Case Reference: EA/2018/0244

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard on: 24 May 2022 by way of the CVP platform

Decision given on: 12/12/2022

Before

TRIBUNAL JUDGE Stephen Cragg QC
TRIBUNAL MEMBER Pieter De Waal
TRIBUNAL MEMBER David Cook

Between

EDWARD WILLIAMS

Appellant

And

INFORMATION COMMISSIONER
CHIEF CONSTABLE OF KENT POLICE

Respondent

Decision: The appeal is Dismissed.

Substituted Decision Notice: None

Mr Williams represented himself
Mr Dijen Basu QC represented the Chief Constable of Kent Police
The Commissioner was not represented.

REASONS

MODE OF HEARING

1. The proceedings were held via the Cloud Video Platform. The parties joined remotely. The Commissioner did not attend. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way

2. The Tribunal considered an open bundle of evidence and documents comprising pages 1 to 174, together with two supplementary bundles amounting to a further 868 pages and the partial transcript of an interview (described below).

3. The Tribunal apologises for the delay in promulgating the decision. Responses to the embargoed decision were overlooked by the Tribunal judge.

BACKGROUND

4. This case was remitted to this Tribunal from the Upper Tribunal (UT) in *Williams v Information Commissioner and Chief Constable of Kent Police* (7 June 2021) No. GIA/651/2020, following a successful appeal by the Appellant, with the following directions: -

> 1. The case is remitted to a freshly constituted panel of the First-tier Tribunal (FTT) for reconsideration.
>
> 2. The First and Second Respondents may rely on exemptions from disclosure under FOIA not previously relied upon before the FTT when it made the original decision on 5 March 2020.
>
> 3. The parties may rely on evidence that was not before the FTT when it made the original decision on 5 March 2020.

5. The following background is taken from the UT judgment in this case: -

> 13. The appeal arises out of an incident in Calais on 12 March 2018 when Ms Lauren Southern was stopped and questioned and refused leave to enter the UK on the grounds that her presence in the UK was not conducive to the public good.
>
> *The Appellant's Request for Information*
>
> 14. This appeal concerns parts 1, 2 and 6 of the request made on 14 March 2018 by the Appellant for the following information made in the following terms:

'According to this video on Youtube:- https://youtu.be/odGiYJdFtE0 Ms Lauren Cherie Southern, a Canadian citizen, was stopped at Calais, France, on or about 12 March 2018 and prevented from entering the UK by British authorities. She has named Kent Police as the relevant police force.

1. Provide all records held regarding the decision to invoke Schedule 7 Terrorism Act 2000 ('The Act') or other legislation/powers and to stop/detain Ms Southern.

2. Provide the custody record or similar record.

3. Provide all training manuals, guidance, advisory circulars or similar material on how those stopped should be treated when stopped or detained at a UK port (including Calais) pursuant to the powers under the Act.

4. Provide all training manuals, guidance, advisory circulars or similar material on how those stopped should be treated when sopped or detailed at a UK port (including Calais) pursuant to the powers under the Act when the relevant person refuses to provide information orally (i.e., answer questions) or refuses to unlock any electronic device such as a telephone, computer etc.

5. Provide leaflet given to those detained.

6. Provide all material held which was (allegedly) distributed by Ms Southern on or about 24 February 2018 in Luton, UK.'

6. We have highlighted the aspects of the request, parts 1, 2 and 6 which are the subject matter of the current appeal. The UT decision continues to explain what happened to the request when considered by the Chief Constable: -

17. The Second Respondent responded to the Appellant's request on 5 April 2018. It refused to confirm or deny that it held the requested information citing s.30(3) of FOIA Schedule 7 of the Terrorism Act 2000 and guidance issued by the College of Policing on that schedule.

18. On 10 May 2018 the Second Respondent conducted an internal review. It concluded that only parts 1, 2 and 6 of the request fell within the scope of ss. 30(3) and 40(5) of FOIA and further relied on s. 24(2) of FOIA (national security). In relation to those parts of the request, it upheld the decision. In relation to parts 3, 4 and 5, the Second Respondent confirmed that the information was held. Some was available in the public domain and links were provided.

In relation to additional material held within the scope of parts 3 and 4 but not already in the public domain, the Second Respondent relied on ss. 24(1) and 31(1)(a)(b) (law enforcement).

19. In the course of the Commissioner's investigation the Second Respondent disclosed further information within the scope of parts 3 and 4, redacted in accordance with s. 40(2) of FOIA. In relation to the remaining withheld material within the scope of parts 3 and 4, the Second Respondent relied on ss. 21(1), 24(1) and 31(1)(a)(b).

20. The Appellant confirmed by letter to the Commissioner dated 10 May 2018 that he wished the Commissioner, the First Respondent, to consider parts1, 2 and 6 of the request.

7. In a decision notice dated 31 October 2018 the Commissioner decided that the Chief Constable was entitled to neither confirm nor deny whether it held any information within the scope of parts 1, 2 and 6 of the request relying on s. 30(3) FOIA. The decision notice did not deal with parts 3, 4 or 5 of the request. The Commissioner held that any information, if held, would be held in relation to investigation(s) into the individual named and would fall within s 30(1)(a) FOIA because it would be held for the purposes of an investigation into whether a person should be charged with an offence. The exemption was therefore engaged.

8. The Commissioner held that the purpose of s.30 FOIA is to preserve the ability of the police to carry out effective investigations and that the public interest in maintaining the exemption outweighed the public interest in issuing a confirmation or denial. In the light of her findings on s.30 FOIA the Commissioner did not go on to consider the other exemptions relied upon by the Chief Constable.

9. The Appellant then submitted an appeal on 7 November 2018. This reads as follows: -

1. The decision notice is not in accordance with the law.
2. The subject, Lauren Southern, is not, as far as I can tell, under criminal investigation. If she was, then she would, presumably have been arrested, summoned to court etc. Instead, she was barred from entering the UK. Prior to this, the police had ample opportunity to arrest, question, summons etc. Ms. Southern but did not.
3. Ms. Southern published a number of Tweets, videos etc. regarding her detainment in France. According to her, no accusation of her committing an offence was put to her.

10. The FTT issued an interim decision dated 14 August 2019: *Williams v Information Commissioner* (Allowed) [2019] UKFTT 2019_0244 (GRC) (03 October 2019). In its interim decision the FTT concluded that s.30(3) FOIA was engaged because the request was for information which is, or if it were held by Kent Police would be, by its nature exempt information by virtue of section 30(1) or (2) FOIA. However, the FTT concluded that the public interest in maintaining the exclusion of the duty to confirm or deny did not outweigh the public interest in confirming or denying that the information was held by the Second Respondent. The FTT explained: -

> 54. …We deal firstly with parts 1 and 2 of the request. At the date of the internal review… the fact that Lauren Southern had been stopped and examined under Schedule 7 had been confirmed in a written answer to a parliamentary question. We accept that Kent Police are in a better position to assess any harm that might flow from revealing that Lauren Southern was or was not questioned or detained under Schedule 7, but we find that any such harm flows from the response to the parliamentary question. By the time of the internal review, this harm would already have occurred as a result of this fact being in the public domain…

11. That decision has not been challenged and on 17 September 2019 the Chief Constable confirmed that information within the scope of parts 1 and 2 of the request is held, but not information within the scope of part 6.

12. Thus, when the case reached the First Tier Tribunal for a final consideration, the position was that the Chief Constable was not relying upon NCND in relation to the information in parts 1 and 2 of the request, and accepted that information was held, but stated that no information was held in relation to part 6 of the request. In relation to part 6, as we understand it, the Appellant does not dispute that the Chief Constable does not hold the information.

13. The FTT, in its final decision, decided that the information sought was 'held by the authority for the purpose of an investigation which the public authority has a duty to conduct with a view to it being ascertained whether a person should be charged with an offence' and therefore the exemption in s30(1)(a) FOIA applied. Having found that the public interest balance for the purposes of information to which s30(1)(a) FOIA applied, was in favour of non-disclosure, the FTT did not go on to consider the further exemption relied upon by the Kent Police, namely exempting the

requested material from disclosure under section 40 FOIA as containing personal information.

14. Thus, the issue before the UT was whether s30(1)(a) FOIA did, in fact, apply to the information sought. The UT decided that it did not because: -

> 67. The FTT erred in finding that Ms Southern had been the subject of a criminal investigation and the material requested was held for such purposes merely because she had been the subject of a Schedule 7 port stop. I am satisfied that the FTT erred … because it did not perform any fact specific analysis but incorrectly decided that material relating to a port stop under Schedule 7 would automatically be information held for the purposes of a criminal investigation (ascertaining whether a person should be charged with a criminal offence).
>
> 68. The FTT failed to identify whether there was any evidence or material in open or closed which established whether Ms Southern or any person had been or was currently (at the time of the Commissioner's review decision) the subject of any criminal investigation and whether the information requested under parts 1 or 2 of the request had been held at any time for such a purpose.

15. Although the Chief Constable canvassed other exemptions, in the UT, the UT declined to rule whether any of them were applicable, preferring to remit the case to the FTT with the directions set out at the start of this decision, to consider any further exemptions raised. As will be recalled the directions said that:

> The First and Second Respondents may rely on exemptions from disclosure under FOIA not previously relied upon before the FTT when it made the original decision on 5 March 2020.
>
> The parties may rely on evidence that was not before the FTT when it made the original decision on 5 March 2020

16. However, although the UT declined to consider further exemptions itself, it did set out at some length the other exemptions relied upon by the Chief Constable and the arguments made in support, and those arguments were re-made to us by Mr Basu QC in the hearing, on behalf of Kent police. They are referred to below.

THE EXEMPTIONS RAISED IN THIS HEARING

17. The Chief Constable claims exemption from the section1(1)(b) FOIA requirement to communicate any information falling within the scope of parts 1 and 2 of the request pursuant to the following provisions of FOIA: -

(i) s.30(1)(b) FOIA (investigations and proceedings conducted by public authorities);

(ii) s.31 FOIA (law enforcement);

(iii) s.40 FOIA (personal information);

(iv) s.24 FOIA (safeguarding national security); and

(v) s.23(1) FOIA to the extent it applies (which is neither confirmed nor denied ("NCND")) (information held by the Chief Constable, which was supplied to him by, or which related to, one of the intelligence services).

18. S.30 FOIA provides as follows, so far as is material: -

> (1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of—
> …
> (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
>
> (c) any criminal proceedings which the authority has power to conduct.
>
> (2) Information held by a public authority is exempt information if—
>
> (a) it was obtained or recorded by the authority for the purposes of its functions relating to—
>
> (i) investigations falling within subsection (1)(a) or (b),
> (ii) criminal proceedings which the authority has power to conduct,
> (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
> (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
>
> (b) it relates to the obtaining of information from confidential sources.
>
> (3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2).

19. Section 31 FOIA provides, so far as is relevant: -

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

(a) the prevention or detection of crime,

(b) the apprehension or prosecution of offenders,

…

(e) the operation of the immigration controls…

20. The Chief Constable dealt with the request (including determining the internal review) before 25 May 2018 and therefore the unamended form of s40 FOIA, which refers to the Data Protection Act 1998 (DPA) (rather than 2018) applies. The original form of s.40 FOIA provided: -

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and
(b) either the first or the second condition below is satisfied.

(3) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles, or
(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

(5) The duty to confirm or deny—

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

(7) In this section—
"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act.
"data subject" has the same meaning as in section 1(1) of that Act.
"personal data" has the same meaning as in section 1(1) of that Act.

21. Under section 23(1) FOIA:

> Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

22. The bodies listed in subsection (3) are included in a schedule, and cover security bodies as described in the witness evidence in this case. Section 23(5) of FOIA states that: -

> The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

23. The exemptions under sections 23(1) and 23(5) FOIA are absolute exemptions and therefore not subject to the public interest test set out at section 2 FOIA.

24. Section 24 FOIA reads, relevantly, as follows: -

> (1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.

> (2) The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.

THE RE-HEARING

25. For the purpose of the rehearing the Chief Constable filed a skeleton argument which explained why the exemptions listed above were relied upon. We refer to the Chief Constable's arguments further below.

26. The Chief Constable also filed witness statements, with open and closed versions. There is a statement dated 22 November 2021 from Inspector Nicholas Thompson, whose role is Counter Terrorism Border Policing at the Channel Tunnel and Port of Dover where he manages border policing activities. In his open statement Insp Thompson explains: -

> Schedule 7 examination has the purpose of determining whether a person appears to be a person who is, or has been, involved in the commission, preparation, or instigation of acts of terrorism. That determination is made through stopping, questioning, searching and detaining a person at a port or the border area in Northern Ireland. Schedule 7 also permits the examination of goods for the same purpose. In addition to this purpose, a Schedule 7 examination very often produces by-products that prove essential to Counter Terrorism, National Security and investigation of general criminality, particularly criminality related to organised crime. For example, when individuals who are involved in terrorism are subjected to Schedule 7 examination, the examining officers may be unable to determine sufficiently their involvement to a level that justifies arrest on suspicion of committing terrorist offences. In such cases, the by-product of examination will be an intelligence product that informs subsequent investigation and monitoring, thereby mitigating threats and potentially resulting in sufficient evidence eventually to charge terrorist offences.

27. Insp Thomson explains in relation to s40 FOIA that: -

> Examination records contain personal information relating to one or more data subjects such as their name, date-of-birth, religious and political affiliations, offending history and financial data. Any disclosure of that information to anyone other than the data subject would breach the Data Protection Act 2018. If the data subjects were to request records of their own examination, I would oppose disclosure because the data subject may exploit the information for terrorist or other criminal purposes. They may also publish the information. All this poses a threat to public safety, specifically because data subjects would gain an insight of what is or is not known about their activities and the revelation of

Schedule 7 tactics would inform development of counter-Schedule 7 tactics by terrorists and criminals.

28. In relation to public interest factors which would be especially relevant to s24 FOIA, Insp Thomson says: -

> Disclosure would have a detrimental impact upon the public interest due to the frustration of police Counter Terrorism activity that would result. While no two Schedule 7 examinations will be identical, the general approach to examination is identical. To be more precise, a Schedule 7 examination will be unique to the individual, so two or more persons may be under examination based upon the same grounds and while those examinations will share some similar characteristics, every examination will contain far more different characteristics. That is because every examinee will answer questions differently, which will develop further questioning unique to them. Also, each examinee will have different possessions, different material held on their digital media and perhaps intelligence held on them, all of which produces a unique experience for each examinee. Consequently, when individuals discuss, or even publish their personal experiences of Schedule 7 examination, while similarities will be apparent, an underlying strategy is not. An underlying strategy does, however, exist in the form of booklet that is used both to guide and to record the examination process. In March 2018, the booklet titled Examination Record Book, was unique to Kent Police and had been in use for a number of years. The practice continues today, but in April 2021, Kent Police adopted a generic version, titled National Examination Booklet, published by Counter Terrorism Policing HQ and in use across UK Counter Terrorism Border Policing. The booklet includes non-sensitive content that serves as a reminder to examining officers in respect of legislation and the rights and obligations of persons under examination. The booklet also has sensitive content that includes personal information of the person under examination. The booklet also details the type of information an examining officer should obtain and includes a free text log in which the examining officer will record the result of database checks, liaison with partner agencies and any other notes that will assist their determination of whether the person appears to be a person who is, or has been, involved in the commission, preparation, or instigation of acts of terrorism. Public disclosure of the sensitive sections of the booklet, particularly a completed booklet, would provide terrorists with a resource from which to develop counter-examination strategies. If that were to occur, the consequential frustration of Schedule 7 examinations would be detrimental to Counter Terrorism and therefore to National Security and public safety.

29. There is also a witness statement from Detective Chief Superintendent Peter Holdcroft posted to Counter Terrorism Policing Headquarters ("CTPHQ") and based at New Scotland Yard. He is the Head of CTPHQ Operations and one of his primary responsibilities is as the Head of the National CTP Borders Capability. His statement focuses on how information supplied by or relating to a body/bodies

specified in Section 23 FOIA can help inform the decision to use Schedule 7 powers, and the impact a disclosure would have on the working relationship with such bodies. He says in his open statement: -

> CTP Borders play a vital role in helping safeguard the UK from terrorist and counter state threats. As I have outlined above, the process to safeguard national security involves close working 'hand in glove' with national security partners. This close working relies on both parties having trust and confidence in the ability to protect sensitive information and protect covert methodologies utilised by UKIC in order to manage national security.
>
> The requested information relates to s.23 bodies because the operational guidance and paperwork is drafted having regard to the close working relationship with the security bodies via the Joint Border Team and so its dissemination would betray areas in which our s.23 body partners have an interest, or by its absence, do not have an interest. It is my professional opinion that the damage would also extend beyond the use of Sch. 7 TACT. It would wider impair the confidence our national security partners place in us, and our ability to protect information in the national security sphere. We rely on this confidence and our close working relationship to safeguard national security and the public.
>
> As an unintended consequence, as the counter state threat legislation mirrors that in Sch. 7 TACT, any disclosure would have serious implications for the UK's work in dealing with hostile states at the Border. In either case, disclosure of the requested information would reveal areas in which s.23 bodies have an interest (or a lack thereof).

30. These witnesses were available for questions at the oral hearing of the appeal, but the Appellant did not wish to ask questions and the Tribunal did not have anything upon which it needed clarification.

31. Neither the Commissioner nor the Appellant made any further written submissions to the Tribunal re-hearing the appeal.

32. The Appellant provided the Tribunal with a partial transcript of a media interview with Ms Southern following her release, in which she states that during questioning under Schedule 7, she was asked about her religious beliefs and ideology, and that her 'cell phone code' was asked for. The Chief Constable accepts this is what Ms Southern said in the media interview, but does not admit this is what happened when Ms Southern was examined under Schedule 7.

33. The Appellant's points raised in the hearing about the importance of disclosure of the information were twofold. First of all, he argued that it was not legitimate for the police to ask questions under Schedule 7 about a person's religious beliefs or ideology. Secondly, he argued that disclosure was important so that the public could see whether Ms Southern had been truthful about what she had said in the media interview.

34. The Appellant did not dispute that the information he has requested in parts 1 and 2 of the request would be personal data and that Ms Southern has not consented to its disclosure.

35. In relation to the Chief Constable's arguments in relation to s40 FOIA these are conveniently set out in the UT decision as follows: -

> 80. Mr Basu submitted that it is beyond doubt that any information under paragraphs 1 and 2 of the request held by the Second Respondent falls within the definition of data contained within s.1(1) DPA 1998.
>
> 81. He submitted that in relation to the first condition set out above, the first data protection principle set out in Schedule 1 DPA 1998 (given the force of law by s.4 DPA 1998) is that personal data be processed fairly and lawfully and shall not be processed unless at least one of the conditions in Schedule 2 DPA 1998 is met – and, in relation to sensitive personal data (as the target data would be here, if it existed) Schedule 3. The processing involved is not necessary for any of the purposes set out in Schedules 2 or 3 to DPA 1998 and there is no valid consent (explicit or otherwise) to the processing.
>
> 82. He submitted that in relation to the second condition, the [s.28 and] s.29 DPA 1998 national security and crime exemptions apply for the reasons set out below. The national security exemption applies where exemption is required for the purpose of safeguarding national security. The crime exemption applies to the extent that compliance would be likely to prejudice the prevention or detection of crime or the apprehension or prosecution of offenders.
>
> 83. Mr Basu further submitted that s.40(5)(b)(ii) of FOIA is activated by the national security and crime provisions of Part IV DPA 1998 referred to above and, in fact, disapplies the duty to confirm or deny, conferring absolute exemption.

36. In relation to s23 FOIA and s24 FOIA, again, the UT conveniently set out the arguments which have now been relied upon before us, orally and in the skeleton argument, and supported by witness statements: -

89. Mr Basu primarily relied on the national security exemption under section 24 FOIA…

90. He also submitted that, for the avoidance of doubt, any information falling within s.23(1) – information held by the Second Respondent which was supplied to it by, or related to, one of the intelligence services – would also be exempt. He submitted that this absolute exemption requires no explanation.

91. Mr Basu submitted that the s.24(1) FOIA qualified exemption applies because exemption from s.1(1)(b) is required for the purpose of safeguarding national security, having regard to the wide security and counter-terrorism purposes of Schedule 7 TACT.

92. He submitted that communicating information about the decision to stop one person pursuant to Schedule 7, and any custody records, but not another, would allow terrorists to use the FOIA to their advantage in order better to understand what the authorities knew about them. As a result, Mr Basu submitted that the Second Respondent cannot communicate this information concerning Ms. Southern because it risks either confirming that she is concerned in [commission, preparation or instigation (CPI) of acts of terrorism] or confirming that she is not concerned in CPI and because it risks (in the former case) revealing how much or how little is known about the acts of terrorism in question. In effect this submission was one of high principle because it would apply to information relating to the subject of any port stop – that all material generated by Schedule 7 stops is exempt from disclosure under s. 24 of FOIA. This does not require a specific factual analysis of Ms Southern's port stop, nor any information produced or held as a result.

DISCUSSION

37. The Chief Constable's case is that the information sought in parts 1 and 2 of the request amounts to personal information as defined in the DPA 1998 and the Appellant does not dispute that this is the case. It seems sensible to the Tribunal, therefore, to begin the discussion by asking whether this is personal information that can be disclosed.

38. Section 40(4) FOIA as it was at the time of the request has the effect that personal information is exempt from disclosure if any provisions in Part IV of the DPA 1998 would prevent a 'data subject' from having access to the personal data.

39. Sections 28 and 29 DPA 1998 were in Part IV of that Act and state that: -

> 28. (1) Personal data are exempt from any of the provisions of-
> (a) the data protection principles
> (b) Parts II, III and V, and
> (c) sections 54A and 55,
> if the exemption from the provision is required for the purposes of safeguarding national security.
>
> 29. (1) Personal data processed for any of the following purposes—
>
> (a) the prevention or detection of crime,
> (b) the apprehension or prosecution of offenders,
> (c) …
> are exempt from the first data protection principle (except to the extent to which it requires compliance with the conditions in Schedules 2 and 3) and section 7 in any case to the extent to which the application of those provisions to the data would be likely to prejudice any of the matters mentioned in this subsection.

40. We accept the evidence of the Chief Constable's officers set out above, in relation to national security and prevention/detection of crime matters. In particular we note that Insp Thompson states that: -

> If the data subjects were to request records of their own examination, I would oppose disclosure because the data subject may exploit the information for terrorist or other criminal purposes. They may also publish the information. All this poses a threat to public safety, specifically because data subjects would gain an insight of what is or is not known about their activities and the revelation of Schedule 7 tactics would inform development of counter-Schedule 7 tactics by terrorists and criminals.

41. It seems to us that the evidence of the officers provides sufficient reasons why the application of ss28 and 29 of DPA 1998 would mean that Ms Southern would not be given access to her own personal information (as contained in the information requested), and therefore the Appellant is also not entitled to disclosure. There are no public interest factors to be taken into account when considering s40(4) FOIA.

42. Even if that conclusion is wrong then in our view the personal data of Ms Southern is not disclosable in any event, pursuant to s40(3) FOIA. She has not consented to the disclosure. Materially, for the purposes of s40(3)(a)(i), the first data protection principle requires that personal data is processed (which includes disclosure) fairly. Section 10 of the DPA 1998 (as referred to in s40(3)(a)(ii)) refers to damage or distress caused by disclosure.

43. In relation to interpreting the first principle, set out in Sch 1 to the DPA 1998, the disclosure must also satisfy at least one of the conditions set out in Sch 2 to the DPA 1998 'relevant for purposes of the first principle'. Processing would be permitted if the data subject had consented to it (Sch 2, first condition). The other relevant condition that might apply for these purposes is that set out as the sixth condition in Sch 2, which would apply if it were to be established that the disclosure is necessary in order to meet the legitimate interests of the appellant.

44. For the purposes of the sixth condition, there is an additional consideration to be made before the gateway to provision of the information is open. Where a need for disclosure has been established as for the purposes of the appellant's legitimate interests, a further consideration must be made in respect of whether those legitimate interests in disclosure are outweighed by reason of prejudice to the rights and freedoms or legitimate interests of the data subject if it were to happen. The disclosure can only be made if the appellant's legitimate interests in it are not outweighed by Ms Southern's fundamental rights and freedoms.

45. In our view, the Appellant does not have a legitimate interest in the disclosure of Ms Southern's personal data. As set out above, the reasons he has given for wanting disclosure is establishing whether Ms Southern is correct in stating that she was asked about her ideological or religious motivations, and in establishing whether Ms Southern was telling the truth about what happened when she was examined under Schedule 7. Both of these reasons supporting the importance of disclosure seem very weak to the Tribunal.

46. In relation to the first point, we note that Schedule 7 TACT entitles a police constable, immigration or customs officers (examining officers) to stop, question and detain a person at a port or border area in order to determine whether the person appears to be a person falling within s.40(1)(b) TACT – in other words, whether they appear to be or have been concerned in the commission, preparation or instigation (CPI) of acts of terrorism. It must be common knowledge that at least some CPI of acts of terrorism may be motivated by a person's beliefs (religious or otherwise) or ideology. It would be an odd state of affairs if an examining officer was unable to ask questions about these issues during an examination. There is no law that we know

of which prevents the police from asking such questions. Discovering whether such questions were, in fact, asked cannot amount to legitimate interests in our view.

47. In relation to the second point, we are of the view that establishing whether Ms Southern was telling the truth in interview, is not a legitimate interest which could justify disclosure of her personal information, to the general public. Whether Ms Southern has been truthful or not really is a matter for her, and the Appellant (and others) can choose whether to believe her or not.

48. If, as we have found, there is no legitimate interest in disclosure of someone else's personal data, then there is no need to go on to consider whether disclosure is 'necessary' to achieve that legitimate interest, or to consider whether the legitimate interest outweighs the fundamental rights and freedoms of the subject of the personal data. However, we would just comment that it seems to us that the 'interests' would need to be of overwhelming importance before they could countervail the rights of a person not to have disclosed personal information in the form of answers provided to the police in a formal examination process. Any interests that the Appellant has in disclosure in this case are not, in our view, of overwhelming importance for the reasons set out above.

49. In relation to s23 FOIA, in the recent case of *Commissioner of the Police of the Metropolis v The Information Commissioner and Rosenbaum* [2021] UKUT 5 (AAC) it was held that section 23 FOIA provides the 'widest protection' of any of the exemptions under FOIA as it is designed to preserve the operational secrecy necessary for security bodies to function, and effectively FOIA cannot be used to obtain information about the activities of these bodies. The purpose of section 23(5) FOIA is to prevent inferences being drawn on the existence of types of information held, through the use of the neither confirm nor deny (NCND) approach.

50. We accept the evidence of DCS Holdcroft (which has not been disputed) that 'the requested information relates to s.23 bodies because the operational guidance and paperwork is drafted having regard to the close working relationship with the security bodies via the Joint Border Team and so its dissemination would betray areas in which our s.23 body partners have an interest, or by its absence, do not have an interest'.

51. Even if s23 FOIA does not apply, for the unchallenged reasons set out by the Chief Constable's witnesses as set out above (see paragraphs 27 and 28), it is our view that s24 FOIA is engaged and exemption from disclosure is required for the purpose of safeguarding national security.

52. In relation to the application of s24 FOIA, the Appellant argues that disclosure is in the public interest. While we can accept that there are public interest reasons for disclosing whether the information is held, given the subject area covered by the request, our role is to consider whether the public interest balance favours disclosing the information. In our view, the public interest in not prejudicing national security, as explained by Insp Thomson (see paragraph 27 above), far outweighs any public interest there might be in disclosing the contents of an individual's interaction with the police through the Schedule 7 process, and therefore the balance falls on the side of non-disclosure.

53. Having reached those conclusions, it is not necessary for the Tribunal to go and consider additional exemptions relied upon by the Chief Constable in s30 and 31 FOIA. The Tribunal has considered the CLOSED material available to it. It supports the conclusions reached above on the OPEN material and it is not necessary to refer to it further

54. For these reasons, this appeal is dismissed.

Signed Tribunal Judge Stephen Cragg QC Date: 12 December 2022