIA's statutory focus on the information of the description specified in the request. That section 1 information is all the information held by the public authority which falls within the request, and the rest of FOIA's consideration of the request is based premise.

86. A further example of the information requested being a unitary concept is the absolute exemption in section 2(2)(a) of FOIA. The absolute exemption referred to in section 2(2)(a) applies if or to the extent that the information is subject to an absolute exemption.

87. The ICO also relied on case law as supporting the above analysis. He argued that paragraphs 52 and 53 of *IPSA* neither mentioned a sliding scale test nor did they consider the partial meeting of the requestor's preferred means of communication. As an observation this is true, but I place little weight on this as the Court of Appeal in *IPSA* was not faced with the argument I am addressing. The ICO also argued that paragraph 40 of *Innes* and its language of "into which it cannot readily be converted" supported the 'all or nothing' approach. Again, I am not sure I can attach any real weight to paragraph 40 of *Innes*. The question arguably might remain what was the "it" that it was not reasonably practicable to convert into another software format: all the information requested or just part of it. In the context of the *Innes* case it was all the information requested, but the Court of Appeal was not, at least directly, addressing the argument with which I am concerned.

88. However, on the statutory language read properly in context, and for the reasons given above, I am satisfied that the phrase "so far as reasonably practicable" in section 11(1) imposes an 'all or nothing' test. That meant a test that asked the extent (if at all) that it was reasonably practicable to provide Mr Walawalkar with all of the information he had requested as transcripts. On the evidence, the only answer to that was 'No'. That is the approach the ICO took in paragraphs 2 and 25-33 of the Decision Notice, and the FTT accordingly made no material error of law in dismissing the appeal against that Decision Notice.

Conclusion

89. For the reasons given above, this appeal is dismissed.

Stewart Wright
Judge of the Upper Tribunal

Authorised by the Judge for issue on 25th March 2025