



**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
(INFORMATION RIGHTS)**

**Appeal References: EA/2021/0019  
& EA/2021/0020**

Heard via CVP on 5 and 6 October 2021

**Before**

**UPPER TRIBUNAL JUDGE RINTOUL  
(SITTING AS A JUDGE OF THE FIRST-TIER TRIBUNAL)  
TRIBUNAL MEMBER K GRIMLEY EVANS  
TRIBUNAL MEMBER D PALMER-DUNK**

**Between**

**ROBERT BACON**

Appellant

**and**

**THE CHIEF CONSTABLE OF GREATER MANCHESTER POLICE**

Second Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

For the Appellant

in person

For Second Appellant

Mr R Reichhold

For the Respondent:

Ms L E John

**DECISION AND REASONS**

Decision

Mr Bacon's appeal (EA/2021/0019) is dismissed for the reasons set out below.

The Chief Constable of Greater Manchester Police's appeal (EA/2021/0020) is allowed for the reasons set out below.

## **Preliminary matters**

### *Abbreviations*

Decision Notice	ICO's Decision of 9 November 2020, IC-46173-V6R6
GMP	The Chief Constable of Greater Manchester Police
FOIA	Freedom of Information Act 2000
ICO	Information Commissioner
Request	Request made by Mr Bacon on 30 December 2020

### **Mode of hearing**

1. The proceedings were held via the Cloud Video Platform. All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way, and no objections were made to that.
2. Although there were at times problems with connections, these were resolved at the time. There were, however, difficulties which arose from the fact that all three members of the panel were in different locations, as were the representatives, the witness, Mr Bacon and the clerk. Further, in order to confer, the panel had to use another platform, further complicating matters. This led to a breakdown in communication with Mr Bacon towards the end of the hearing on the second day for which an apology has already been given.
3. The Tribunal considered the open bundle and a redacted spreadsheet. We also took into account a closed bundle and an unredacted version of the spreadsheet.

### **Introduction**

4. This decision relates to two appeals brought against the same Decision Notice. The first, EA.2021.0019 was brought by Mr Bacon against the ICO and GMP. The second, EA.2021.0020 was brought by GMP against the Decision Notice to which Mr Bacon was joined. The appeals were joined by an order of the Registrar on 20 January 2021.
5. It is regrettable that, as will be evident from our decision, the issues in these appeals narrowed significantly after a prolonged closed session. It was only then, and belatedly, that GMP set out fully the reasons why it sought to rely on the exemptions set out in section 31 of FOIA. The consequence was that the closed evidence session was inevitably considerably longer than was necessary which is undesirable, given the strong presumption in favour of open justice. GMP could and should have provided a far more detailed, closed explanation

of why they were relying on the exemptions much earlier. Had they done so, the proceedings would have been much shorter and far less costly.

6. Mr Gillespie, GMP's witness, sought in the closed session to apologise on behalf of GMP for how this state of affairs arose; he repeated that to Mr Bacon in the open session at the panel's request.
7. After the closed session, the ICO, having considered its position, in effect withdrew its opposition to GMP's reliance on exemptions set out in FOIA. That reversal was made only in oral submissions.
8. Although as a result of the final submissions, the issues became much narrower, we consider it important to set out in some detail how GMP conducted itself in respect of the request made and subsequent appeals.
9. In the normal way, a copy of this decision was sent to the ICO, and GMP for them to check that the draft does not inadvertently disclose closed material and to make representations as to whether any parts of the decision should therefore be omitted. The version of the decision provided to Mr Bacon and promulgated generally will have been redacted and/or edited, if necessary, in the light of such representations.

### **Background**

10. These appeals arise out of a request made by Mr Bacon to GMP, initially on 15 November 2019 and refined on 30 December 2019, about its new IT system, iOPS, which had been introduced in July 2019, replacing three existing systems. iOPS had been scheduled to go live in March 2018.
11. As HM Inspectorate of Constabulary stated in its report of March 2020:

There have been significant problems with the performance of iOPS resulting in serious backlogs of work and a loss of staff confidence in the system. The problems with iOPS attracted negative media attention, in particular, concerning fears that public and officer safety were being put at risk.

In 2019, GMP simultaneously replaced three ICT systems critical to how the force functions. The first was the command and control system which logs calls from members of the public and tracks the deployment of officers. The second and third were record management systems, containing intelligence, criminal investigations, custody records and files for court cases. iOPS also introduced systems to improve the use of mobile technology and demand management data.

...

All three legacy systems were old and GMP identified risks both to the force and the public should the systems fail. The force also recognised that it needed to invest in ICT to equip it for modern-day policing and to provide its workforce with the tools to police in an efficient and effective way.

The force decided to replace the old systems with one integrated system, iOPS. This contains two elements, one to replace the command and control system, called ControlWorks, and one to replace the records management systems, called PoliceWorks.

...

In July 2019, iOPS went live. A major factor in this decision was the serious risk that

the old systems could fail. The process for the transition from the old ICT systems to the new iOPS system is referred to as the 'cutover'. The first stage was to migrate the force data from the old ICT systems to a legacy data store, which is a copy of all force data. Then the new PoliceWorks systems would be populated with agreed information from the legacy data store and commence usage.

To support the cutover phase, the force implemented a governance structure and prepared contingencies in case any anticipated issues arose. It also put in place a team of specialists to react to problems as they happened. Despite this, problems became worse than anticipated. Three principal issues, individually and in combination, adversely affected the workforce's ability to operate iOPS. Technical issues with the force ICT systems and infrastructure; changes to operational and working practices; and the training provided to operate the system.

These resulted in a loss of confidence by staff, particularly in the PoliceWorks system, and reduced force performance.

12. Mr Bacon's primary concern is, as we understand it, that the decision to implement iOPS (and replace the old systems) was flawed, rushed, and that there had not been a proper evaluation of the risks in doing so; that the implementation, despite the known defects in iOPS had caused significant harm; and, that there is a strong public interest in the publication of the documentation relating how those decisions were made in light of the risks - in particular those relating to the risks of going live with a system known to have flaws.
13. We are concerned not with whether the decision to implement iOPS was correct, but with the request for information regarding that decision. It is not for us to enquire into the merits of the decisions taken.

### **The Request & subsequent responses**

14. The process following the Request was drawn out; and, we regret to say, frustratingly, because of GMP continually changing its position, and seeking at different points to rely on a large number of different exemptions, only few of which it now seeks to rely. In addition to correspondence between the ICO and GMP, and between Mr Bacon and the ICO, there was also during the period between the Request and DN, a significant amount of correspondence between Mr Bacon and GMP. It is telling that GMP had to apologise before us and to Mr Bacon for the manner in which GMP's employees had communicated with him.

15. Mr Bacon initially made a request to GMP on 15 November 2019 which was refused on cost grounds pursuant to section 12(1) of FOIA. GMP advised him how he might reframe the question and he did so, on 30 December 2019, asking:

In relation to iOps;

1. I would like to see the test strategy documentation which was signed off for this project. Included within this I would like to see how your S1/P1 severity 1 priority 1 defects have been categorised and why, and how you have moved into UAT [User Acceptance Testing] from the previous testing phases which should be pre-determined by agreed Entry and Exit criteria within the test strategy.

2. I would like to see the TCR (Test Completion Report)

3. I would like to see the project RAIDS log (Risks/ Actions/Issues/Dependencies)

4. I would like to see the minutes of the final 'Go Live' decision for the project and who signed this off and basically why given the system was clearly not fit for purpose.

16. We note in passing that a RAID log is a project planning tool used to identify key Risks, Assumptions, Issues and Dependencies (hence the acronym "RAID").

17. GMP again refused the application, citing section 12(1) of FOIA, stating as follows: -

Greater Manchester Police (GMP) does not hold the information that you have requested in an easily retrievable format. To provide the data requested would again involve a manual search through a very large number of files to identify the relevant information based on a process of elimination.

At a very conservative estimate to locate, retrieve and review each file it would take approximately a full working week of 36.25 hours to complete and ascertain the data required.

Therefore to comply with the whole of your request the process would take over 18 hours' work which exceeds the appropriate limit of £450.00, the amount to which we are legally required to respond.

18. Mr Bacon then contacted the ICO on 6 January 2020 to complain about the manner in which his request had been handled. The ICO suggested an internal review, which GMP did not initially conduct
19. On 1 June 2020 the ICO asked GMP why it was relying on section 12(1) of FOIA. There was no reply until 3 July 2020 when GMP said it would not be in a position to respond for three months due to the effects of the pandemic, GMP systems upgrade and projects on its resources. This was considered excessive by the ICO.
20. On 12 August 2020 GMP issued a revised response, saying it no longer wished to rely on section 12(1) of FOIA but that it had identified some information it

wished to disclose in response to the request with the remainder being withheld in accordance with various FOIA exemptions.

21. The details of what was disclosed are set out in the Decision Notice at [28] to [32].

28. For part 1 of the request (namely the test strategy documentation), GMP identified two documents in scope. It disclosed a document entitled GMP IS Transformation Programme Test Strategy (v 1.2) in full. The other document, entitled GMP iOPS Test Strategy, is a 52 page report which GMP withheld in its entirety citing section 43(2) (commercial interests) of the FOIA.

29. For part 2 of the request (the Test Completion Report) GMP said it did not hold any information of that name but considered that the 'GMP iOPS Test Strategy' referred to under part 1 above also fell in scope of part 2 of the request (withheld in its entirety under section 43(2)). In addition, GMP considered that the 'iOPS Testing Exit Strategy Report' fell in scope. This is a 108 page report which GMP withheld in its entirety under section 43(2).

30. Part 3 of the request for the RAID log (Risks, Actions, Issues, Dependencies) consists of a spreadsheet with various tabs. GMP had earmarked some of the tabs for disclosure to the complainant, together with some of the entries within the log, but initially had not reviewed part of the spreadsheet to determine whether any of the recorded information could be disclosed. As a result, the Commissioner asked GMP to revisit the log and complete its assessment of the remaining information in scope; she did this as part of her further investigation into the newly cited exemptions referred to in paragraph 31 below.

...

32. For part 4 of the request (namely the minutes of the 'Go Live' Meeting), GMP disclosed the minutes in full with some names removed under section 40(2).

22. In addition, GMP sought to rely on sections 31, 31(3), section 38, section 40(2) and section 43(2) of FOIA in respect of part 3, that is the RAID entries.

23. Mr Bacon responded as follows

Having reviewed just the 'Go Live' meeting minutes it is very clear that the full content has not been disclosed. Any meeting has an associated attendees list and role title to be certain as a collective group the recognised and accountable staff are being included in any such major decisions

The minutes attached provide none of this stock material content / clarity and are remarkable in their vagueness of content. There are no discussions for example around the current circumstances controlling the defect management test cycle and the priorities of those outstanding tests or discussions concerning post go live support arrangements and provisioning of floor walkers

All of these details and so so much more should be part and parcel of any go live debates so I simply do not believe these are the complete and accurate meeting contents.

24. In light of the claim to be entitled to rely on new exemptions, ICO requested further information. GMP responded on 19 October 2020 that Capita (its contractor) had agreed to disclosure of parts of the reports, minus the names. The ICO then considered it was sensible to summarise the information in the scope of the request in the decision notice at [46]:

46. The Commissioner considers it helpful to summarise here the remaining information in scope of the request (ie that information which has not already been identified for disclosure and/or which is disputed by the complainant):

- Entries within the RAID log – (withheld under sections 31, 31(3), 38, 40(2) and 43 of the FOIA).
- GMP iOPS Test Strategy Report - (majority of the report withheld under section 43(2) and section 40(2) in relation to named individuals).
- iOPS Testing Exit Strategy Report - (majority of the report withheld under section 43(2) and section 40(2) in relation to named individuals).
- Whether any further information is held in relation to ‘Go Live’ minutes.

47. Due to the complexities of how the exemptions have been applied, the Commissioner has considered the application of exemptions to each individual part of the request. As the most complex area related to part 3 of the request, she has considered this first. She has then considered parts 1 and 2 together and, finally, part 4 implementation project without due reference to the wider context of the iOPS programme ...

### **The Decision Notice**

25. The Decision Notice sets out much of the background, the Request, and the responses which we have summarised above. In broad terms, the ICO classified the Request as seeking four types of information:

- 1 The test strategy information
- 2 A test completion report (“TCR”)
- 3 RAID logs; and
- 4 Minutes of the final “Go Live” decision and associated documents

26. The ICO effectively accepted that the TCR did not exist per se, and that the two strategy reports (the Test Strategy Report (“TS”) and the Testing Exit Strategy Report (“TSE”)) covered the ground covered by parts 1 and 2 of the request. The ICO found that section 43(2) was engaged and that the public interest did not require disclosure and so the exemption under that section applied. She concluded also [166] that GMP was entitled to withhold the names of individuals identified in the two testing strategy reports under section 40(2) through application of section 40(3A) (a).

27. The ICO noted at [48] that GMP had failed to make any submissions explaining its reliance of its exemptions with respect to the RAID log analysis. She concluded also that in the absence of any specific section 31(1) rationale being provided by GMP, neither section 31(1)(a) or (b) was engaged; that the GMP could not rely on section 31(3); that section 38 was not engaged and that with respect to section 43(2) the entries withheld in the RAID log, the public interest in withholding the information outweighed the public interest in disclosure.
28. Turning to part 4 of the request the ICO concluded that on the balance of probabilities no further recorded information within the scope of a request was held beyond the minutes already provided to the complainant (see paragraphs [181] to [183] of the decision notice).
29. In the light of that, the ICO ordered disclosure of a number of RAID entries not covered by the section 43(2) exemption. These are set out in the annex to the Decision Notice.

### **Grounds of Appeal**

30. In light of Mr Bacon stating in closing submissions that he was not interested in the personal details of those involved, and his statement that he understood and accepted why the material in relation to the RAID entries has been withheld; and, in light of the ICO in effect accepting that GMP was entitled to rely on the exemptions pleaded, it is unnecessary to address those issues in detail.
31. Mr Bacon submitted that the ICO's decision was wrong on the following grounds:

2 areas have (in my opinion) not been addressed correctly, and I think a fundamental lack of understand of Project Management principles puts the Commissioner at a disadvantage and subsequent failure regarding the importance of the documents requested.

This is a serious failure, as I have made clear to the ICO before. People lives have been impacted as a result of the failure of the GMP and Capita to implement iOps safely and efficiently. They effectively rushed the 'Go Live' decision, without correctly testing the system before hand, and subsequently I am aware of at least one small child who needed up in hospital as a result. I am sure this has wider reaching impact but even one such life put at risk should not be tolerated, all because of poor project management, funding concerns, and the arrogance a lies presented by the GMP and in particular Ian Hopkins when questioned about the project.

Ian Hopkins denied publicly that there were any problems, yet was fully aware of the issues. Many reports hit the press concerning these failing and yet he still denied the issues. The Manchester Evening News has covered this extensively and I thought Priti Patel was supposed to be addressing the concerns but its all gone very quiet, yet another example of brushing serious issues under the carpet.



The 2 documents I requested where the ICO Commissioner has failed to grasp the point are the Test Strategy and Go Live decision minutes. The test strategy should clearly identify how they planned to test the system and what the exit criteria for each stage of testing should be, which then, put quite simply, should be discussed and agreed re unit/Systems/SIT and UAT testing results at the Go Live meeting to assesses what outstanding tests exist and the given business priority and severity assessments of those failed tests and the impact they may or do have Anything that fails to meet the test strategy exit criteria should be used as a key marker for whether or not the system is in a fit state to go live.

iOps very publicly and clearly wasn't tested properly but this needs to be clear with the documentation along with who signed this off within the go live meeting. Not disclosing this information is crucial to showing where the failures occurred and the accountability behind these failed project management and business related issues, and who was responsible. Questions need to asked and individuals held accountable for these significant and dangerous failures, which until now are being brushed aside and hidden which can not be tolerated in a democratic world.

The GMP are publicly funded and the amount of money invested and effectively wasted is enormous, yet those involved have washed their hands clean of any responsibility because to date no one has been allowed to show their failings and challenge them.

I intend to do so, but with the documents requested my hands are being tied to protect the guilty.

This is an outrage and must be addressed.

32. GMP stated in its grounds of appeal that it acknowledges [17] that more could and should have been done to assist the ICO, regretting it was unable to provide timely and complete responses. GMP stated [19] that 26 entries in the RAID log should be exempt from disclosure pursuant to section 31 of FOIA. These are then listed. The basis for the reliance on exemptions pursuant to section is that:

29. Disclosing these 13 entries - for reasons which will be made clear in closed submissions - will impact auditing and role-based access control in relation to the iOPS system. There is a real (not merely hypothetical) risk that disclosing these entries will lead to improper access to, or misuse of, iOPS.

30. The iOPS system contains a very large volume of sensitive personal data. The public interest in ensuring that iOPS is used lawfully, responsibly and ethically solely for the public good outweighs the public interest of disclosure, particularly because there is a high likelihood of prejudice and a high degree of harm that would result from improper access to, or misuse of, iOPS.

...

34. Policing systems, in common with many public sector IT systems, are regularly subjected to high levels of non-targeted and unsophisticated attacks. This is a global problem that affects governments, industry, political organisations, education, health,

essential service providers and operators of other critical infrastructure. Such attacks are regularly detected and neutralised through security technology and expertise within the GMP IT Department.

33. In response to GMP's reply, Mr Bacon referred again to the delay by GMP in providing information, stating that they had still failed to produce the documents in full, that he had requested in particular that they had denied the existence of the TCR (test completion report), an international project management standard document produced by a test manager in order to provide a final status of all testing, be that functional or non-functional against an agreed and signed (by the business) set of UAT test scripts. He submitted it was impossible for the business to have made a "go/no go" decision based purely on RAIDs.
34. Mr Bacon referred also to the failure of iOPS on numerous occasions. He submitted that the withholding of certain elements of documents on the basis of commercial interests was an obstruction tactic and required GMP to explain every single withheld RAID entry in relation to each paragraph where the exemptions had been relied upon. He has, as we have noted, now dropped that aspect of his appeal.
35. GMP replied to Mr Bacon's appeal, submitting [7] that the grounds of appeal do not engage the decision notice.
36. In response to that, Mr Bacon in his notice of appeal submitted that GMP and Capita rushed the "go live" decision without correctly testing the system, resulting in injuries to at least one small child who ended up in hospital. He submits further that disclosing the information is crucial to showing whether failure has occurred and that GMP are publicly funded, and the amount of money invested and effectively wasted is enormous.
37. In her response, the ICO noted that GMP's grounds of appeal are narrowly confined [23] and Mr Bacon's grounds of appeal, although not clear, were understood as follows: -
  - a. The Commissioner erred in concluding that the public interest balance lies in favour of withholding parts of the documents 'GMP iOPS Test Strategy' and 'iOPS Testing Exit Strategy Report' under section 43(2) of FOIA;
  - b. The Commissioner erred in concluding that it would contravene the data protection principles to disclose those parts of the 'GMP iOPS Test Strategy' and 'iOPS Testing Exit Strategy Report' that fall within section 40(2) of FOIA; and
  - c. The Commissioner erred in concluding that it would contravene the data protection principles to disclose those parts of the minutes that respond to Request 4, and that fall within section 40(2) of FOIA.
25. Mr Bacon does not appear to dispute the Commissioner's conclusion that section 43(2) FOIA is engaged; or her conclusion that, on the balance of probabilities, GMP do not hold any further information within the scope of Request 4.

38. With respect to GMP's appeal the commissioner said this:
26. The Commissioner is unable to respond to GMP's appeal. GMP is still yet to advance an explanation of why the particular parts of the RAID logs which it wishes to withhold are within section 31 FOIA: it has simply stated its intention to provide that explanation in closed evidence/submissions in due course: GMP's Grounds of Appeal §§29, 35, and 40. The Commissioner will review her position upon receipt of the GMP's evidence/submissions. At this stage, there is no reason for considering her Decision Notice to be in error.
39. With respect to Mr Bacon's appeal the ICO stated, in effect, that it was awaiting the evidence from GMP.
40. In its belated open reply in accordance with the case management directions made on 20 January 2021, GMP said that the rationale for withholding each of the 26 RAID entries was set out in the witness statements of Mr Mike Gillespie.
41. In respect of Mr Bacon's appeal, GMP maintained its position that the personal data should be retained and that the section 43 exemption applied in respect of commercial interests. It is recorded [27] that GMP agreed with the ICO in relation to the TSE report, TS report and "Go live" minutes [29], submitting that Mr Bacon had not provided a basis on which the exemptions set out in section 40(2) and/or section 43(2) FOIA did not apply and that the individuals named in the disputed information did not have public facing roles, thus there was no legitimate interest in disclosing their personal information.
42. GMP stated that the basis on which the TSE report and TS report are exempt from disclosure under 43(2) are in essence reliant on what Capita had said.

#### **Section 14 Notice**

43. On 10 June 2021 the registrar made directions preventing the disclosure of GMP's closed reply and closed witness statement. The closed material has been gisted to Mr Bacon, as was the closed evidence and submissions.

#### **The appeal hearing**

44. The appellant did not give evidence, nor did he call any oral evidence. The panel heard evidence from Mr Gillespie who was called by GMP, first in an open session and then in a closed session. Subsequent to that a gist of his evidence was agreed and was served on Mr Bacon.
45. The closed evidence in this case lasted for a significant amount of time. In this session Mr Gillespie expanded in considerable detail why releasing the RAID details would be prejudicial. During that session Mr Gillespie sought to explain and apologise about how this matter had been dealt with, a statement which at the panel's prompting he repeated in open, stating that he had joined GMP a year ago; that he was a strong supporter of the need to hold it to account and that he had tried to do much in GMP to improve the situation.

46. Mr Gillespie said directly to Mr Bacon in a subsequent open session, at the panel's direction, that his request had not been dealt with well when it first arrived, that he had been quite appalled at how long it had taken and how it had been dealt with. He added that the person who had dealt with it should not have dealt with it, was not qualified to do so and no longer worked at GMP. He said that he wholeheartedly apologised for this and that he had hoped that this could have been resolved amicably but by the time he got involved there was an appeal and that this was the only way which it could have been done. He said otherwise he would have had a dialogue to resolve the situation a year earlier and he apologised for the time and anxiety that it caused. He said that he wanted Mr Bacon to believe that he was committed to transparency and that exemptions should be relied upon rarely.
47. Cross-examined by Mr Bacon, Mr Gillespie said that he believed that there is no document called ATCR that GMP listed all they have as discussed with the ICO. He said that the UAPCR had been disclosed.
48. In his open evidence, Mr Gillespie explained that he had been with GMP for twelve months to professionalise their approach and ensure compliance with standards.

#### *Submissions*

49. The panel heard open submissions from the parties and then submissions in a closed session. Owing to a breakdown in communications, it was not explained properly to Mr Bacon that a gist of that would need to be prepared, and for him to be given an opportunity to respond to it. An apology for that has been offered, and he was given a further 14 days to respond to the gist of the closed submissions.
50. The ICO submitted that with regard to the personal data Mr Bacon said he was not interested in the names of those involved and thus there was no legitimate interest in the data being processed in the form of disclosure. With regard to the testing strategy document and the exit strategy report the ICO maintained the position as set out in the decision notice, that is that although iOPS had been problematic and there was a compelling interest in disclosing part of it, it was submitted that what had been disclosed was sufficient to discharge that burden.
51. It was submitted that GMP had not ignored the request to produce the TCR and that Mr Gillespie's evidence was that the UAT was considered as containing the relevant information, that was not a TCR.

52. Miss John for the ICO accepted that, in closed session they had for the first time heard a proper explanation for the withholding of the RAID data and in light of that the ICO accepted that section 31(1)(a) was engaged, given the detailed evidence and given that crime was likely to be committed, including cyber-attacks and what was submitted in that organised crime groups might be encouraged was real, actual and of substance and was likely to cause prejudice as claimed. It was accepted also that section 1(b) was engaged with respect to the category 2 information as it would make cyber-attacks more likely which if successful could bring down the system, making it more difficult for the GMP to do its job. It was not, however, accepted that section 31(1)(c) was engaged.
53. It was submitted that the public interest in this case was very finely balanced, there being compelling factors in favour of disclosure, in particular with regard to the problematic transition towards IOP and that there were specific factors but very finely in favour of withholding the information.
54. Mr Reichhold for GMP submitted that it was not IOPS that was on trial and that the appeal should be limited to the request under FOIA, the question being whether the material should be disclosed. It was accepted that it was only the day before that a detailed account had been given and that with regard to Mr Bacon's appeal all the necessary information had been given to him. He observed that GMP regretted that they had not done better to help with this matter and that steps would be taken to make sure things were better in the future.
55. With regard to commercial sensitivity the three documents in open had been redacted to some extent and that there would be a risk of a commercial disadvantage as noted by the correspondence with Capita. It was submitted these statements had not simply been accepted at face value but had been properly considered by the ICO and they agreed with the ICO that what had been disclosed satisfied the public interest.
56. Mr Reichhold submitted that there was no such document as the TCR and that GMP had not adopted a pedantic approach.
57. Mr Bacon said he was not interested in the personal information at all and his concern was the provision of the TCR. He submitted that although GMP had said it does not exist what they said at paragraph 18, at page 5 was a contrary position. He submitted that there was a specific user acceptance report which was his focus which had not been provided and that this would have provided crucial information prior to the go live meeting as set out in the minutes. It would have been necessary for a formal decision to be made, there was no discussion of it and hence the TCR should exist.
58. In terms of the RAID log, he said that he understood and accepted why that information was withheld and he was not interested in that. He said that he

wanted to understand why iOPS went live when it was not in a position for it to be done and the public had been put at risk.

59. We then heard closed submissions which were gisted to Mr Bacon in writing, as the closed evidence had been prior to submissions.

### **The law**

60. Section 2 of FOIA provides, so far as is relevant:

2. – Effect of the exemptions in Part II.

...

(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.

61. Section 31 of FOIA provides so far as it is relevant for the purposes of this appeal that:

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,

[...]

(h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, ...

62. Section 31 of FOIA is subject to a prejudice test as defined in Baker v Information Commissioner [2019] WL 0634701. If prejudice is established, then the Tribunal must weigh the competing public interests for and against disclosure – see Willow v Information Commissioner [2017] EWCA Civ 1876.

63. Section 43(2) of FOIA provides

43. – Commercial interests.

...

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

...

64. In order for the exemption set out in section 43 (2) to be engaged, a number of requirements must be met, as shown in Department for Work and Pensions v Information Commissioner & Zola [2016] EWCA Civ 758 at [16]-[18] and [22]-[27]. If, then, it is established that section 43(2) is engaged, that exemption will be applied only where the public interest in maintaining the exception outweighs the public interest in disclosing the disputed information.
65. How this balancing exercise is to be conducted is set out in APPGER v ICO & FCO [2013] UKUT 0560 as endorsed by the Court of Appeal in Department of Health v ICO [2017] EWCA Civ 374 at [43]. We have followed these principles.
66. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

If on an appeal under section 57 the Tribunal considers -

- (a) that the notice against which the appeal is brought is not in accordance with the law, or
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

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

67. We note that the burden of proof in satisfying the Tribunal that the ICO's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

### **Discussion**

68. Our task is to consider this matter afresh and in doing so, we have to consider information which was available at the time the Appellant's request was made, and at the time the decision notice was prepared, but was not available to the ICO.
69. To recap, GMP's appeal was solely against the decision that certain RAID entries should be disclosed. Mr Bacon's appeal was wider than that, as he sought (initially) to challenge the ICO's decision to uphold the exemptions that GMP had relied upon, and the ICO's acceptance that all relevant documents within the scope of the request had been disclosed.

70. In his submissions, Mr Bacon said he was not interested in the personal information and that he accepted why the RAID information had been withheld. The ICO in effect no longer argues that the material should not be withheld. In the circumstances, we conclude that Mr Bacon no longer contends that the RAID entries should be disclosed, despite what he had said earlier in his pleadings.
71. Two matters remain in the challenge to the decision in respect of the RAID entries: whether as GMP submits, the exemption in section 31(c) is also met where claimed; and, as to the margin by which the public interest is outweighed.
72. As it is not in contention that the exemptions set out in sections 31(a) and (b) of FOIA are met in respect of reach of the RAID entries, no purpose is served in seeking to decide the academic issue of whether section 31 (c) also applies where claimed, nor is there merit in making findings as to the margin by which the public interest in disclosure was outweighed. It is sufficient to record that, having considered the material both in open and closed for ourselves, we consider that there is a very great public interest in the public being able to know the difficulties that there were in the implementation of a major IT programme for the country's second largest police force. We are, however, persuaded, just, that as the ICO submitted, the difficulties identified by the material were such that, were they to become known, there was a real and substantial risk to the public such that we are just satisfied that the public interest favours maintaining the exemption.
73. We turn next to whether the section 43 (2) exemptions are met in respect of (a) certain of the RAID entries and (b) in respect of the TS and TSE reports. We heard no argument on the former, and little argument on the latter, save for submissions from the ICO and GMP that the public interest was in this case outweighed by the need to protect the commercial interests of both a public body (GMP) and a commercial entity, Capita.
74. We accept, as a starting point, that there is always a public interest in transparency, and that significant weight must be attached to that.
75. The ICO's position is that on the basis of the evidence seen, that the public interest in disclosure was outweighed. It is therefore for Mr Bacon to persuade us that was incorrect.
76. Mr Bacon has not set out in his grounds, or in his submissions, any proper basis on which it can be said that contrary to what the ICO found, section 43 (2) is not engaged. Nor has he provided sufficient material, nor made a proper case that that the public interest in transparency is not outweighed by the need to



maintain commercial interests. He has, rather, engaged primarily with seeking disclosure of documents he says exist, but which have not been disclosed.

77. We have, however, considered both aspects of section 43(2) and we are satisfied that on the basis of the material set out in the Decision Notice and in Mr Gillespie's evidence (which was not challenged on this point) that the section 43 (2) exemption is engaged and is satisfied both in respect of the strategy reports and in respect of the RAID entries.
78. We turn next to the issue of confidentiality and the withholding of personal data. We understand, given what he said in closing submissions, that Mr Bacon's position is now that he accepts the ICO's decision on that point. Further, and in any event, having considered the material for ourselves, we are satisfied that the ICO was correct in concluding that the names and personal details which have been withheld should not be disclosed as those persons were not in a public-facing role, and had every expectation that their details would not be disclosed. In any event the information would add very little to public understanding.
79. That then brings us to the issue of whether there is in existence a document or documents referred to by Mr Bacon as a TCR which has not been disclosed.
80. In his reply to GMP's grounds of appeal, Mr Bacon said:

GMP still failed to produce the documents in full that I have requested, and in particular have even denied the existence of the TCR (Test Completion Report) which is an international Project Management standard document produced by a the Test Manger in order to provide a final status of all testing, be that functional or non-functional against and agreed and signed (by the business) of set of UAT test scripts. It is impossible for the business to have made a 'Go/No Go' decision based purely on RAIDs, and they must have been aware of the status of any outstanding test scripts to ensure test coverage was not only 'tested' but resulted in successful tests now being marked and proved as complete. This document has still not been provided at all.

The test strategy should clearly identify how they planned to test the system and what the exit criteria for each stage of testing should be, which then, put quite simply, should be discussed and agreed re Unit/Systems/SIT and UAT testing results (TCR) at the Go Live meeting to assesses what outstanding tests exist and the given business priority and severity assessments of those failed tests and the impact they may or do have Anything that fails to meet the test strategy exit criteria should be used as a key marker for whether or not the system is in a fit state to go live.

iOps very publicly and clearly wasn't tested properly but this needs to be clear with the documentation along with who signed this off within the go live meeting. Not disclosing this information is crucial to showing where the failures occurred and the accountability behind these failed project management and business related

issues, and who was responsible. Questions need to be asked and individuals held accountable for these significant and dangerous failures, which until now are being brushed aside and hidden which can not be tolerated in a democratic world.

81. Mr Bacon also took issue with the ICO accepting GMP's word, arguing that they have avoided the TCR issue. He submitted, in effect, that GMP were using a different name for a document which must exist.
82. Mr Bacon also questioned Mr Gillespie about the TCR. Mr Gillespie replied that there was no document with such a name, and that not all organisations behave in the same manner.
83. In closed evidence, Mr Gillespie said, in response to questions from Ms John that GMP were not being pedantic about there being an equivalent, and that they had been through the data logs to check. He said that every project is run differently depending on the manager and the organisation; an organisation may close a project with outstanding points, depending on its appetite for risk and on the project. He said it was unfair to say you cannot finish a project with high risks remaining if you are the risk owner.
84. At paragraph [29] of the Decision Notice it is recorded that:

For part 2 of the request (the Test Completion Report) GMP said it did not hold any information of that name but considered that the 'GMP iOPS Test Strategy' referred to under part 1 above also fell in scope of part 2 of the request (withheld in its entirety under section 43(2)). In addition, GMP considered that the 'iOPS Testing Exit Strategy Report' fell in scope. This is a 108 page report which GMP withheld in its entirety under section 43(2).

85. GMP's case is, in summary, that the document Mr Bacon has requested does not exist, and that the information in the TS and TSE Reports covers effectively the same ground.
86. The TS is, understandably, prospective in that it sets out how Capita intended to test the project; that is clear from the overview at section 2.1. The User Acceptance Testing is also defined there, and at section 2.9 its objectives are set out.
87. Only 5 pages of the TSE were disclosed; much of the remainder is granular detail, but we do not consider that even looking at it as a whole that it has the characteristics of a TCR as described by Mr Bacon.
88. We note that GMP has now disclosed a substantial number of documents, including minutes. We note that Mr Bacon said this in response:

Having reviewed just the 'Go Live' meeting minutes it is very clear that the full content has not been disclosed. Any meeting has an associated attendees list and

role title to be certain as a collective group the recognised and accountable staff are being included in any such major decisions. The minutes attached provide none of this stock material content / clarity and are remarkable in their vagueness of content. There are no discussions for example around the current circumstances controlling the defect management test cycle and the priorities of those outstanding tests or discussions concerning post go live support arrangements and provisioning of floor walkers. All of these details and so so much more should be part and parcel of any go live debates so I simply do not believe these are the complete and accurate meeting contents.

89. In her decision notice, the ICO at paragraph [172] of the Decision Notice onwards, set out in some detail what GMP told her. We consider this needs to be set out in full. At [179] the Decision Notice states:

179. In addition, GMP submitted the following details:

Everyone was round a table during what was the final go/no go meeting. SRO went round the room asking if anyone had any reason go live could not proceed

No one did

The minutes of the meeting were added to the CLIO records system at some point after the meeting...

'I can see from full CLIO update created at 23:57 hours (this appears to be the time you finished writing and press send, rather than the time the entry was opened, if that makes sense), that go/no go decision was made at 2340 hrs. This suggests that the CLIO entry was made shortly afterwards'.

90. The Decision Notice also records:

182. Based on the explanation provided by GMP and the disclosure already made to the complainant, the Commissioner is satisfied, on the balance of probabilities, that no further recorded information within the scope of the request is held.

183. The Commissioner is therefore satisfied that, on the civil standard of the balance of probabilities, that GMP does not hold any further requested information beyond the minutes already provided to the complainant.

91. Given GMP's admittedly poor handling of the request, and reliance on exemptions it then abandoned, we have examined very carefully what has been said to us about the documents relating to the project that do exist.

92. Looking at the evidence as a whole, both closed and open, while there are references to User Acceptance Testing, we find no reference to a TCR. Mr Bacon says it must exist because that is a document that ought to have been created. He submits that usual and good practice in project management would require the creation of a document in which the risks of going live with iOPS and the risks of not doing so (and relying on the legacy systems which in itself was a risk) were set out and evaluated. And, that this would have been signed off.

93. The issue of whether there is a TCR or a document by another name but having the same purpose has troubled us given that we, and the ICO, are in effect having to take GMP at its word and in a context where GMP has delayed, obfuscated and only revealed the detail of its case at the very last minute. We note the apology offered by Mr Gillespie, and while we do not doubt his sincerity, it was not he who was responsible for this state of affairs.
94. That said, Mr Bacon's assertion pre-supposes that the project was well and properly managed. It is however beyond doubt that things went very seriously wrong. As is evident from Mr Gillespie's witness statement at [34] onwards and in his open evidence there were serious concerns that when iOPS went live it might be vulnerable to cyber-attack, and other security concerns. The gist of his closed evidence is that he explained, in detail, how disclosure of each of the RAID log entries would cause the prejudice that GMP allege. He expanded upon the concerns which are summarised in his open witness statement and which he explained in summary in the open session.
95. We note also that the decision to "Go live" with iOPS was taken at 23.40 hours on the day in question, indicative that to us that this had not been an easy decision.
96. Looking at the evidence as a whole, we conclude that there was no TCR; the issue of whether such a document would have been desirable is not one which the Tribunal has to decide. It appears to us that the meeting at which the decision to "go live" was taken did consider the risk of doing so and weighed them with the risks of not doing so, and that there has been disclosure by GMP, as Mr Gillespie said, of all the relevant documents within scope of the Request.
97. As a final note, although we have allowed GMP's appeal, this should not be taken as an endorsement of their conduct before and during the appeal.

### **Conclusion**

For the reasons set out above, we find that the withheld material is exempted information by operation of section 31 of FOIA in respect of the RAID entries and by section 43 (2) in respect of the parts of the TS and TSE not released. We find also that the personal data withheld is exempted by operation of section 40 of FOIA.

Signed

Date 22 December 2021

Upper Tribunal Judge Rintoul  
(Sitting as a judge of the First-tier Tribunal)  
Promulgated 22 December 2021