



IN THE FIRST TIER TRIBUNAL

Appeal No: EA/2016/0297-0301

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

On appeal from the Information Commissioner's Decision Notices FS50633637, FS50633653, FS50633648, FS 50633625, FS50633628 dated 15/16 November 2016

Before

Andrew Bartlett QC (Judge)

Jean Nelson

Dave Sivers

Heard at Field House, London EC4.

Date of hearing 21 May 2018

Date of decision 5 June 2018

Date of Promulgation 11 June 2018

Between

KEVIN BLOWE

Appellant

and

(1) THE INFORMATION COMMISSIONER

(2) HOME OFFICE

**(3) CHIEF CONSTABLE OF GREATER MANCHESTER
(in appeal 0297 only)**

Respondents

Attendances:

For the appellant Jude Bunting

For the 1st respondent Christopher Knight

For the 2nd respondent Catherine Callaghan QC

For the 3rd respondent Russell Fortt

Subject matter: Freedom of Information Act 2000 – duty to confirm or deny

Cases:

Baker v IC and Cabinet Office EA/2006/0045, 12 February 2007

APPGER v IC and Ministry of Defence [2011] UKUT 153 (AAC), 56

R (Lord Carlile) v Home Secretary [2014] UKSC 60, [2015] AC 945, 32-33

Keane v IC and Home Office [2016] UKUT 0461 (AAC)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal and declares pursuant to FOIA s58(1) that the Information Commissioner’s Decision Notices FS50633637, FS50633653, FS50633648, FS 50633625, FS50633628 were not in accordance with the law, because the five police forces were not entitled to rely upon FOIA s24(2) in response to Mr Blowe’s information requests.

The consequence is that the five police forces are required to respond to the requests afresh.

REASONS FOR DECISION

Introduction

1. When an information request made under FOIA (the Freedom of Information Act), the first duty of a public authority is to inform the requester in writing whether it holds information of the description specified in the request: FOIA s1(1)(a). This is known as the duty to confirm or deny.
2. This appeal is concerned with the exemption to this duty which is found in FOIA s24(2). By that subsection the duty to confirm or deny does not arise if, or to the extent that,

exemption from s1(1)(a) is required for the purpose of safeguarding national security. The exemption is qualified by the public interest test in s2(1)(b). An 'NCND' response neither confirms nor denies that information of the description specified in the request is held.

The request, the public authority's response, and the complaint to the Information Commissioner

3. The Appellant ("Mr Blowe") is the co-ordinator of the Network for Police Monitoring ("Netpol"), a non-profit organisation concerned with monitoring police conduct in the public order context. On 19 October 2015 Mr Blowe wrote to five police forces in the North-West of England (Cheshire, Cumbria, Greater Manchester, Lancashire and Merseyside police) with the following information request:

Please can you tell me the number of referrals made since January 2015¹ through the multi-agency counter-radicalisation 'Channel' process that were made specifically for individuals allegedly at risk of being drawn into 'extremism' through involvement in anti-fracking campaigns?

4. After consideration of the request all five forces issued an NCND response, relying on s24(2) (national security) and s31(3) (law enforcement). Mr Blowe requested internal review. After some modest delay the internal reviews upheld the NCND responses.
5. Mr Blowe referred the matters to the Information Commissioner. After investigation the Commissioner upheld the application of s24(2), without expressing a view on the application of s31(3).

The appeal to the Tribunal and the questions for the Tribunal's decision

6. Mr Blowe appeals to the Tribunal on the grounds that (a) the Commissioner wrongly concluded that exemption was required for the purpose of safeguarding national security, and (b) the Commissioner erred in concluding that, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
7. At the hearing Greater Manchester Police represented itself and, by extension, the interests of the other police forces, there being no material difference in the issues in the five related appeals. Mr Fortt clarified that s31(3) was not actively relied upon.

'Prevent' and 'Channel'

8. The Channel programme is part of the Government's Prevent strategy, which is itself part of the Government's wider counter-terrorism strategy. Mr Muncie of the Home Office explained these terms in his witness statement. Prevent safeguards people who are vulnerable to radicalisation. The Prevent duty contained in ss 26-35 of the Counter-

¹ 2015 was mistyped as '2915' but the intent was sufficiently clear.

Terrorism and Security Act 2015 imposes a duty on a range of specified authorities to have due regard to the need to prevent people from being drawn into terrorism. Sections 36-41 place a duty on local authorities, known as the Channel duty, to ensure that a panel is in place to assess the extent to which identified individuals are vulnerable to being drawn into terrorism, and to prepare and implement support for them. The implementation of these duties is covered by statutory guidance issued by the Secretary of State.

9. Members of the authorities or members of the public may raise concerns about individuals. When this happens, the police make initial inquiries to ensure that the concerns are not obviously malicious or misinformed and that there does indeed appear to be a vulnerability connected to radicalisation. A detailed vulnerability assessment framework is used. This identifies 22 factors to consider.
10. Onward referral to the panel is governed by s 36(3), which provides: “A chief officer of police may refer an individual to a panel only if there are reasonable grounds to believe that the individual is vulnerable to being drawn into terrorism.” Such a referral may lead to support being offered to the individual. Such support requires the individual’s consent (or, in the case of minors, consent of their parent or guardian).
11. The Home Office position on anti-fracking activities in relation to Prevent and Channel was stated by Mr Muncie. It is that peaceful participation in, or support for, any lawful movement or campaign, including anti-fracking campaigns or protests, would not, by itself, be considered an indicator of vulnerability to being drawn into terrorism, and should not on its own result in a case being accepted onto the Channel programme. However, if there was evidence of additional behaviours that indicated that an individual was vulnerable to being drawn into terrorism, for example, if an individual demonstrated interest in attacking fracking sites or seriously harming individuals in the fracking industry and/or was capable of causing such harm, to the extent that such activities might constitute an act of terrorism as defined in the Terrorism Act 2000, then in principle such an individual could be referred to and accepted onto the Channel programme for support.
12. Section 1 of the Terrorism Act 2000 provides:
 - (1) In this Act “terrorism” means the use or threat of action where—
 - (a) the action falls within subsection (2),
 - (b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and
 - (c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.
 - (2) Action falls within this subsection if it—

- (a) involves serious violence against a person,
- (b) involves serious damage to property,
- (c) endangers a person's life, other than that of the person committing the action,
- (d) creates a serious risk to the health or safety of the public or a section of the public, or
- (e) is designed seriously to interfere with or seriously to disrupt an electronic system...."

13. Thus in the context of the present discussion the elements of terrorism would be (a) use or threat of serious violence or other harm as defined, (b) designed to influence the Government or intimidate a section of the public, (c) for the purpose of advancing the political cause of anti-fracking.

Mr Blowe's concerns about Prevent and Channel

14. In his witness statement Mr Blowe drew attention to concerns raised by the Independent Reviewer of Terrorism Legislation, by the UN Special Rapporteur on the Right to Freedom of Assembly, and by journalists reporting for the BBC, The Guardian and The Independent.
15. In relation to anti-fracking in particular, he stated, among other things, that in the autumn of 2015 Netpol was separately contacted in confidence by two anti-fracking activists from the north west of England, who were angered about unexpected referrals to Channel made by Universities or Further Education Colleges because of their political opposition to onshore oil and gas extraction. It appeared that police forces regarded anti-fracking as an extremist and possibly violent movement, whereas he characterized it as an entirely peaceful protest movement. He considered that there was a powerful public interest in understanding the number of referrals to Channel that might indicate wrongful targeting of legitimate political campaigners.
16. Mr Blowe confirmed through Mr Bunting that in his information request 'the number of referrals' meant the number of statutory referrals under s36(3). The Respondents likewise confirmed, through counsel, that this was the sense in which the request had been understood.
17. A considerable quantity of official statistics has been published concerning referrals. These were in evidence before us. They provide numbers of referrals by various categories such as timing, age, religion, race, region, and ideology. None was at the level of granularity which would have answered Mr Blowe's request.

Reasons advanced for NCND

18. The principal evidence concerning the justification for the NCND response was from Mr David Wells, the Regional Prevent Coordinator of Counter Terrorism Policing North West. After describing the Channel programme he stated:

[18] Prevent Police Officers in Greater Manchester are deployed geographically; in other words, the Prevent Police Officer for the borough of Oldham will be tasked to manage cases in Oldham. This model of delivery is broadly replicated across the North West region. Prevent Police Officers' workload is predominantly demand led; dependent upon referrals coming from other areas of Policing or external partners, such as schools and social services.

[19] Beyond the information already published by Her Majesty's Government in November 2017, the Police do not publish further information about the origin of referrals for a number of reasons.

[20] In the first instance, this could expose police tactics, and afford terrorists or extremists valuable information that will enable them to either disrupt the police's activity, or indicate to them that there are vulnerable people who may be exploited. Conversely, publication could ensure that extremists actively avoid areas where police activity may be taking place.

[21] This request relates in particular to anti-tracking [*sic*]; it could equally apply to other types of protest or operations run by a police force, or even particular policing events such as football.

[22] If the information exists, specific requests (which could be repeated over all areas of any given Force and made to all 43 Forces in the United Kingdom) have the potential to reveal where counter terrorism police resources or informants are engaged. If the information exists, each request could act as a piece of a jigsaw to map out a national picture of potential 'safe havens' or vulnerable areas and therefore risking national security.

[23] Additionally, the production of local information could adversely impact upon communities (i.e. negative reporting in the media) or, particularly where referral numbers are low, can risk identifying a vulnerable person. Such information could undermine the trust and confidence within communities; where information may lead to the identification of a vulnerable individual. This could have a catastrophic impact on that vulnerable individual, their family and their community. It may also affect the confidence of the referee that their identity will be protected, if indeed that is their wish.

[24] All of this could hinder the police's attempts to protect vulnerable people, alongside its partner agencies. It could also lead to inaccurate speculation around individuals who have been wrongly identified.

[25] The public, and those vulnerable people directly engaged with the Channel process, need to be confident that information is treated professionally, confidentially and sensitively as with all other safeguarding concerns.

[26] For the above reasons, it is my belief that it is reasonably necessary to neither confirm nor deny the information exists otherwise national security would be compromised.

19. On behalf of the Commissioner, Mr Knight's skeleton justified the use of NCND in this way:

[34] Either confirming or denying information was held in relation to the number of persons referred to Channel as a result of involvement in anti-fracking campaigns would reveal information. It would reveal either that such referrals had been made, because information was held, to Channel in a particular Force area – or given multiple requests, regionally or even nationally – against a very specific (and relatively narrow) activist movement, thereby indicating that a view had been taken that there was a risk of individuals being drawn into terrorism in that context. Alternatively, it would reveal that no such referrals had been made, because information was not held, which would – given the statutory duties under the 2015 Act – inevitably be interpreted to mean that no individuals had been identified in that movement as being at risk of being drawn into terrorism.

[35] That simple confirmation or denial tells the public something about where anti-terrorism police resources are or are not being required, or potentially required.

[36] That is sufficiently closely linked – given the prevention of terrorism context and regardless of the substantive content of the information held (if any) – to be a matter the avoidance of which is reasonably required for the purposes of safeguarding national security.

Engagement of s24(2): analysis

20. FOIA s1(1)(a) refers to the holding of information. It is pertinent to recall that, by s84, 'information' means 'information recorded in any form'. Mr Blowe's request is therefore directed at recorded information concerning the number of statutory referrals made specifically for individuals allegedly at risk through involvement in anti-fracking campaigns.

21. The parties reminded us of the importance of giving appropriate weight to the views of the Executive, especially where national security is involved: *R (Lord Carlile) v Home Secretary* [2014] UKSC 60, [2015] AC 945, 32-33; *APPGER v IC and Ministry of Defence* [2011] UKUT 153 (AAC), 56. In the present circumstances the responsibility to decide upon the engagement of the exemption and upon the public interest balance is placed by statute upon the Tribunal. Nevertheless we recognize that the Home Office and the police have knowledge and expertise concerning policing and national security which the Tribunal does not possess, and we proceed on that basis, giving appropriate weight to their views.

22. In order to determine whether s24(2) is engaged, it is necessary to consider what would be learned from a 'yes' or a 'no' answer; in other words, either from confirmation that information of the specified description was held or from denial that any information of the specified description was held.
23. The main thrust of Mr Bunting's criticism of the Respondents' evidence was that it was chiefly directed to the consequences of revealing whatever information was held, rather than to the consequences of revealing that some information was or was not held. In our view there is considerable force in this criticism. In particular, paragraphs 20 and 22 of Mr Wells's statement seem to depend upon something more being revealed than the mere fact that recorded information is held specifically in relation to the number of referrals arising from anti-fracking.
24. If one or more police forces were to confirm that information of the specified description was held, this would indicate to the requester and the public that someone (whether a person in the relevant force, or a regional coordinator or some other Government official) regarded it as worthwhile to retain a record which showed the number of statutory referrals which were related specifically to involvement in anti-fracking. This would indicate a level of concern or watchfulness concerning anti-fracking campaigning as a movement where there was thought to be a realistic possibility that someone might be drawn into terrorism. This would not of itself reveal anything new that is not already in the public domain. The Tribunal's attention was drawn to a video hosted on Vimeo, which recorded a police officer delivering a Prevent training session giving an example of anti-fracking protestors crossing the line into unlawful violence. Whether the example was true and justified or was untrue and unjustified makes no difference to the fact that it is public knowledge that the police regard anti-fracking campaigning as a movement where there is a realistic possibility that someone might be drawn into terrorism. The existence of this perception on the part of the police is one of Mr Blowe's concerns, since he considers it to be unjustified. A statement that information was held would provide additional confirmation of this perception. In our judgment it is stretching credulity to contend that such confirmation would be of material assistance to terrorists or potential terrorists.
25. The Respondents to the appeal argued that a positive answer would also show that at least one person had been referred by any police force which gave a positive answer. This in turn (since the request was made to multiple forces and could be made to yet others) would start to build up a picture about the deployment of anti-terrorism resources. In our judgment this does not follow. Assuming a positive answer, the recorded information held by a police force on the number of referrals from January to October 2015 specifically for individuals allegedly at risk through involvement in anti-fracking campaigns could be that the number was zero in that category. Or it could be any other number. The fact that a number was contained in recorded information would provide no information about the deployment of anti-terrorism resources.

26. The Respondents also stressed the geographically localised nature of anti-fracking protests, suggesting that positive or negative answers would for that reason reveal information that could be useful to terrorists concerning the deployment of resources. In our view this does not assist their arguments. And we are unable to accept the arguments put forward by Mr Wells in paragraphs 23-25 of his statement. On the evidence placed before us, even if it were revealed that referrals were made by Greater Manchester police, this would not tell the public whether the referrals were so made because they arose from a protest in the Greater Manchester police area or because the persons who were referred lived in that area, or a mixture of the two. And in any event, as stated above, a positive answer, stating that information was held, would not prove that any referrals had actually been made in the specified period.
27. If one or more police forces were to state that information of the specified description was not held, what would this tell the public? There are several possible interpretations of a negative answer. One possible interpretation might be that no one connected with anti-fracking had been referred by that police force in the specified period.² Another possibility would be that the retained records were not sufficiently detailed to show the number of referrals related to anti-fracking. This could be due to inclusion of anti-fracking in a wider category, such as environmental activists, or it could be due to administrative shortcomings.
28. Accordingly, in our judgment the submission that the ‘confirmation or denial tells the public something about where anti-terrorism police resources are or are not being required, or potentially required’ is not established.
29. We conclude that s24(2) is not engaged, because exemption from s 1(1)(a) is not required for the purpose of safeguarding national security.
30. Since this is our conclusion, we are not required to carry out an exercise of assessing whether the public interest in maintaining the exemption outweighs the public interest in revealing whether information of the specified description is held. However, we were reminded at the hearing that in *Keane v IC and Home Office* [2016] UKUT 0461 (AAC) at [58] Judge Wikelly stated: ‘the public interest in maintaining the qualified national security exemption in section 24(1) is likely to be substantial and to require a compelling competing public interest to equal or outweigh it’. We note the term ‘likely’, and we consider that a similar general statement can properly be made about s24(2).
31. However, we further note that on the particular facts of this case, the public interest in transparency has a bearing on whether the s24(2) exemption is engaged.

² Compare *Baker v IC and Cabinet Office* EA/2006/0045, 12 February 2007, [34], where a worked example concerning the number of MPs subjected to intrusive surveillance proceeded on the basis that, if the Cabinet Office said that no information was held, this would mean that no MPs had had their communications intercepted in the relevant period. The factual scenario in the present case is somewhat different, where it is public knowledge that statistics about referrals are kept in various categories, since (at a chosen level of aggregation) they are published.

32. Having reviewed the evidence and the arguments, it seems to us that it is not seriously in dispute that there is a public interest in transparency as regards the operation of the Prevent strategy and of the Channel programme as part of it. The Home Office has wisely placed a considerable amount of information in the public domain. On the evidence placed before us, this approach is essential, since the strategy can only work if it has widespread public understanding and support. Publicity and explanation are a vital part of what is needed to maximize the effectiveness of these aspects of counter-terrorism policy.
33. Having regard to what is already in the public domain, and having regard also to the existence of the concerns about appropriate use of Channel referrals, we judge that answers concerning whether the requested numbers are held would make a small but worthwhile contribution to public understanding, and hence towards the effectiveness of the programme. This tends to reinforce our conclusion that s24(2) is not engaged.

Conclusions and remedy

34. Our conclusion is that the Information Commissioner's Decision Notices FS50633637, FS50633653, FS50633648, FS 50633625, FS50633628 were not in accordance with the law, because the five police forces were not entitled to rely upon FOIA s24(2) in response to Mr Blowe's information requests.
35. At the hearing, counsel were agreed as to the consequence of such a conclusion. The appeal must be allowed. The five police forces must respond to the requests afresh, without reliance on s24(2).

Signed

Andrew Bartlett QC, Tribunal Judge

5 June 2018