



First-tier Tribunal
(General Regulatory Chamber)
Information Rights

CASE MANAGEMENT DIRECTIONS TO BE ISSUED IN ALL APPEALS MADE
UNDER SECTION 57 FREEDOM OF INFORMATION ACT 2000

1. This case concerns an appeal under s.57 of the Freedom of Information Act 2000 against a Decision Notice made by the Information Commissioner. You should carefully read the below case management directions made below and the annexed documents.
2. The Tribunal's Procedure Rules¹ require the Information Commissioner to provide a Response to the appeal within 28 days of the date on which he receives the appeal.
3. The Tribunal has agreed to operate an interim process where, in every new appeal, the Information Commissioner is treated as having made an application to extend the 28 day time limit to 12 weeks. This is because the Information Commissioner provided evidence that in most cases his legal team are temporarily unable to provide a Response within 28 days. This is a summary of his reasons:
 - a. An increase in the number of appeals being made to the Tribunal leading to operational pressures within the Information Commissioner's legal services team;
 - b. A temporary increase in output motivated by the Information Commissioner's commitment to reducing the backlog caused, in large part, by the Covid-19 pandemic;
 - c. The Information Commissioner's participation is likely to assist the Tribunal in the determination of appeals, particularly in appeals where the appellant is not represented by a lawyer;

¹ [The Tribunal Procedure \(First-tier Tribunal\) \(General Regulatory Chamber\) Rules 2009](#), rule 23(1)

- d. If the Information Commissioner has to make an application in every appeal this imposes an administrative burden on his team and is likely to result in greater delay than a general extension;
 - e. The Information Commissioner will continue to review cases in order to identify those that are complex and, in his opinion, should be expedited.
4. The interim process only applies to appeals received between 24 February 2023 and 30 September 2023 inclusive and works as follows.
5. In each new appeal the appellant is provided with:
 - a. these directions;
 - b. the decisions by Tribunal judges to operate the interim process;
 - c. the witness statements by Siân Williams (the Information Commissioner's Head of Legal Services) setting out why the Information Commissioner has difficulty in providing a Response within the 28 day time limit;
 - d. a Listing Notice (unless the appellant has consented to the appeal being decided without an oral hearing).
6. Ms Williams' witness statements will be treated as a standing application for an extension of time in every case, including this one. The Tribunal will consider whether to grant that application and extend the 28 days for providing the Response. It would then be due within 12 weeks from the date on which the Information Commissioner is notified of the appeal.
7. To the Appellant – within 14 days of the date on which these directions are sent to you by the Tribunal you are required to notify the Tribunal and the Information Commissioner:
 - a. whether you consent to the application for an extension of time OR you object to the application for an extension of time, and
 - b. if you object to the extension of time, the reasons why.

If you do not reply within 14 days of the date on which these directions are sent to you the Tribunal is likely to proceed on the basis that there is no objection to the extension requested by the Information Commissioner.

8. To the Appellant and the Respondent –

- a. within 14 days of the date on which these directions are sent to you by the Tribunal you are required to notify the Tribunal and the other party (in a case where the appellant has not consented to a decision on the papers) of any dates on which you cannot participate in a remote oral hearing by video within the date range notified to you by the tribunal in the Listing Notice that accompanies these directions.
 - b. all cases will be listed for a half day hearing [3 hours] unless a party makes an application to increase the time estimate which must include reasons for the application and any evidence in support of that application. The length of hearing will be determined by a Judge or Tribunal Registrar even if the parties agree.
9. To the Tribunal – On receipt of the above or after 15 days in default the Tribunal will place the appeal before a Judge or Tribunal Registrar for determination of the application for an extension of time and any other necessary case management directions.

Judge Neville

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Case Reference: EA/2022/0440

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Considered without a hearing on 28 April 2023

Before

TRIBUNAL JUDGE NEVILLE

Between

STEPHEN GIBBONS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

The end date of the process directed by the Chamber President on 15 February 2023 is extended to 30 September 2023.

REASONS

1. The background to this order can be read in the decision of Judge O'Connor, Chamber President, dated 15 January 2023. In summary:
 - a. This Tribunal considers appeals against decision notices issued by the Information Commissioner, pursuant to s.50 of the Freedom of Information Act 2000.
 - b. On receipt by the Tribunal, an appeal is sent to the Commissioner. Rule 23 of the Tribunal's Procedure Rules then require the Commissioner to provide a formal Response to the appeal within 28 days.
 - c. On 13 January 2023 the Commissioner wrote to the Tribunal requesting that the 28 day time limit be extended to 12 weeks on all new appeals. This would apply to all new appeals received between 24 February 2023 and 28 April 2023 inclusive ("the interim period").

- d. The reasons for requesting that extension of the time limit were set out in a witness statement by Siân Williams, Head of Legal Services (Enforcement) in the Information Commissioner's Office. They can be summarised as follows:
 - i. An increase in the number of appeals being made to the Tribunal leading to operational pressures within the Commissioner's legal services team;
 - ii. A temporary increase in output motivated by the Commissioner's commitment to reducing the backlog caused, in large part, by the Covid-19 pandemic;
 - iii. The Commissioner's participation is likely to assist the Tribunal in the determination of appeals, particularly in appeals where the appellant is not represented by a lawyer;
 - iv. If the Commissioner has to make an application in every appeal this imposes an administrative burden on his team and is likely to result in greater delay than a general extension.
2. Ms Williams' witness statement concluded by stating that the Commissioner would review the situation in early April 2023 and inform the Tribunal as to whether he applied for an extension to the interim period.
3. Judge O'Connor accepted that the Commissioner faced a systemic inability to meet the 28 day deadline, and that the fair resolution of an appeal was usually supported by a Response having been provided. He refused a general extension of time but did decide that the Tribunal would treat Ms Williams' witness statement as a standing application by the Commissioner for an extension of time for every new appeal received during the interim period. This would give the appellant the opportunity to object to any individual extension. The mechanics of that process were set out in standard Case Management Directions which were accordingly issued on newly received appeals. I shall refer to it as the "interim process".
4. The interim process is due to end today, and if it does then the Commissioner will again be required to comply with the 28 day time limit for providing a Response and, if he cannot, make an application for an extension of time in each individual appeal.
5. On 25 April 2023 the Commissioner applied to extend the interim period to 30 September 2023.

Consideration

6. Another example of arrangements being made in response to a systemic inability of a government body to comply with a time limit is described in R. (KA and another) v Secretary of State for the Home Department (ending of Kumar arrangements)

[2018] UKUT 201 (IAC). In that case, as in this, the Tribunal neither amended its own Procedure Rules nor prospectively granted an extension of time in cases that did not yet exist. The present context is therefore that the Tribunal has simply decided to make arrangements as to the way in which it will consider new appeals. An extension to the interim period does not require the same procedure to be undertaken as a conventional exercise of judicial power to decide an issue contested between two opposing parties.

7. Notwithstanding what is said in the above paragraph, natural justice still requires careful scrutiny of whether the Commissioner has justified an extension. The arrangements provide a benefit to the Commissioner that is not enjoyed by appellants (or, for that matter, by the many other regulators that respond to appeals made to this Chamber), who are still required to make an individual application for any necessary extension of time. If too readily granted, the extension may perpetuate an inequality of arms in favour of a party that ought to be provided with sufficient resources to meet its legal obligations. I carefully bear in mind the overriding objective to the Tribunal's Procedure Rules, whether or not it formally applies to this decision.
8. As Ms Williams' second statement is annexed to this document, I do not set out its contents in detail. The key conclusions that can be drawn in favour of the Commissioner's position are as follows:
 - a. The Commissioner has continued to increase the rate at which decision notices are issued. In the first nine months of 2022 an average of 143 decision notices were issued each month. In October 2022 to March 2023 the average was 312. The individual monthly figures show an upward trend.
 - b. The 'concentrated activity' has been successful in reducing the number of outstanding FOIA complaints. In April 2022 it stood at 2,295 and now it is 800. I recognise the value of that work and the importance of reducing delay in deciding complaints.
 - c. More decision notices mean more appeals, as shown in Table 2. In March 2023 in particular, 83 appeals were received – 33 more than the second busiest month, November 2022. There is still much work to do. The number of decision notices issued will continue to be high and there are currently 70 appeals awaiting allocation to a lawyer.
 - d. Ms Williams adopts a 'baseline' figure of 19.1 appeals per month on average before the 'concentrated activity' began, taken from the first nine months of 2022. In the subsequent six months to March 2023, the average figure is 49.3. I accept that an increase of that magnitude in a short period of time is bound to cause difficulties for the appeals team in managing its workload.
9. I would also emphasise the value of the Response in general and the quality with which they are often drafted. As noted by Judge O'Connor, the Response is not akin to a Defence in civil proceedings. The Commissioner is the guardian of FOIAⁱ and the

Tribunal and the parties are frequently assisted by the way in which the relevant facts, principles and analysis are provided in the Response. In many cases the interests of justice are better met by a late well-drafted Response than if it were timely but drafted with less care and attention.

10. There are points to be taken against the Commissioner. The concentrated activity was always likely to increase the number of appeals, and it is not clear that this contingency was properly addressed when the concentrated activity was introduced. The Commissioner was also, perhaps, unduly optimistic in considering that the interim process would only be necessary until the end of April 2023. The present application should have been made much sooner.
11. Also of concern is the way in which Ms Williams has adopted a 'baseline' monthly number of appeals to explain the present inability to provide a Response (see para 8(d) above). I accept it as an illustration of the increase in workload, but reject that it represents a time where the Commissioner's ability to meet deadlines was satisfactory. Applications were still routinely made for an extension of time, often referring to "unprecedented" work volumes and resourcing problems. In granting one such applicationⁱⁱ on 24 October 2022, retrospectively, I remarked:

"...the word "unprecedented" has now been deployed by the Commissioner in numerous cases for a significant period of time. The time will come when this bare assertion is no longer accepted."

12. The present open and constructive approach of the Commissioner is to be applauded. But it is arguable that even during the "baseline period", and before the 'concentrated activity' began, the Commissioner had begun to miss the 28 day time limit in so many cases as to give rise to significant concern. The (undoubtedly sincere) statement at paragraph 28 of the second witness statement that no further extension of the interim process will be required beyond 30 September 2023 attracts a degree of scepticism if the intention is to return to the level of resourcing present a year ago.
13. Taking all these matters together, and not without some hesitation, I conclude that the factors I have identified do weigh in favour of a further extension. The Commissioner (and those responsible for providing him with resources) should nonetheless be aware that upon any:

- a. Further application to extend the interim process;
- b. Failure to meet an extended 12 week time limit; or
- c. Once the interim process ends, frequent failure to meet the 28 day time limit;

...the Tribunal will expect the Commissioner to provide a full explanation of why the breathing room afforded by this extension did not solve the problem. This is an interim process. In the longer term, any failure to meet the time limits in the Procedure Rules must be exceptional.

Signed

Date:

Judge Neville

28 April 2023

ⁱ Browning v Information Commissioner [2014] EWCA Civ 1050 at [33]

ⁱⁱ This case concerned s.165 of the Data Protection Act 2018 rather than FOIA, but the point is of general application.



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(Information Rights)**

Appeal Ref: EA/2022/0440

**Heard by: Cloud Video Platform
On: 9 February 2023**

Before

**JUDGE O'CONNOR
(CHAMBER PRESIDENT)**

Between

STEPHEN GIBBONS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

In the matter of an application made by the Information Commissioner for a "temporary variation of Rule 23(1) to extend the prescribed 28 days for the Commissioner to respond to an appeal to 12 weeks".

Representation

The Appellant: In Person

The Respondent: Mr R. Reichhold of Counsel

DECISION

Introduction

1. By way of a letter of the 13 January 2023, the Information Commissioner ("ICO") made a request to the First-tier Tribunal (General Regulatory Chamber) ("the Tribunal") for a "temporary variation of Rule 23(1) to extend the prescribed 28 days for the Commissioner to respond to an appeal to 12 weeks. The extension is sought to the end of April 2023" ("the general application").

2. On 17 January 2023, the ICO made an application for an extension of time to file its Rule 23 response (“the Response”) in the Mr Gibbons’ appeal. The application sought an extension of time of three weeks, until 10 February 2023. Mr Gibbons objected to the granting of such an extension.
3. Both applications were put before Judge Griffin, who directed that the application in Mr Gibbons’ appeal be listed for a case management hearing on 9 February 2023, at which time the Tribunal would consider both the application made by the ICO in Mr Gibbons’ appeal and the ICO’s general application of 13 January 2023.
4. The substance of this Decision considers the ICO’s general application of 13 January 2023, for a “*temporary variation of Rule 23(1) to extend the prescribed 28 days for the Commissioner to respond to an appeal to 12 weeks*”.
5. Consideration of the individual application made by the ICO in Mr Gibbons’ appeal, is appended as Annex B to this decision. As it turned out, the ICO did not request the Tribunal to apply the terms of the general application to Mr Gibbons appeal.

The legal framework

The statutory framework

6. The First-tier Tribunal was created by section 3 of the Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”). The rules governing the procedure for dealing with appeals in the First-tier Tribunal are contained in the Rules made under section 22 of the 2007 Act. They are made by the Tribunal Procedure Committee in accordance with the process set out in Schedule 5 to the 2007 Act.

The Rules

7. The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976, as amended) (“the 2009 Rules”) govern the practice and procedure to be followed in the First-tier Tribunal in proceedings which have been allocated to the General Regulatory Chamber. Appeals brought pursuant to section 57 of the Freedom of Information Act 2000 (“FOIA”), to which the instant Decision relates, have been allocated to the General Regulatory Chamber.
8. Rule 2 of the 2009 Rules provides that the Tribunal must give effect to the overriding objective of dealing with cases fairly and justly when exercising its powers under the Rules or interpreting any rule or practice direction. That rule also provides that parties must help the Tribunal to further the overriding objective.
9. Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure (rule 5(1)). Pursuant to Rule 5(3)(a) of the 2009 Rules, the Tribunal may, “*extend or shorten time for complying with any rule, practice direction or direction amending, suspending or setting aside an earlier direction.*”

10. Rule 7, as far as material, provides that:

"7. Failure to comply with rules etc.

(1) An irregularity resulting from a failure to comply with any provision in these Rules, a practice direction or a direction, does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as the Tribunal considers just, which may include –

- (a) waiving the requirement
- (b) requiring the failure to be remedied
- (c) exercising its power under rule 8 (striking out a party's case);
- (d) exercising its power under paragraph (3); or
- (e) barring or restricting a party's participation in the proceedings."

11. Pursuant to rule 23 of the 2009 Rules, headed "*The Response*", each Respondent, and for the purposes of the instant Decision that includes the ICO, "(1) ...*must send or deliver to the Tribunal a response to the notice of appeal so that it is received ...*(b) ...*within 28 days after the date on which the respondent received the notice of appeal*". By its general application of 13 January 2023, the ICO seeks a variation of this provision such that the words "*within 28 days*" are varied, so as to read "*within 12 weeks*".
12. By rule 23(5), "*If the respondent provides the response to the Tribunal later than the time required by paragraph (1) or by any extension of time under rule 5(3)(a) (power to extend time), the response must include a request for an extension of time and the reason why the response was not provided in time.*"

The general application - evidence

13. The ICO's letter to the Tribunal of 13 January 2023 briefly sets out unevidenced reasons as to why the ICO is seeking a variation the terms of rule 23 of the 2009 Rules. I need not set out the terms of this letter because, in preparation for the hearing of the 9 February, the ICO provided a witness statement authored by Sian Williams, Head of Legal Service (Enforcement) at the ICO ("the Statement"), setting out and evidencing those reasons. The Statement is appended as Annex A to this judgment.
14. In summary, the Statement identifies that in order for the ICO to achieve the performance commitments set out in the ICO25 Strategic Plan, there has, since October 2022, been a period of concentrated activity which, in part, is focused on clearing the residual backlog of FOIA complaints that accumulated "*in large part*" due to the effects of the Covid-19 pandemic. This has resulted in a significant increase (117%) in Decision Notices issued by the ICO, with the consequential increase in the number of appeals to the Tribunal from those Decision Notices. Funding of the ICO for all FOIA work derives from a finite "*grant-in-aid*". The ICO's limited FOIA funding has led to

constraints on resourcing which have become “*severely exacerbated*” during the period of concentrated activity. There has also been an increased workload resulting from the ICO’s FOIA transformation project. The Statement further observes that it has been increasingly necessary for the ICO to apply for *ad hoc* extensions of time to file rule 23 Responses to appeals, which has created a further administrative burden on the ICO.

15. The Statement clarifies that the ICO’s application relates only to appeals brought pursuant to section 57 of the FOIA and that, by the instant general application, the ICO seeks, “*a new temporary general arrangement pursuant to which the Tribunal will...regard a Response filed by the Commissioner within 12 weeks of service of such appeal as falling for consideration, notwithstanding the 28-day limit prescribed by Rule 23(1)(b).*” It is proposed that the concentrated activity will continue until the end of March 2023.
16. Sian Williams adopted the Statement in evidence at the hearing of 9 February, and provided additional evidence orally, both in relation to the general application and the specific application made by the ICO in Mr Gibbons’ appeal. Ms Williams confirmed that it was part of an ICO’s lawyers’ duties to draft the Responses, although the ICO also engages external counsel to draft Responses, budget permitting. In addition, the ICO’s lawyers deal with procedural matters arising in individual appeals. The length of time it takes a lawyer to draft a Response depends on the complexity of the appeal. Generally, it can take five to six hours to draft a Response in a straightforward appeal, and it may take two days in a less straightforward matter.

The general application – ICO’s submissions

17. In written submissions dated 6 February, and amended with the permission of the Tribunal on 9 February, the ICO stated as follows:

“15. The new general arrangement sought by the Commissioner is as follows: the First-tier Tribunal will, in all appeals against decision notices brought under s.57 of FOIA, regard a response filed by the Commissioner within 12 weeks of service of the notice of appeal as falling for consideration, and will not undertake consideration of the appeal before the end of that 12-week period.

16. It is submitted that such a new arrangement would be in accordance with the overriding objective of dealing with cases fairly and justly, and in particular: (i) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; (ii) avoiding unnecessary formality and seeking flexibility in the proceedings; and (iii) avoiding delay, so far as is compatible with proper consideration of the issues.

a. In relation to the Commissioner’s participation in proceedings, current operational pressures within the legal services team (due to the current increase in appeals to the Tribunal) have resulted in the Commissioner requiring more time to prepare responses. The Commissioner’s participation in proceedings is likely to assist the Tribunal in the determination of appeals, particularly bearing in mind that in approximately 90% of appeals the appellant is unrepresented.

b. As to flexibility, the Commissioner's proposal is temporary in nature, aimed at alleviating short/ medium-term pressures.

c. Finally, with regard to delays, it is submitted that requiring the Commissioner to continue making *ad hoc* applications for extensions during the period of increased appeals is likely to result in further delays, particularly where the application is contested and/or where the Tribunal considers it necessary to determine the application at a case management hearing.

Existing case load

17. As to the existing case load, the Commissioner has identified 22 appeals, all filed since 18 January 2023, in relation to which an extension is required to ensure the Commissioner is able to participate fully in the proceedings ("**the Existing Appeals**"). For the avoidance of doubt, the Existing Appeals do not include all the appeals received by the Commissioner since 18 January 2023, merely those which have been identified as requiring more time following triage, bearing in mind the operational pressures set out in the witness statement of Sian Williams. The Existing Appeals consist of the following cases [appeal references listed in original]:

18. The Commissioner proposes that the new general arrangement would operate so as to extend the total time to 12 weeks for the Commissioner to file his Response starting from the date on which each of the Existing Appeals or, if later, all the appeal documentation, was received. So, for example, if one of the Existing Appeals was received by the Commissioner on 19 January 2023, it is proposed that the new general arrangement would have the effect of extending time for the Commissioner to file his Response in that appeal to 12 weeks, starting from 19 January 2023.

Future appeals

19. In addition to the Existing Appeals, the Commissioner invites the Tribunal to apply the proposed new general arrangement to all appeals which are filed from 9 February 2023 until 30 April 2023 (inclusive).

Conclusion

20. The Commissioner has carefully considered the matter before making this application. It is believed that the proposed new general arrangement is required to ensure that Responses can be filed in all cases during the period of increased appeals, without the requirement for *ad hoc* applications. As explained by Sian Williams, the current situation by which *ad hoc* extensions are sought imposes an administrative burden on the ICO, and no doubt also the Tribunal.

21. For these reasons, it is submitted that the Tribunal has the power to implement the new general arrangement proposed by the Commissioner, and that it would be in accordance with the overriding objective for the Tribunal to do so."

18. In oral submissions, Mr Reichhold broadly reiterated that which is contained within the written submissions. The Tribunal probed Mr Reichhold as to the fairness to other parties to an appeal of a general extension of the type sought. In response to a question from the Tribunal regarding those appeals in which the interests of justice demanded a swift Response from the ICO, or at least a Response earlier than the 12 weeks provided for should the general application be granted, Mr Reichhold confirmed that the ICO intended to maintain the triage system that it currently operates, which would enable the ICO to identify, at an early stage, any appeal in which it would not be in the interests of justice for the general extension to apply. The ICO would then notify the Tribunal and expedite its Response.
19. In response to further questions from the Tribunal on this issue, and in particular the advancement of the notion that fairness would require an appellant in an individual case (and other parties if there are any) to be given the opportunity to make submissions on the issue of whether the timeframe specified in rule 23 should be extended in their appeal, Mr Reichhold contended that this would defeat the object of the ICO's application in that it would lead to the ICO needing to divert resource to respond to the likely objections. Further probing by the Tribunal on this issue led to Mr Reichhold indicating that the ICO would be content not to respond to each objection made by an appellant, but to be invited to respond to an objection by the Tribunal only where the Tribunal thought, exceptionally, that such a response was required.

The general application - Discussion and Decision

Temporary variation of rule 23

20. I refuse the ICO's application to "*temporarily vary*" rule 23 of the 2009 Rules. I am far from satisfied that the Tribunal has the power to vary or disapply the 2009 Rules so as to adopt a general practice which contradicts a specific provision of the Rules, and in my conclusion it certainly cannot do so by saying as much in a judicial decision: see Bovale Ltd and another v SSCLG [2009] EWCA Civ 171 .
21. As identified above, the Rules are contained within a statutory instrument made under section 22 of the 2007 Act. Section 22(2) of the 2007 Act states that the "*Rules are to be made by the Tribunal Procedure Committee*". Whilst, as Mr Reichhold correctly identifies, rule 5(1) of the 2009 Rules permits the Tribunal to regulate its own procedure, that 'permission' is specifically made subject to the provisions to the 2007 Act.
22. There is a potential mechanism permitting of the variation of a procedure rule, this being by way of the statutory construct of a Practice Direction. By section 23 of the 2007 Act, a Practice Direction may be given by the Senior President of Tribunals or the Chamber President, the former being empowered to give directions as to the practice and procedure of the First-tier Tribunal and Upper Tribunal, and the latter as to the practice and procedure of the Chamber over which the President presides. However, if such a Direction is made by the Senior President it requires the approval of the Lord

Chancellor (S23(4)) and if it is made by a Chamber President it requires the approval of both the Senior President and the Lord Chancellor. In the absence of any specific submissions made by Mr Reichhold on this potential mechanism, I do not consider this possibility any further. However, I observe that, although not necessary under the legislation, prudence would likely require a wider consultation of Tribunal users to be undertaken before embarking on a path towards the variation of the procedure rule. Given the temporary nature of the variation sought, this mechanism would be impractical in the current circumstances.

Alternative proposal for appeals received on or after Friday 24 February 2023

23. Although I have refused the ICO's request in the terms sought, I accept in its entirety the evidence given by Sian Williams as to the resource pressures on the ICO and the efforts the ICO is making to ensure that it complies with its obligations under the Rules, including by the making of timely *ad hoc* extension requests which add further burden to finite resources.
24. The 2009 Rules are intended to be conducive to consistency and efficiency in the conduct of proceedings in the tribunals and a means of promoting the interests of justice. The overriding objective to the Rules requires the Tribunal to deal with matters justly and fairly, which includes avoiding unnecessary formality, seeking flexibility in proceedings, ensuring as far as practicable that the parties are able to participate fully in the proceedings, and avoiding delay as far as compatible with proper consideration of the issues (rule 2).
25. In considering a response to the ICO's continuing inability to meet the 28-day deadline set out in rule 23, it is necessary to identify the function of the ICO and the ICO's Response in appeals before the Tribunal. The ICO acts as the guardian of FOIA, and there are unique features of appeals under FOIA where issues of third-party confidentiality and damage to third party interests loom large. The procedure in the Tribunal is at least in part investigatory as opposed to adversarial (see Browning v Information Commissioner and DBIS [2014] EWCA Civ 1050 at [33]). The function of the ICO's Response must be set in this context. It is not akin to a defence in civil proceedings, but rather is a document which should be produced by ICO, from its particular vantage point, with the aim of assisting the Tribunal in its role of determining the full merits appeal. It may contain factual information not known to the appellant or the Tribunal or may draw attention to legal provisions or arguments of which an appellant (who is often a litigant in person) may be unaware. It may also include information that assists the Tribunal to manage the appeal process. The filing of a Response by the ICO generally furthers the efficient administration of justice.
26. At the hearing of 9 February, alternative proposals to a temporary variation of the rule 23 were posited by the Tribunal. One such proposal was for the Tribunal to treat the witness statement of Sian Williams as a standing application for an extension of time by the ICO. In my conclusion, this is an appropriate way of dealing with the unusual circumstances that have arisen. Therefore, this is a proposal which the Tribunal will

now adopt for appeals made pursuant to section 57 of the FOIA, that are admitted by the Tribunal on or after 24 February 2023 and before 29 April 2023 .

27. Justice unquestionably requires that an appellant be provided with an opportunity to consider the ICO's application and respond to it as thought appropriate. In order to facilitate this opportunity, upon receipt of a Notice of Appeal the Tribunal will send to the appellant a copy of this judgment, a copy of the witness statement of Sian Williams (Annex A to this judgment), and standard directions, which will summarise the nature of the ICO's application and require the appellant to notify the Tribunal within 14 days whether they consent to the application, or object to it. If the appellant objects to it, then the Directions will require reasons to be provided for this objection.
28. As referred to above, Mr Reichhold raised concerns on behalf of the ICO that the process of providing appellants with the opportunity to respond to the ICO's application for an extension of time, would lead to the ICO needing to divert significant resources to considering such responses. As an alternative, Mr Reichhold proposed a process by which the ICO, at its triage stage, would identify those appeals in which justice required a Response by the ICO in advance of the 12-week timeframe and to notify the Tribunal accordingly. In my view, this proposed process falls far short of providing justice between the parties. The appellant is entitled to put their own views forward in response to the ICO's application, and it is for the Tribunal to determine the strength of any reasons provided by an appellant in this regard. That being said if, when triaging an appeal, the ICO does identify reasons in any given case as to why justice requires a Response by the ICO in advance of 12 weeks, the Tribunal would expect the ICO to promptly notify both the Tribunal and the appellant of this conclusion, and to take steps to expedite its Response accordingly.
29. Returning to the process which is to be adopted by the Tribunal; in addition to the Tribunal sending the appellant a copy of (i) this judgment, (ii) the witness statement of Sian Williams and (iii) the Tribunal's Directions, where the appellant's Notice of Appeal identifies that they do not consent to a decision on their appeal being taken without an oral hearing, the Tribunal will also, at the same time, provide both parties with a Listing Notice. This Notice will provide a range of dates within which the hearing of the appeal will be listed. It will invite the parties to provide dates to avoid within that date range. The Tribunal will require a response to the Listing Notice within 14 days. The listing of a hearing date at an early stage of the appeal has the aim of improving the efficiency of the progress of an appeal through the Tribunal, ultimately leading to an earlier disposal of the appeal than would be the case under the current processes. Any application to postpone the hearing date once it is fixed will need to be made at the earliest opportunity, be supported by reasons and founded in evidence.
30. As for appeals in which the parties have consented to a decision on the papers, the Tribunal does not currently notify the parties of the date that such an appeal is to be considered. This is primarily for operational reasons in that these appeals are often

listed at short notice, particularly when they are listed to replace other matters which have been adjourned or postponed. This will continue to be the case.

31. Moving on, once an appellant has responded to the Tribunal's Directions, or the 14-day time limit for doing so has expired and the appellant has not responded and not sought an extension of time, the issue of whether to grant the ICO an extension of time in the terms sought, will be put before a judge, or a Tribunal registrar exercising delegated judicial powers.
32. If the appellant consents to an extension, then the usual course will be that ICO's application for extension of time will be granted, and the parties will be notified accordingly.
33. If the appellant objects to the granting of an extension of time, then it will be a matter for the judge or registrar before whom the matter is placed to decide whether the interests of justice require further submissions from the ICO in response to that objection. In doing so, the judge or registrar will have cognisance of the position taken by the ICO at the hearing of 9 February, i.e. that it is concerned at the need to divert resources in order to provide responses to appellants' objections and that it is content not to respond to each objection made by an appellant, but to be invited to respond to an objection only where the Tribunal concludes, exceptionally, that such a response is required.
34. If no further submissions are sought from the ICO, then the application for an extension will be determined by the judge or registrar.
35. If the appellant fails respond within 14 days to the Tribunal's Directions requiring an expression of either consent or objection to the ICO's application, and the appellant has not sought an extension of time within which to do so, then the judge or registrar before whom the application is placed will decide whether it is in the interests of justice to determine the ICO's application absent such a response and, if it is, will so determine it.
36. This judgment does not seek to provide guidance as to how the ICO's application should be determined in a particular case. Whilst the evidence of Sian Williams, in my view, provides powerful reasons for the granting of an extension of time for the filing of a Response in the terms sought - absent the provision of a good reason for not doing so in any given appeal, it must, nevertheless, be stressed that the Rules are rules, which should be complied with and not routinely ignored. The timeframe provided by the Rules for the filing of a Response is imposed for good reason. Avoiding delay in the appeal process is embedded into the overriding objective of the Rules, as far as this is compatible with a proper consideration of the issues. Nevertheless, as identified above, provision of a Response by the ICO generally aids such a consideration. Ultimately, the balancing of the scales of justice is not a matter which can be undertaken on a 'general' level, and it will always be necessary in any given appeal to consider the ICO's application in light of all material matters that have been presented.

Existing caseload

37. As to the existing case load, the ICO has provided the Tribunal reference numbers for 22 appeals filed with the Tribunal between 18 January 2023 and 8 February 2023 (inclusive) in which it seeks an extension of time to file a Response, from the 28 days provided by the Rules to a date 12 weeks from the date the appeal was lodged with the Tribunal. In addition, the ICO seeks an identical extension of time in relation to all those appeals lodged with the Tribunal on or after 9 February. For obvious reasons, the ICO cannot provide the reference numbers for this cohort of appeals. In both scenarios, the ICO relies upon the evidence provided in Sian Williams' witness statement.
38. The Tribunal will adopt the same process for the aforementioned 'existing caseload' of appeals as is to be adopted for those appeals lodged on or after 24 February 2023. The 'existing caseload' for these purposes is the cohort of 22 appeals made pursuant to section 57 of FOIA that were lodged with the Tribunal on or after 18 January 2023 and before 9 February 2023 in which the ICO seeks an extension of time, plus those appeals made pursuant to section 57 of FOIA that have been lodged with the Tribunal on or after 9 February 2023 and before 24 February 2023.
39. The witness statement of Sian Williams will be treated as an application for an extension of time by the ICO in each of these appeals. Each of the appellants will be notified of the application by the Tribunal by service of the documents identified at paragraph 40(II) and, if appropriate 40(III) below, and the process will thereafter proceed in an identical manner to those appeals lodged on or after 24 February 2023.

Summary of new general process

40. **From Friday 24 February 2023 until Friday 28 April 2023 (inclusive of both dates), the Tribunal will operate the following process in relation to each appeal made pursuant to section 57 of FOIA that is admitted by the Tribunal during that period:**
 - (I) **The Tribunal will treat the witness statement of Sian Williams, dated 7 February 2023 and appended to this judgment as Annex A, as a standing application by ICO for an extension of time, from 28 days to 12 weeks, to file its rule 23 Response. The ICO is not required to make individual applications in each appeal.**
 - (II) **Upon receipt of a Notice of Appeal which has been admitted by the Tribunal, the Tribunal will provide the appellant with a copy of:**
 - (i) **this judgment and Annex A to this judgment;**
 - (ii) **a direction from the Tribunal:**
 - (a) **summarising the nature of the ICO's application;**

- (b) requiring the appellant to notify the Tribunal and the ICO within 14 days whether they consent to the application for an extension of time or object to the application for an extension of time. If an objection is raised, then the direction will require the appellant to provide reasons for this objection, and
 - (c) If appropriate, requiring the appellant within 14 days to file a response to a Listing Notice issued in accordance with paragraph (III) below.
- (III) Where the appellant's Notice of Appeal identifies that they do not consent to a decision being made on their appeal without an oral hearing, the Tribunal will send a Listing Notice to both parties providing a date range for the listing of the appeal for hearing. The hearing will be listed for a remote oral hearing by video unless the Tribunal directs otherwise. The Listing Notice will invite the parties to provide dates to avoid within the range of dates identified.
- (IV) Upon the expiry of 14 days from the date of the Tribunal sending the documents identified in (II) and (III) above, the documents on the Tribunal's file will be put before a judge or registrar for consideration of the ICO's application for an extension of time to file its Response, and any other necessary case management considerations.

Signed:

M. O' Connor

Judge O' Connor

Chamber President

Date: 15 February 2023

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

B E T W E E N :-

STEPHEN GIBBONS

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

WITNESS STATEMENT OF SIÂN WILLIAMS

I, Siân Williams, of the Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF, say as follows:

1. I make this witness statement in support of the application by the Information Commissioner for a new general arrangement whereby there is an extension of time in which to provide his responses to appeals brought under s.57 of the Freedom of Information Act 2000 ("**FOIA**"). Pursuant to paragraph 4 of the case management directions of 25 January 2023, the Tribunal will consider this application at the case management hearing listed on 9 February 2023.
2. My role at the Information Commissioner's Office ("**ICO**") is Head of Legal Service (Enforcement). As such, I have overall responsibility for the legal team charged with responding to FOIA appeals. The facts and matters set out in this witness statement are within my own knowledge unless otherwise stated, and I believe them to be true. Where I refer to information supplied by others, the source of the information is identified; facts and matters derived from other sources are true to the best of my knowledge and belief. To this end, insofar as this witness statement relates to operational pressures relating

to the ICO’s handling of FOIA complaints, I have been assisted in the drafting of this statement by the provision of information from colleagues at the ICO.

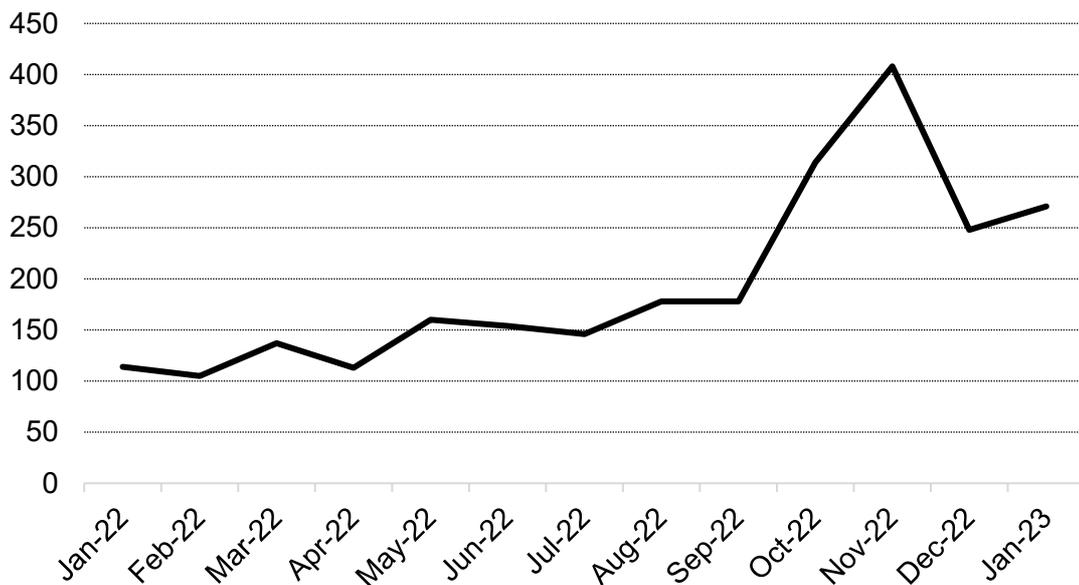
3. In July 2022, John Edwards, the Information Commissioner (“**the Commissioner**”) launched a consultation on ICO25, which is the ICO’s strategic plan setting out its objectives, purpose and performance measures. ICO25 includes a commitment that ICO performance should be judged by reference to key measures, including the efficiency and timeliness of the service provided by the ICO to the public. Specifically in relation to FOIA, the performance commitments set out in ICO25 include:
 - a. ensuring that less than 1% of the ICO’s FOIA caseload is over 12 months old; and
 - b. reaching a decision and responding to 80% of FOIA complaints within six months.
4. To enable the ICO to reach these objectives, a period of concentrated activity was undertaken during the fourth quarter of 2022 (October-December 2022) and will continue throughout the first quarter of 2023 (January-March 2023). Part of this concentrated activity is focussed on clearing the residual backlog of FOIA complaints which accumulated in large part due to the effects of the Covid-19 pandemic.
5. The concentrated activity has resulted in a significant increase in the number of decision notices (“**DNs**”) issued by the Commissioner. Figures provided to me from colleagues show that in the financial year 2021-2022, a total of 1,411 DNs were issued. However, for the financial year 2022-2023, there have been 1,915 DNs issued so far (an increase of at least 35%). The marked increase in DNs issued by the Commissioner is set out in the table immediately below.

Table 1: DNs issued by the Commissioner

Month	DNs	Average
January 2022	114	Average number of DNs per month pre-concentrated activity: 143
February 2022	105	
March 2022	137	
April 2022	113	
May 2022	160	
June 2022	154	
July 2022	146	
August 2022	178	
September 2022	178	
October 2022	314	Average number of DNs per month during concentrated activity: 310
November 2022	408	
December 2022	248	
January 2023	271	

6. An average of 143 DNs were issued per month in 2022 before commencement of the concentrated activity (during the period January-September 2022). During the four months of concentrated activity so far (October 2022 to January 2023) the average number of DNs issued per month has risen to 310, an increase of 117%. This is depicted in the chart below.

Chart 1: DNs issued by the Commissioner



7. While it is difficult to forecast with precision, it is anticipated that the number of DNs issued in February and March 2023 will remain significantly above the usual level.
8. As a result of the surge in DNs issued by the ICO, there has been a marked increase in the number of appeals to the Tribunal. I understand from colleagues that between 2018 and 2021, there were an average of 254 appeals per year. In 2022, there were 307 appeals, almost half of which (152) were received between September and December 2022.
9. As rough rule of thumb, it is anticipated that around 20% of DNs will result in an appeal to the Tribunal. This figure is based on the experience of those dealing with appeals at the ICO. As such, when the average number of DN is 143 per month (as it was in 2022 before the concentrated activity), approximately 29 Tribunal appeals per month could be expected. However, in December 2022, 40 Tribunal appeals were received. This

increased to 51 in January 2023. It projected that there will be an elevated number of appeals until the end of April 2023, at least.

10. As described in the letter of James Moss dated 13 January 2023, funding for all FOIA work – including ICO casework pre-DN, at the Tribunal stage and beyond – derives from a finite grant-in-aid. The ICO's limited FOIA funding has led to constraints on resourcing, which have become severely exacerbated during the period of concentrated activity. It should be noted that there has also been increased workload resulting from the ICO's FOIA transformation project, reviewing the end-to-end process to make a better FOI service. It is anticipated that upon completion this will have a positive impact on the ICO's capacity to fulfil its functions with respect to FOIA complaints and appeals. It will promote openness, transparency and accountability, supporting the development of a modern Freedom of Information framework.
11. During this period of increased FOIA appeals, the ICO has sought to deploy its limited resources as effectively and efficiently as possible in order to meet the increased demand. There are seven full-time equivalent lawyers who are assigned to FOIA appeals, aided by four paralegals. Budget permitting, the ICO also engages external counsel to draft Responses pursuant to Rule 23 of the Tribunal's Rules of Procedure.
12. Nevertheless, in order to ensure that the Commissioner is able to participate in appeals and assist the Tribunal in accordance with the overriding objective, it has become increasingly necessary to apply for *ad hoc* extensions of time for the Commissioner to file his Response pursuant to Rule 23. It is for this reason that an application for an extension has been made in this case.
13. However, it is recognised that an *ad hoc* approach – requiring a separate application in each case – creates an administrative burden on the Tribunal and the ICO, and diverts resources away from progressing FOIA appeals. It also introduces an element of uncertainty for the Tribunal and parties to appeals. To alleviate this, the ICO – via James Moss' letter of 13 January 2023 – invited the Tribunal to consider a temporary measure whereby the Tribunal will extend the time limit for the Commissioner to file Responses to FOIA appeals. It is proposed that such a measure could be implemented by way of a temporary new general arrangement pursuant to which the Tribunal will, in all FOIA appeals that are filed between 10 February and 30 April 2023, regard a Response filed by the Commissioner within 12 weeks of service of such appeal as falling for consideration, notwithstanding the 28-day limit prescribed by Rule 23(1)(b).

14. In the event that the Tribunal were to accede to the Commissioner's request for a temporary new general arrangement with the practical effect of extending to 12 weeks the time for the Commissioner to file a Response, it is anticipated that it would not be necessary for additional requests to be made for *ad hoc* extensions of time, save in exceptional and/or unexpected circumstances. Specifically in relation to the case of Mr Gibbon's appeal, it is not anticipated that any further extension of time will be required.
15. Further, in all cases before the Tribunal, the Commissioner will seek to file his Response as soon as reasonably possible, notwithstanding the temporary new general arrangement sought. It is further proposed that the Commissioner will review the situation in early April 2023 and inform the Tribunal as to whether the number of appeals has reduced sufficiently to revert to the 28-day limit imposed by Rule 23(1)(b), or whether the Commissioner considers a further application is required for an extension of the new general arrangement for a limited period.

Statement of Truth

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed:.....S Williams.....

Siân Williams

7 February 2023

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

B E T W E E N :-

STEPHEN GIBBONS

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

**COMMISSIONER'S APPLICATION FOR AN EXTENSION
OF THE NEW GENERAL PROCESS**

1. By way of a letter dated 13 January 2023 – clarified by written submissions filed on 6 and 9 February 2023 – the Information Commission (“**the Commissioner**”) made an application to the First-tier Tribunal (General Regulatory Chamber) (“**the Tribunal**”) for a ‘new general arrangement’ to be implemented by which the time to provide his responses to appeals brought under s.57 of the Freedom of Information Act 2000 (“**FOIA**”) is temporarily extended to 12 weeks.
2. By way of the decision of Judge O’Connor (Chamber President) dated 9 February 2023 (“**the Decision**”), the Tribunal adopted a ‘new general process’ by which the witness statement of Siân Williams, dated 7 February 2023 (“**Ms Williams’ first statement**”), is treated as a standing application by the Commissioner for an extension of time, from 28 days to 12 weeks, to file his Response in FOIA appeals pursuant to r.23(1)(b).¹
3. As anticipated in paragraph 15 of Ms Williams’ first statement, the Commissioner has now carried out a review of the situation, and has determined that the number of FOIA

¹ References to rules herein are to the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

appeals has not reduced sufficiently such as to enable the Information Commissioner's Office ("ICO") to revert to the 28-day limited imposed by r.23(1)(b).

4. In support of this application, Ms Williams has prepared a second witness statement, dated 21 April 2023 ("**Ms Williams' second statement**") explaining the reasons why the Commissioner now makes this application for an extension of the new general process up to the end of September 2023.
5. As a preliminary matter, the Commissioner notes that the FOIA appeal brought by Mr Gibbons is currently being determined on the merits, without a hearing. The outcome of this application will have no bearing on Mr Gibbons because the Commissioner has already filed his Response. Therefore, the Commissioner does not consider it necessary for the Tribunal to require Mr Gibbons to make submissions on the merits of this application for an extension. However, the Commissioner nevertheless makes this application under the guise of Mr Gibbons' appeal because: (i) the initial application was made in these proceedings; (ii) in the Commissioner's view, this application needs to be made within the context of an appeal, and cannot be made on a freestanding basis; (iii) other current appeals are already subject to the new general process and no further extension is sought in relation to those cases; and (iv) it would further the overriding objective for this application to be made now, rather than wait for an appeal to be filed after the new general process expires at the end of April 2023.
6. It is explained in Ms Williams' second statement why the Commissioner requires an extension of the new general process until 30 September 2023. In particular:
 - a. In the two-month period since the new general process was adopted, the number of DNs has been close to the previous peak reached in November 2022 (see paragraph 11 of Ms Williams' second statement). This is approximately four times more than the historic average number of FOIA appeals.
 - b. The number of FOIA appeals filed since the new general process was adopted has been exceptionally high, with 83 appeals received by the Commissioner in March 2023 (see paragraph 8 of Ms Williams' second statement). As a result, the number of FOIA appeals is expected to remain elevated throughout April 2023 (at least).
 - c. The knock-on effect of the 169-181 'additional' appeals received as a result of the concentrated activity will continue to severely exacerbate constraints on

resourcing of the FOIA appeals team until at least 30 September 2023 (see paragraph 26 of Ms Williams' second statement).

7. In making this application, the Commissioner relies on his written submissions filed on 6 and 9 February 2023, which are not repeated herein. The Commissioner submits that the Decision strikes the right balance between (i) fairness to other parties to an appeal; and (ii) the very real operational pressures on the Commissioner's FOIA appeals team, described in both Ms Williams' statements. Further, as noted at paragraph 29 of Ms Williams' second statement, the Commissioner will maintain the triage system described in paragraph 18 of the Decision. It is not currently anticipated that any further extension of the new general process will be required beyond 30 September 2023.
8. The Commissioner notes the recognition in the Decision of the unique role he plays and his overarching aim of assisting the Tribunal in its role of determining FOIA appeals. As such, "[t]he filing of a Response by the ICO generally furthers the efficient administration of justice" (Decision, §25). The Commissioner makes this application for the purpose of ensuring that the ICO can fully and properly participate in FOIA appeals during the period May-September 2023.
9. For these reasons, the Commissioner respectfully requests the Tribunal to extend the new general process – set out in the Decision – to all FOIA appeals sent to the Commissioner between 29 April and 30 September 2023 (inclusive).

21 APRIL 2023

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IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

B E T W E E N :-

STEPHEN GIBBONS

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

SECOND WITNESS STATEMENT OF SIÂN WILLIAMS

I, Siân Williams, of the Information Commissioner’s Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF, say as follows:

1. I make this second witness statement in support of the application by John Edwards, the Information Commissioner (“**the Commissioner**”), for an extension of the new general process by which the Tribunal is treating my previous witness statement dated 7 February 2023 (“**first statement**”) as a standing application for an extension of time, from 28 days to 12 weeks, to file his response to FOIA appeals (“**the new general process**”).¹
2. My role at the Information Commissioner’s Office (“**ICO**”) is Head of Legal Service (Enforcement). As such, I have overall responsibility for the legal team charged with responding to FOIA appeals. The facts and matters set out in this witness statement are within my own knowledge unless otherwise stated, and I believe them to be true. Where I refer to information supplied by others, the source of the information is identified; facts and matters derived from other sources are true to the best of my knowledge and belief.

¹ *Stephen Gibbons v IC* (EA/2022/0440), Decision of 9 February 2023.

Insofar as this witness statement relates to ongoing operational pressures relating to the ICO's handling of FOIA complaints and appeals, I have been assisted in the drafting of this statement by the provision of information from colleagues at the ICO.

Review of the current situation

3. As described in my first statement, in order to meet the objectives of the ICO25 Strategic Plan, the ICO undertook a period of concentrated activity during the fourth quarter of 2022 (October-December 2022) and the first quarter of 2023 (January-March 2023). Part of this concentrated activity focussed on clearing the residual backlog of FOIA complaints which accumulated in large part due to the effects of the Covid-19 pandemic.
4. It is further explained in my previous statement that the Commissioner would "*review the situation in early April 2023 and inform the Tribunal as to whether the number of appeals has reduced sufficiently to revert to the 28-day limit imposed by Rule 23(1)(b), or whether the Commissioner considers a further application is required for an extension of the new general arrangement for a limited period.*" The Commissioner has now carried out this review, and for the reasons explained in this statement, he considers that a further application is required to extend the new general process until 30 September 2023.

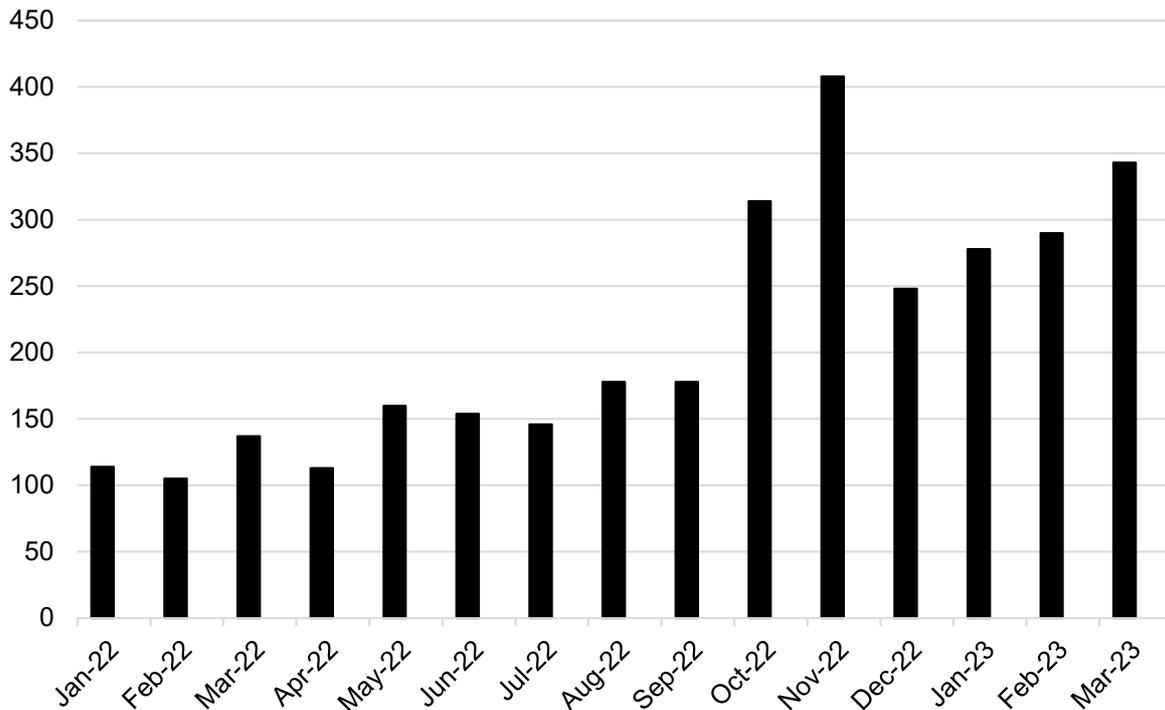
Increase in the number of Decision Notices

5. The concentrated activity resulted in a significant increase in the number of Decision Notices ("**DNs**") issued by the Commissioner. As explained in my first statement:
 - a. during the financial year 2021-2022, a total of 1,411 DNs were issued;
 - b. however, as of 7 February 2023, 1,915 DNs had been issued.
6. In the period since 7 February 2023 (the date of my first statement), the number of DNs issued by the Commissioner has remained considerably elevated, and has been trending upward. This can be seen in Table 1 and Chart 1 immediately below:

Table 1: DNs issued by the Commissioner per month

Month	DNs	Average
January 2022	114	Average number of DNs issued per month pre-concentrated activity: 142.8
February 2022	105	
March 2022	137	
April 2022	113	
May 2022	160	
June 2022	154	
July 2022	146	
August 2022	178	
September 2022	178	
October 2022	314	Average number of DNs issued per month during the period of concentrated activity: 312.3
November 2022	408	
December 2022	248	
January 2023	271	
February 2023	290	
March 2023	343	

Chart 1: DNs issued by the Commissioner per month



7. An average of 142.8 DNs were issued per month in 2022 before the start of the concentrated activity (*i.e.* during the 9-month period from January to September). During the 6 months of concentrated activity (from October 2022 to March 2023) the average number of DNs issued per month rose to an average of 312.3 per month, an increase of 218%.
8. In the 2-month period since the new general process was adopted, the number of DNs issued has been close to the peak that was reached in November 2022:
 - a. 290 DNs were issued in February 2023; and
 - b. 343 DNs were issued in March 2023.

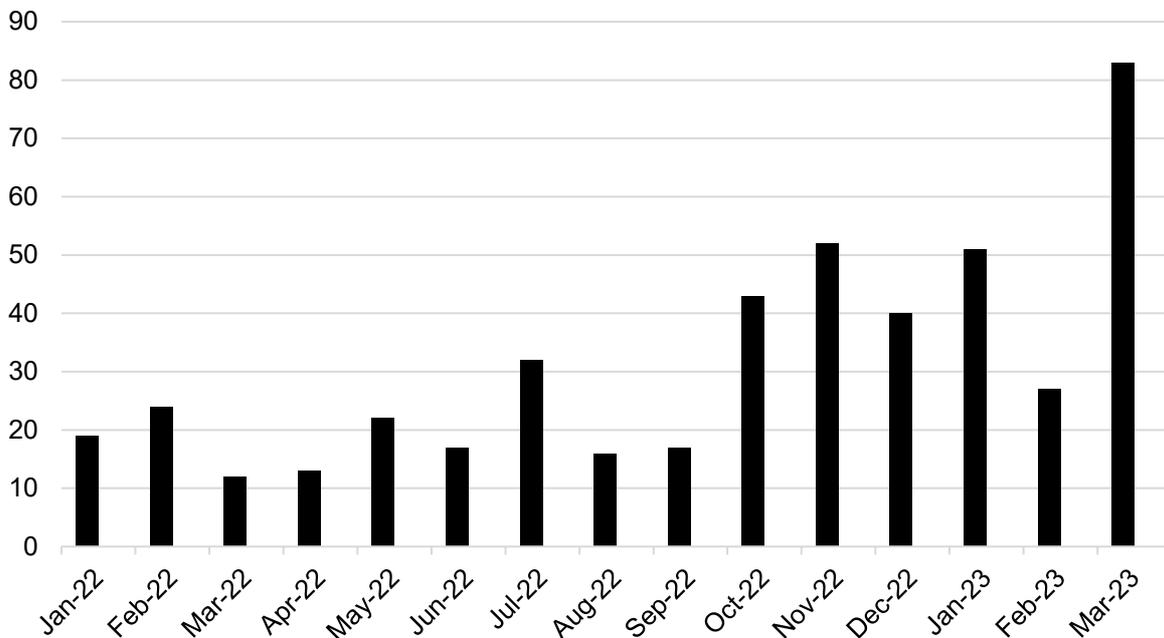
Increase in the number of FOIA appeals

9. The ongoing elevated level of DNs has resulted in a correspondingly marked increase in the number of FOIA appeals to the Tribunal. As noted in my first statement: between 2018 and 2021, there were an average of 254 appeals per year (*i.e.* approximately 21.2 appeals per month on average). In the calendar year 2022, there were 307 FOIA appeals, almost half (152) of which were received between September and December 2022.
10. As a result of the concentrated activity, which has continued throughout February and March 2023, the number of FOIA appeals continues to be significantly elevated:
 - a. During the first 9 months of 2022 (before the period of concentrated activity), there were 172 FOIA appeals, which is an average of 19.1 appeals per month.
 - b. During the 6-month period of concentrated activity (from October 2022 to March 2023), there were 296 FOIA appeals, which is an average of 49.3 per month.
11. The number of FOIA appeals received by the Commissioner is set out in Table 2 and Chart 2 below:

Table 2: Appeals received by the Commissioner per month

Month	DNs	Average
January 2022	19	Average number of appeals received per month pre-concentrated activity: 19.1
February 2022	24	
March 2022	12	
April 2022	13	
May 2022	22	
June 2022	17	
July 2022	32	
August 2022	16	
September 2022	17	
October 2022	43	Average number of DN's issued per month: 49.3
November 2022	52	
December 2022	40	
January 2023	51	
February 2023	27	
March 2023	83	

Chart 2: Appeals received by the Commissioner per month



12. As can be seen from Table 2 and Chart 2 above, whereas the number of appeals dipped slightly in February 2023 (27), the number of appeals received in March 2023 (83) is significantly higher than the previous peaks in November 2022 (52) and January 2023 (51). To put this into context:
 - a. The average number of appeals received per month during the period of concentrated activity (49.3) represents an increase of 158% when compared to the average number of appeals received per month in the 9 months before the period of concentrated activity (19.1).
 - b. The number of FOIA appeals received in March 2023 alone (83) exceeds the total number of appeals received in the 4-month period before the start of concentrated activity (82).

Ongoing operational pressure on the Commissioner's FOIA appeals team

13. It is difficult to predict the number of DNs that will be issued in the coming months, and the number of corresponding FOIA appeals. However, the ICO's caseload of FOIA complaints has been significantly reduced as a result of the concentrated activity. Over the last 12 months, the ICO issued over 2,500 DNs, more than any other year in its history.² In April 2022, the caseload of FOIA complaints stood at 2,295 cases, well above the roughly 1,250 cases at the start of each of the three years before the Covid-19 pandemic. As of March 2023, there were around 800 live FOIA complaints in the Commissioner's system.³
14. Despite the reduction in the ICO's FOIA complaint caseload resulting from the concentrated activity, it is expected that the Commissioner's FOIA appeals team will continue to experience significant operational pressure up until the end of September 2023. There are two reasons for this.
 - a. First, the elevated number of DNs persisted throughout the first quarter of 2023, increasing every month since December 2022. The period of concentrated activity resulted in a further 633 DNs being issued in February and March 2023. The appeals that will arise from these DNs are yet to all filter through.

² See: <https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2023/03/ico-to-prioritise-freedom-of-information-complaints-with-significant-public-interest/> (last accessed 21 April 2023).

³ See: <https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2023/03/director-s-update-celebrating-success-and-challenging-ourselves-for-the-future/> (last accessed 21 April 2023).

- b. Second, there remains a considerable existing case load. The exceptionally high number of appeals received in March 2023 (83) is expected to impose a considerable and lasting strain on the FOIA appeals team. As of the date of this statement, there are approximately 70 appeals that are still awaiting allocation to a lawyer in the FOIA appeals team.

- 15. Now that the concentrated activity has come to an end, it is possible to get a sense of the resulting additional FOIA appeal caseload. As explained above:
 - a. In the first 9 months of 2022, there were, on average, 19.1 FOIA appeals per month.

 - b. During the 6-month period of concentrated activity, the average number of FOIA appeals per month rose to 49.3.

- 16. It follows that during the period of concentrated activity there were, on average, 30.2 'additional' FOIA appeals per month (*i.e.* the number of appeals received by the Commissioner in addition to the average number of appeals received per month over the preceding 9 months). The number of 'additional' FOIA appeals is depicted in Chart 3 immediately below:

17. In Chart 3 above:
 - a. the dashed line represents the average number of FOIA appeals, per month, during the first 9 months of 2022;
 - b. the columns represent the total number of FOIA appeals actually received by the Commissioner; and therefore,
 - c. the 'additional' appeals are those represented in the columns, above the dashed line.
18. Over the whole 6-month period of concentrated activity, the total number of 'additional' appeals is approximately 181.⁴
19. It should be noted that even adopting the higher figure of 21.1 FOIA appeals received per month during the period 2018-2021 (referred to in paragraph 9 above), the number of 'additional' FOIA appeals during the 6-month period of concentrated activity would be approximately 169.⁵
20. Therefore, in my view, it would be accurate to say that the concentrated activity carried out by the ICO has resulted in approximately 169 to 181 'additional' FOIA appeals.

Steps taken by the Commissioner to address the ongoing operational pressures

21. The Commissioner has continued to take steps to deploy his limited resources as effectively and efficiently as possible in order to meet the increased demand. The following are steps that have already been taken (others are being explored):
 - a. First, a triage system has been implemented to identify, at an early stage, appeals which may require expedition.
 - b. Second, one of the Commissioner's caseworkers who is CILEX qualified has been moved (temporarily) to the FOIA appeals team to assist and support the 7 full-time

⁴ This figure has been calculated as follows: (i) there were 172 FOIA appeals during the first 9 months of 2022, an average of 19.1 per month; (ii) there were 296 FOIA appeals during the period of concentrated activity, an average of 49.3 per month; (iii) therefore, during each month of concentrated activity, there were 30.2 'additional' FOIA appeals (*i.e.* 49.3 minus 19.1); and (iv) as such, over the 6-month period of concentrated activity, there were 181.2 'additional' appeals (*i.e.* 30.2 multiplied by 6).

⁵ This figure has been calculated as follows: (i) there were 21.2 FOIA appeals per month, on average, during the period 2018-2021; (ii) there were 296 FOIA appeals during the period of concentrated activity, an average of 49.3 per month; (iii) therefore, for each month of concentrated activity, there were 28.1 'additional' FOIA appeals (*i.e.* 49.3 minus 21.2); and (iv) as such, over the 6-month period of concentrated activity, there were 168.6 'additional' appeals (*i.e.* 28.1 multiplied by 6).

equivalent lawyers and 4 paralegals who are assigned to FOIA appeals. The Commissioner is currently exploring other options to increase resourcing within the confines of finite Grant-in-Aid funding, both internally and externally.

- c. Third, the Commissioner continues to instruct external counsel to prepare responses (budget permitting and subject to counsel availability). It should be noted that instructing counsel only goes so far. The ICO lawyer instructing counsel retains conduct of the appeal at all times and retains responsibility for: (i) drafting instructions; (ii) transmitting papers; (iii) responding to counsel's queries; (iv) taking instructions from the Commissioner; (v) preparing bundles; (vi) liaising with appellants and other respondents; and (vii) reviewing responses before they are filed.

22. However, even with these initiatives, I am firmly of the view that it will not be possible to revert to the 28-day limit to file responses by 28 April 2023.

Extension of the new general process

23. I have carefully considered how long it will take before the level of FOIA appeals is likely to reduce sufficiently so as to enable the FOIA appeals team to respond to appeals within 28 days in accordance with rule 23(1)(b).

24. Pursuant to the 12-week deadline imposed by the new general process, appeals received up until 28 April 2023 will require responses to be filed up to 21 July 2023. Throughout this period, the FOIA appeals team will need to respond to the considerable existing caseload (including the 'additional' appeals) and at the same time, continue responding to new appeals.

25. Bearing in mind:

- a. the significant work required to clear the existing caseload; and
- b. the number of 'additional' appeals;

the FOIA appeals team will not have the necessary capacity or resources to respond to new appeals within 28 days during the period May-July 2023.

26. As a result, I anticipate that the Commissioner will require extensions in the vast majority of new appeals sent to him during the period May-July 2023. If extensions of time are sought in the vast majority of new appeals up to the end of July 2023, those responses will fall to be filed up to September 2023 (assuming that the Tribunal would grant

extensions of up to 8-12 weeks). Therefore, the backlog of FOIA appeals will continue to have a considerable knock on-effect on the FOIA team's operational capacity throughout this period. I firmly believe that constraints on resourcing of the FOIA appeals team will continue to be severely exacerbated until at least the end of September 2023.

27. The Commissioner is mindful that the new general process imposes an administrative burden on the Tribunal. However, requiring the Commissioner to make *ad hoc* extension applications in the vast majority of new appeals during the period May-July 2023 will:
 - a. increase, even more, the administrative burden for the Tribunal;
 - b. result in more uncertainty for appellants and respondents; and
 - c. divert the Commissioner's resources away from progressing FOIA appeals, further aggravating the ongoing operational pressures.

28. In the event that the Tribunal were to accede to the Commissioner's application to extend the new general process to all appeals sent to the Commissioner up to 30 September 2023, it is anticipated that it would not be necessary for additional requests to be made for *ad hoc* extensions of time, save in exceptional and/or unexpected circumstances. It is not currently anticipated that any further extension of the new general process will be required beyond 30 September 2023.

29. Finally, I wish to make clear that if the Tribunal does extend the new general process, the FOIA appeals team will maintain the triage system that it currently operates, which would enable the ICO to identify, at an early stage, any appeal in which it would not be in the interests of justice for the general extension to apply. The Commissioner would then notify the Tribunal and expedite his Response.

Statement of Truth

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed:.....S Williams.....

Siân Williams

25 April 2023