



**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
[INFORMATION RIGHTS]**

**EA/2010/0006**

**ON APPEAL FROM:**

**Information Commissioner's Decision Notice: FS50227776  
Dated: 7 December 2009**

**Appellant: THE COMMISSIONER OF POLICE OF THE METROPOLIS**

**Respondent: THE INFORMATION COMMISSIONER**

**Date of hearing: 16 and 17 June 2010**

**Date of Decision: 9 July 2010**

**Before**

**Annabel Pilling (Judge)  
Rosalind Tatam  
and  
David Wilkinson**

**Representation:**

For the Appellant: Ben Hooper  
For the Respondent: Jeremy Johnson

**Subject matter:**

Tribunal's powers s.58 (Late raising of exemptions)  
FOIA Qualified exemptions – National security s.24  
FOIA Qualified exemptions – Investigations and proceedings conducted by public authorities s.30  
FOIA Qualified exemptions – Health and Safety s.38

**Cases:**

*Baker v Information Commissioner and the Cabinet Office (EA/2006/0045)*  
*Archer v Information Commissioner and Salisbury District Council (EA/2006/0037)*  
*Department for Environment, Food and Rural Affairs v Information Commissioner (EA/2009/0039)*  
*Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth (EA/2007/0072)*  
*Crown Prosecution Service v Information Commissioner (EA/2009/0077)*  
*Home Office and Ministry of Justice v Information Commissioner [2009] EWHC 1611 Admin)*  
*Guardian Newspapers Limited and Brooke v Information Commissioner and the BBC (EA/2006/0011 and 0013)*  
*Department for Education and Skills v IC and Evening Standard (EA/2006/0006)*  
*Department for Culture Media and Sport v Information Commissioner (EA/2008/0065)*  
*Department of Trade and Industry v Information Commissioner (EA/2006/0007)*

**DECISION OF THE FIRST -TIER TRIBUNAL**

The Appeal is allowed for the reasons set out below.

The Tribunal substitutes the following Decision Notice to reflect this decision:

**SUBSTITUTED DECISION NOTICE**

**Dated: 9 July 2010**

**Public Authority: THE COMMISSIONER OF POLICE OF THE METROPOLIS  
New Scotland Yard  
Broadway  
London  
SW1H 0BG**

**Name of Complainant: Mr Neil Millard**

**The Substituted Decision**

For the reasons set out in the Tribunal's Decision, the public authority did not deal with the request for information in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 in that it did not serve a refusal notice citing all the relevant exemptions for withholding the information requested.

However, the public authority was not obliged to disclose the information requested as the exemptions in both section 24 and section 30(2) of the Freedom of Information Act 2000 are engaged and, in respect of each exemption, the public interest in maintaining that exemption outweighs the public interest in disclosure.

No action is therefore required.

## Reasons for Decision

### Introduction

1. This is an Appeal by the Commissioner of the Metropolitan Police Service (the 'MPS') against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 7 December 2009. The Decision Notice relates to a request for information made to the MPS under the Freedom of Information Act 2000 (the 'FOIA').

### The request for information

2. The complainant made a request under FOIA to the MPS on 25 July 2008:  
*"How much money has Croydon Police spent in each of the last three years on paying informants?"*
3. The MPS refused the request on 19 August 2008, relying on exemptions in FOIA, specifically:
  - a) section 41(1) (information provided in confidence);
  - b) section 30(2) (criminal investigations);
  - c) section 31(1)(a), (b) and (c) (law enforcement);
  - d) and section 38(1)(b) (health and safety).
4. The refusal notice set out the evidence of harm that could be caused by disclosure and an assessment of the public interest balancing test. The MPS considered that Covert Human Intelligence Sources ('CHIS') would be or would be likely to be identified from disclosure of the total amounts spent on informants and that this would result in substantial physical harm or mental trauma and a compromise to their right to privacy and private life. Additionally, the MPS considered that disclosure would undermine the trust and confidence of current and potential informants and would be likely to prejudice the prevention or detection of crime by reducing the flow of information to the police service and intelligence services.
5. The MPS concluded that while accountability is a strong factor favouring disclosure, there is a significant amount of accountability already in place and that it was not in

the public interest to disclose the information requested. In particular, the MPS already discloses the amount spent service-wide, that is, for the entire Metropolitan area not borough by borough.<sup>1</sup>

6. The complainant was dissatisfied and applied for an internal review on 26 October 2008. In particular he did not accept that disclosure of the information requested would lead to the identification of the CHIS, and therefore would not create an atmosphere of distrust between the police and CHIS, or encroach on their right to privacy. He also argued that the mere fact of the amount of money spent on CHIS payments being placed in the public domain would not, in itself, prevent others from coming forward and working with the police in the future.
7. The MPS conducted an internal review and notified the complainant of the result by undated letter.
8. In this review, the MPS overturned the reliance on section 41(1) and 31(1)(a)(b) and (c) and instead relied upon section 30(2)(b) (obtaining information from confidential sources) and section 38(1)(a) and (b) (endangering the physical or mental health of any individual or the safety of any individual). The MPS confirmed the arguments that harm and prejudice would be likely to occur should the information be released into the public domain. The MPS maintained that release of the total yearly payments for a single Borough would allow individuals to cross reference them with criminal and law enforcement agency activity and therefore be possible for a CHIS to be identified. The internal review also addressed the public interest balancing test and concluded that the information must be exempt as its disclosure would negatively affect the MPS's ability to fulfil its core function of law enforcement, preventing and detecting crime as well as to protect life.

#### The Complaint to the Information Commissioner

9. On 22 December 2008 the complainant complained to the Commissioner about the way his request for information had been handled.

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<sup>1</sup> Including Heathrow Airport there are 33 boroughs within the Metropolitan Police Service.

10. The Commissioner then investigated the complaint. In particular, he asked the MPS to consider the Decision Notice FS50123912 dated 20 January 2009 regarding a similar request made to Northumbria Police and to review its response in the light of the Commissioner's findings in that case. The MPS decided to continue to withhold the information and provided more reasoning to support the case for non-disclosure. During the investigation, the MPS was reluctant to provide the disputed information to the Commissioner and would only provide a limited amount of information orally, refusing to record figures in written correspondence.
11. The Commissioner issued a Decision Notice on 7 December 2009. He concluded that the MPS had not dealt with the request for information in accordance with FOIA:
- i) the exemptions provided in sections 38(1)(a) and (b) of FOIA are not engaged;
  - ii) the exemption provided in section 30(2)(a)(i) and 30(2)(b) of FOIA is engaged but that the public interest in maintaining the exemption did not outweigh the public interest in disclosure.
12. The Commissioner required the MPS to disclose the information to the complainant within 35 calendar days.

#### The Appeal to the Tribunal

13. The MPS appealed to the Tribunal on 4 January 2010.
14. The Appeal has been determined following an oral hearing on 16 and 17 June 2010.
15. The Tribunal heard evidence from two witnesses whose evidence had not been before the Commissioner. These were Assistant Chief Constable Patricia Gallan of the Merseyside Police who is the ACPO<sup>2</sup> Lead and Chair of the National Source Working Group, (CHIS) and National Undercover Working Group, and Detective

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<sup>2</sup> The Association of Chief Police Officers of England, Wales and Northern Ireland.

Inspector D<sup>3</sup> of the MPS, an experienced CHIS “Handler” and “Controller”, currently in the MPS Specialist Crime Directorate, Covert Source Management Unit at New Scotland Yard.

16. Although witness statements had been served in advance of the hearing, in accordance with directions from the Tribunal, it was of no little concern to us that the significant evidence each witness gave only became apparent in cross-examination, or after an invitation from Mr Johnson (for the MPS) for the witness to “expand” upon the witness statement or to provide detailed examples to support the rather bald assertions contained in the witness statement.
17. We were greatly assisted by Mr Hooper, for the Commissioner, in his reassessment of the Commissioner’s views in light of the evidence that was heard on the first day of the hearing. This could, and in our opinion should, have been avoided by the MPS providing (partly under confidential cover where required by the contents) full witness statements in advance as directed and not “ambushing” the Commissioner and the Tribunal with the revelation of significant evidence that could, and, in this case, did, change the complexion of the appeal. There are significant public costs incurred in holding hearings such as this, spanning two days and involving a number of participants from the MPS, the Commissioner’s Office and the Tribunal itself. The original requestor of the information would also be unaware of why and how the case had changed and the impact of the evidence provided during the appeal hearing. We agree with Mr Hooper’s comments that this was not a sensible use of public resources and we would urge the MPS to revise its approach to hearings such as these. As we are aware that this is not the first time the MPS has taken this approach to the preparation for an appeal before this Tribunal, there may be costs implications for the MPS in future cases.
18. We were also provided with an agreed bundle of documents and an agreed bundle of authorities.
19. Although we may not refer to every document in this Decision, we have considered all the material placed before us. We are unable to repeat parts of the submissions

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<sup>3</sup> We are satisfied that we should not reveal the witness’s full name as to do so could result in the inference that people he is known to be in contact with are or have been informants.

and evidence that we heard in closed sessions which we are satisfied should properly be kept confidential, as to reveal it would result in the publication of information that would be exempt from disclosure under FOIA.

### The Powers of the Tribunal

20. The Tribunal's powers in relation to appeals under section 57 of the FOIA are set out in section 58 of the FOIA, as follows:

*(1) If on an appeal under section 57 the Tribunal considers-*

- (a) that the notice against which the appeal is brought is not in accordance with the law, or*
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*

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

21. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives and hears evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether FOIA has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

### The Issues for the Tribunal

22. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.

23. The section 1(1)(b) duty of the public authority to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions. Where the information is subject to a qualified exemption, it will only be exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b)).

24. The issues for the Tribunal to decide are:

- i) whether the MPS could rely on exemptions raised for the first time before the Tribunal (that is, the exemptions provided in section 23 and section 24 of FOIA);
  - ii) if so, whether the exemption provided in section 23 and 24 of FOIA is engaged;
  - iii) whether the exemption provided in section 30(2) of FOIA is engaged;
  - iv) whether the exemption provided in section 38 of FOIA is engaged;
- and, if any exemption is engaged,
- v) whether in all the circumstances of the case the public interest in maintaining the exemption(s) outweighs the public interest in disclosure.

### Can the MPS rely on exemptions raised for the first time before the Tribunal?

25. In its Grounds of Appeal dated 4 January 2010, the MPS submitted that the Commissioner had erred in not finding that the exemption provided in section 24 of FOIA was engaged, despite the MPS not relying on this exemption. In Amended



Grounds of Appeal dated 27 January 2010, served with leave of the Tribunal, the MPS submitted that the Commissioner had erred in not finding that the exemptions provided in section 23/section 24 of FOIA were engaged. In fact, before us, the MPS did not pursue the argument that the Commissioner had erred in not considering an exemption not raised by it but submitted that it should be permitted to rely on the exemptions provided in sections 23 and 24 of FOIA in conjunction even though it was accepted that it was the MPS's error not to have relied on these exemptions earlier.

26. Section 23 of FOIA is an absolute exemption and provides as follows:

*23(1) 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).*

...

*(2) The bodies referred to in subsections (1) and (2) are-*

*(a) the Security Service,*

*(b) the Secret Intelligence Service,*

*(c) the Government Communications Headquarters,*

*(d) the special forces,*

*(e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,*

*(f) the Tribunal established under section 7 of the Interception of Communications Act 1985,*

*(g) the Tribunal established under section 5 of the Security Service Act 1989,*

*(h) the Tribunal established under section 9 of the Intelligence Service Act 1994,*

*(i) the Security Vetting Appeals Panel,*

(j) *the Security Commission,*

(k) *the National Criminal Intelligence Service,*

(l) *the Service Authority for the National Criminal Intelligence Service.*

27. Section 24 of FOIA is a qualified exemption and provides as follows:

*24(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.*

28. Sections 23 and 24 of FOIA are closely linked provisions; section 24 applies only where section 23 does not. The MPS submitted that it is accepted practice for these two exemptions to be relied upon in conjunction to avoid disclosure of the fact that a section 23 body is, or might be, involved, relying on *Baker v Information Commissioner and the Cabinet Office* (EA/2006/0045).

29. The MPS readily accepted that it was a mistake that these exemptions were overlooked. We were told that the initial refusal and review were dealt with internally from an essentially criminal investigations and law enforcement perspective, without consulting any other security bodies and no regard had therefore been given to whether disclosure of the information would have an impact on national security. The Decision Notice was issued on 7 December 2009 and over the Christmas period legal advice was obtained on challenging the Commissioner's decision. It was only at this stage that it was realised consideration should have been given to national security CHIS as well as "pure crime" CHIS.

30. Both parties accepted the "well established jurisprudence of the Tribunal"<sup>4</sup> that the Tribunal has discretion whether to consider exemptions (or exceptions under the Environmental Information Regulations 2004 (the 'EIR')) raised for the first time before it.

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<sup>4</sup> *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037), *Department for Environment, Food and Rural Affairs v Information Commissioner* (EA/2009/0039), *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth* (EA/2007/0072), *Crown Prosecution Service v Information Commissioner* (EA/2009/0077).

31. There is no higher court authority on this point. Mr Justice Keith expressly declined to rule on this issue in *Home Office and Ministry of Justice v Information Commissioner*<sup>5</sup>. The Tribunal has recently given permission for the Department for Environment, Food and Rural Affairs to appeal to the Upper Tribunal against a decision of this Tribunal not to allow it to rely on exceptions under the EIR that had been raised for the first time before the Tribunal. The main ground of appeal in that case is that the entire current line of Tribunal decisions is wrong, that there is no legal basis for the discretion that has been identified and that the Tribunal has an *obligation* to consider any exception or exemption raised by a public authority at any stage in the process.
32. The purpose of the FOIA, and the EIR, is to provide for the disclosure of information held by public authorities and the development of the Tribunal's jurisprudence on the late reliance on exceptions or exemptions arises from the underlying purpose of the legislation. We do not consider that Parliament intended for a public authority to refuse to disclose information and only properly consider and identify the basis for non-disclosure after a requestor has complained to the Commissioner, and/or the Tribunal unless there are reasonably justifiable circumstances. There is a risk that this would lead to the appeal process becoming more unfair for the requestor, more cumbersome and uncertain, costs being incurred and could lead public authorities to take a more "cavalier" approach to their obligations under FOIA or the EIR.
33. Against this, we do not consider that Parliament intended for a public authority to be required to disclose information that would otherwise be exempt, without any regard to the circumstances of the individual case.
34. We agree with the decisions of differently constituted Panels of this Tribunal that there is no obligation on the Tribunal to consider any exemption relied upon by a public authority that had not previously been relied upon; exemptions or exceptions raised for the first time before the Tribunal should only be considered if there is a reasonable justification.

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<sup>5</sup> [2009] EWHC 1611 (Admin) at paragraph 46

35. Having come to that conclusion, we considered whether in the circumstances of this case we should allow the MPS to rely on the exemptions provided in sections 23 and 24 of FOIA.
36. In this case, the MPS readily accepts that it was a mistake that these exemptions were not considered internally. It submits that as soon as it was aware that these exemptions were engaged, or potentially engaged, it put the Commissioner and the Tribunal on notice. It further submits that the Tribunal should consider the effect of a refusal to allow the MPS to rely on these exemptions, one of them an absolute exemption. If the MPS is correct in its submissions that these exemptions are engaged, a Tribunal decision that the public authority should disclose the disputed information would in the case of the section 23 exemption be contrary to 2(2)(a) of FOIA and, in the case of the section 24 exemption, potentially contrary to 2(2)(b) of FOIA.
37. The Commissioner does not specifically object to the late claiming of the exemption provided for in section 24 and submits that it is a matter for the Tribunal. Mr Hooper observes that the arguments relating to section 24 are, in effect, a “re-labelling” of the public interest arguments that had already been raised by the MPS in relation to the exemptions provided for in sections 30 and 38 of FOIA.
38. However, Mr Hooper submits that the Tribunal should not allow the MPS to rely on the exemption provided for in section 23 at this late stage. He drew our attention to disclosure by Suffolk Constabulary and Bedfordshire Police of amounts paid to CHIS; in each of these cases the total amount paid service-wide per year was disclosed, along with a caveat that the amount did not include any payments made to informants where funding may have been supplied by exempt bodies. While a requestor without detailed knowledge of the FOIA may not understand the significance of that caveat, it is clear that this wording has been adopted to maintain a neither confirm nor deny stance in relation to those bodies listed in section 23 (3).
39. In effect, Mr Hooper submits that the late raising of exemptions should be confined to those cases where the exemption that is claimed provides protection for third

party private interests. He submits that in this case the MPS has been dealing with the request for information throughout and that if section 23 was relevant it would have been raised by the MPS earlier and not considered for the first time only after independent legal advice.

40. We gave a preliminary ruling that we would allow the MPS to raise the exemption in section 24 of FOIA for us to consider; without considering at that stage the question of whether the exemption is in fact engaged. We are of the opinion that it is incumbent on the Tribunal to allow a public authority to rely on an exemption that has such potentially serious public implications. We were not satisfied in the circumstances of this case that there was any reasonable justification to allow the MPS to raise the exemption in section 23.

*Does the disputed information fall within the exemption in section 24 of FOIA?*

41. The use of informants, or CHIS, is seen by the MPS as a very important tool in combating criminal activities at all levels. It is public knowledge that law enforcement agencies receive information from CHIS, and that their use is regulated by legislation. Informants provide information regarding “pure crime” but it is public knowledge that there have also been informants in cases involving national security and that their use is critical to the effort to prevent terrorism.

42. It was common ground between the parties and accepted by the Tribunal that informants disclose information to law enforcement agencies under conditions of confidentiality and that confidentiality is strongly protected. We accept the evidence that information provided by CHIS cannot be replaced by other covert intelligence methods, such as undercover police officers, surveillance, telephone interception or listening devices. All those methods can only be deployed when the law enforcement agencies are already in possession of certain relevant information and each has certain operational limitations as well as resource implications. CHIS can provide potentially useful background and contextual information as well as hard information in advance of the commission of an offence. CHIS are therefore a versatile source of information and their versatility cannot be matched by other covert methods.

43. We do not doubt the benefits of CHIS in respect of general criminal intelligence and on national security, particularly in connection with the prevention of terrorism.

44. In taking oral evidence, we kept in mind throughout the MPS submission that exemption from section 1(1)(b) is required because disclosure of the disputed information would have the following negative effects both for criminal investigations and national security :

- (i) it would deter existing CHIS from continuing their relationship with law enforcement agencies, in particular those who could provide information regarding threats to national security (the 'retention' argument);
- (ii) it would deter potential CHIS from entering into a relationship with law enforcement agencies (the 'recruitment' argument);
- (iii) the release of any information about payments of rewards would increase the risk to individuals, whether CHIS or not, that they might, rightly or wrongly, be identified as CHIS (the 'identification' argument); and
- (iv) release of this type of information would assist in highlighting areas of operational vulnerability (the 'operational vulnerability' argument).

45. The two witnesses gave evidence as to the impact of disclosure of the disputed information on each of these arguments. Some of Detective Inspector D's evidence illustrating the impact of disclosure was given in a closed session; the content of this part of his evidence was regarded as confidential by the MPS and would have been exempt from disclosure under FOIA.

46. After hearing the evidence from DI D, the Commissioner no longer adopts the submissions made in his written skeleton argument that disclosure of the disputed information might not lead to the type of harm set out by the MPS, but he does not adopt a positive position that section 24 is or is not engaged in this case. He submits that if the Tribunal finds that section 24 is engaged, then the public interest in maintaining the exemption outweighs the public interest in disclosure.

47. The Commissioner had referred us and the witnesses to a number of instances where various disclosures of “high-level” information about informant expenditure have been made in the past by a number of police forces following other requests made under FOIA. There have also been disclosures of informant expenditure under the Audit Commission Act 1998<sup>6</sup>. The Commissioner initially relied on the fact that there was no evidence that the risks feared by the MPS had occurred as a result of this.
48. The Commissioner now concedes, after considering the evidence of DI D at the hearing, that there is evidence as to why the disputed information in this case should not be regarded as comparable with that disclosure in those other instances:
- a) DI D’s evidence as to the significance of geography; while populations might not be greatly dissimilar, service-wide disclosures plainly cover wider geographical areas than single London boroughs. His evidence was that CHIS would be more concerned with disclosure that relates to a particular locality;
  - b) The effect of local media reporting would serve to enhance the link with the local area and, especially given the febrile nature of the environment in which they operate, this would have an especially direct impact on local CHIS and their sense of insecurity that their confidentiality would be somehow compromised;
  - c) The examples of the concerns expressed to DI D by CHIS directly.

49. Assistant Chief Constable Patricia Gallan gave evidence in an open session.

50. For ACC Gallan, the most troubling aspect of the disclosure of the disputed information was the risk of the identification, or misidentification, of CHIS. She agreed that in her ACPO role she would have been made aware if there had been any known effect on the retention or recruitment of CHIS following disclosure of the amounts spent on CHIS by the police forces in Suffolk, Bedfordshire and Northumbria and as disclosed to the BBC following a request made under FOIA in

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<sup>6</sup> In the past, the totals spent on CHIS during 12 month periods by police forces have been disclosed under this Act.

relation to a number of police forces in the 2008-2009 financial year. However, she said that although no concerns had been specifically raised she would expect to see these concerns being raised over time. But she stressed that she did not consider these examples to provide a basis for a proper comparison with the disputed information in this case as these related to force-wide disclosures and this case concern an individual Borough within the MPS, and the force-wide figure for the MPS is already in the public domain.

51. In particular, she felt that if there were peaks and troughs in successive annual figures at a Borough wide level this could highlight when information had been given and therefore which informant(s) were likely to have been used. On a service-wide area such peaks and troughs are unlikely to lead to identification of individuals, but once the area has been reduced in size (a smaller population and a smaller geographical area) the risk of identification is greater. Payments to informants are made on a "results basis" rather than paid when information is received or, contrary to what we suspect is a widely held perception, informants being kept on a "retainer" or "salary". The risk of identification through the sudden arrival of a large amount of money is something that is considered as part of the risk assessment before any payment to a CHIS would be authorised. In some instances it would be necessary to arrange for smaller payments to be made over a period of time to avoid this risk. This therefore could not properly be regarded as a piece of information that could lead to "jigsaw" identification.

52. She also said that in her opinion, the amount spent on CHIS in a borough would inevitably reveal the extent of CHIS activity in that borough. If the annual amount was low or nil, that might suggest to criminals or terrorists that it would be safer to operate there than in another borough with a higher annual amount. Conversely, if the figure was particularly high, this might suggest a significant amount of CHIS activity and lead criminals or terrorists to move onto neighbouring boroughs where the perception was that there was less law enforcement activity and CHIS presence.



53. Mr Hooper skilfully dealt in cross-examination with the troubling issue of involvement by CHIS in crime, either as part of the law enforcement operation (for example, being in possession of drugs prior to the arrests of the main dealers) or in a wholly different offence after which the CHIS might make an attempt to avoid prosecution based on their status. The witness described that it might be necessary in some circumstances for a CHIS to be authorised to become involved in criminal activity if it was part of a wider operation but ACC Gallan explained that the police would generally go to great lengths to avoid a CHIS being put at risk of criminal prosecution in such circumstances. She said that a CHIS committing criminal offences would not be spared prosecution on the basis of their CHIS status.
54. We were more persuaded by the evidence of Detective Inspector D. We have already commented on the fact that in our opinion his substantive evidence should have been available to the Commissioner and the Tribunal in advance of the hearing. We found DI D to be, in some respects, an overly cautious witness. He did not, for example, accept that the Tribunal should have been provided with the disputed information and appeared to disagree with what we were told was the “MPS” view as to the level of sensitivity of certain pieces of information.
55. We agree that DI D is an expert witness in the field of CHIS. He has many years experience as a handler and controller of CHIS. He strongly believes that disclosure of the disputed information would have an immediate and significant effect as it would undermine the whole CHIS system.
56. He explained the CHIS system is based very much on relationships built on trust. In his experience, each individual who has agreed to undertake the role of CHIS has an expectation of complete confidentiality with regard to their identity and activities becoming known outside of their CHIS relationship. All require a significant amount of assurance that this will be the case. This expectation is reinforced by the law enforcement agency’s methodology, careful decision-making around acting upon intelligence provided by informants and the use of public interest immunity processes within the criminal courts. He also spoke of the “duty of care” owed to CHIS; if a law enforcement agency was compelled to reveal the identity of a CHIS, the costs of protecting that individual and their family could run to millions of pounds.

57. While he did not express strong concern that disclosure of the disputed information would lead to the identification or misidentification of CHIS, his evidence is that the “paranoia” of CHIS is such that any disclosure of any information that relates to CHIS would significantly erode the relationship of trust that is fundamental to the whole CHIS system and this would cause serious harm to the retention and recruitment of CHIS. It would not matter to a CHIS whether the disclosure was volunteered by the law enforcement agency or was ordered by the Commissioner or the Tribunal: the former infers a lack of understanding by the law enforcement agency and the latter a lack of control. It is, he said, the perception of the CHIS that is of paramount importance.
58. He gave evidence about three occasions during his time as a controller within the MPS when he had personally been challenged by CHIS regarding the release of information about expenditure on CHIS at a force-wide level, stating that the release of such information fuels the anxiety of CHIS and makes already highly insecure people feel even more worried about continuing to fulfil their role. These three individuals were long-standing CHIS and had a sufficiently strong relationship with their handlers and were persuaded to continue their role. He said that one factor in favour of maintaining their confidence was that the financial information was force-wide rather than relating to a smaller area.
59. In addressing the issue of previous disclosures of similar information, DI D observed that disclosure of the annual figure spent, for example, by the Suffolk Constabulary on CHIS might not have an impact on the retention and recruitment of CHIS, but that disclosure of, for example, the figure spent in Ipswich would. In the same way, he says that disclosure of the MPS figure raises concerns but does not result in an identifiable impact on retention and recruitment, but that once the figure begins to be broken down borough by borough, that impact would be felt very swiftly on the retention of CHIS. The impact on recruitment is harder to assess as it is not possible to say with any accuracy how many potential CHIS might be deterred by their fears in this regard.
60. Although the disputed information in this case could be regarded as superficially anodyne, we consider that there is much force in the retention, recruitment and operational vulnerability arguments (paragraph 44 above) as evidenced by the

illustrations that were given to us by DI D in closed session. Mr Johnson submits that the effect of disclosure “would be cataclysmic”. We found this to be unnecessarily strong language and certainly not supported by the evidence, although we accept that the effect *could* be.

61. We agree with the parties that the disputed information in this case can be distinguished from the disclosure in what without the oral evidence we might have regarded as comparable situations.
62. We accept the evidence that the disclosure of the amounts spent by Croydon police in a given year would have the impact DI D described on the retention of existing CHIS, the recruitment of potential CHIS and the highlighting of areas of operational vulnerability to the extent that law enforcement agencies would lose the services of some CHIS and would be hampered in recruiting CHIS. We placed weight on the evidence he gave of the three CHIS expressing concerns to him regarding disclosure of the amounts spent on CHIS at a service-wide level. We consider that this would be magnified if disclosure was made at borough level. We accept that this type of covert intelligence cannot be replicated, in particular in relation to providing information about the commission of future offences and in the prevention of terrorism, and therefore there would be a very real threat to investigations of criminal activity and to national security.
63. We are not satisfied on the evidence that disclosure would have the impact on the identification of individuals advanced by the MPS in its submissions. Given the weight of the factors identified above, we did not need to come to a decision whether the release of this information could, when combined with other information, lead to the identification of individual CHIS.
64. Having heard the oral evidence and in particular evidence in closed session from DI D we are satisfied that the exemption from the duty to disclose information in section 1(1)(b) of FOIA is required for the purpose of safeguarding national security and that the exemption in section 24 of FOIA is engaged.

*Does the disputed information fall within the exemption in sections 30(2) of FOIA?*

65. The relevant parts of section 30 of FOIA provide as follows:

*30(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-*

*(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-*

*(i) whether a person should be charged with an offence, or*

*(ii) whether a person charged with an offence is guilty of it*

....

*(2) Information held by a public authority is exempt information if –*

*(a) it was obtained by or recorded by the authority for the purposes of its functions relating to-*

*(i) investigations falling within subsection (1)(a) or (b),*

.... and

*(b) it related to the obtaining of information from confidential sources.*

66. It is common ground between the parties that this exemption is engaged in this case. We agree. Although it could be argued that the information was not recorded for the purpose of investigations but for accounting purposes, we agree with the Commissioner that it is appropriate to consider the purpose for which the information was initially recorded rather than the purpose for which it was collated into its present form. The collated figures held for accounting purposes would not have existed had an original record not been made of payments to CHIS for the purpose of investigations. The disputed information therefore falls within section 30(2)(a). The disputed information clearly relates to the obtaining of information from confidential sources and therefore falls within section 30(2)(b).

67. We are satisfied that as the information falls within sections 30(2)(a) and (b) the exemption is engaged.

*Does the disputed information fall within the exemption in section 38 of FOIA?*

68. Section 38 of FOIA provides as follows:

38 (1) Information is exempt information if its disclosure under this Act would, or would be likely to-

(a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual.

69. In light of our findings in relation to section 24 and section 30, we are not required to consider whether the exemption provided in section 38 of FOIA is also engaged.

On the evidence we heard (DI D suggested that this *might* be an *indirect* consequence) we would not have been satisfied that there is a “real and significant” risk that disclosure of the disputed information in this case would or would be likely to have the effect feared by the MPS.

*The Public Interest Test: General Principles*

70. Having found that the exemptions provided for in section 24 and section 30(2) of FOIA are engaged, we must therefore consider where the balance of the public interest lies in respect of the disputed information.

71. We consider that the following principles, drawn from relevant case law, are material to the correct approach to the weighing of competing public interest factors. The principles established by these cases do not form a rigid code or comprehensive set of rules and no Panel is bound by decisions of differently constituted Panels of this Tribunal. These principles are to be regarded as guidelines of the matters that should properly be taken into account when considering the public interest test, but each case must be decided on its own facts.

- (i) The “default setting” in FOIA is in favour of disclosure: information held by public authorities must be disclosed on request unless the Act permits it to be withheld (*Guardian Newspapers Limited and Brooke v Information Commissioner and the BBC (EA/2006/0011 and 0013) ('Brooke')* (at paragraph 82).

- (ii) The balancing exercise begins with both scales empty and therefore level. The public authority must disclose information unless the public interest in maintaining the exemption outweighs the public interest in disclosing the information (see, for example, *Department for Education and Skills v IC and Evening Standard* EA/2006/0006 (DfES) at paragraphs 64-65).
- (iii) Since the public interest must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought.
- (iv) The public interest factors in favour of maintaining an exemption are likely to be of a general character. The fact that a factor may be of a general rather than a specific nature does not mean that it should be accorded less weight or significance. “A factor which applies to very many requests for information can be just as significant as one which applies to only a few. Indeed, it may be more so.” (per Keith J at paragraph 34, *Home Office and Ministry of Justice v Information Commissioner* [2009] EWHC 1611 (Admin)).
- (v) Considerations such as openness, transparency, accountability and contribution to public debate are regularly relied on in support of a public interest in disclosure. This does not in any way diminish their importance as these considerations are central to the operation of freedom of information regimes and are likely to be relevant in every case where the public interest test is applied. However, to bear any material weight each factor must draw some relevance from the facts of the case under consideration to avoid a situation where they will operate as a justification for disclosure of all information in all circumstances (*Department for Culture Media and Sport v Information Commissioner*<sup>7</sup>).

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<sup>7</sup> EA/2007/0090 (*DCMS*) at paragraph 28

- (vi) The “public interest” signifies something that is in the interests of the public as distinct from matters which are of interest to the public (*Department of Trade and Industry v Information Commissioner*<sup>8</sup>).

*The Public Interest Test: Factors in favour of disclosure*

72. The following have been identified as factors in favour of disclosure:

- a) public interest in the use of CHIS;
- b) public interest in the allocation of resources for the purpose of investigating crime;

73. In his Decision Notice, the Commissioner concluded that disclosure concerning the expenditure on CHIS would enhance and inform public discussion on the issue without real and significant prejudice to police investigations. He conceded that the lack of greater detail in the disputed information would not necessarily demonstrate value for money, but maintained that its disclosure would still provide greater transparency and accountability compared to that which currently exists. When allied with other information, crime statistics for example, he stated that the disputed information may enhance debate on the effectiveness of the use of CHIS by the police.

74. However, it is difficult to see what the disputed information in this case would provide, in itself, to further this. Matters raised in cross-examination, such as the authorisation for CHIS to participate in low level crime as part of the wider operation, might well be interesting or of interest to the public but those are not matters that would be enhanced in any way by disclosure of the disputed information, the annual figure spent by Croydon police over three given years. The fact that the disputed information relates to the controversial issue of CHIS does not, by itself, carry any weight to support the public interest in its disclosure.

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<sup>8</sup> EA/2006/0007 at paragraph 50

75. The MPS accept that there is a public interest in the disclosure of the disputed information as it reveals, at a specified low level, how public money is spent and how the police budget is allocated. However, the MPS submit that this public interest should not be overstated because:

- (i) the overall amount spent service-wide is already disclosed, so to this extent the public interest is met;
- (ii) although, by its very nature, confidential information about expenditure on informants at a local level cannot be placed in the public domain, there is significant regulation of police use of informants and police expenditure such that the police are accountable to various regulatory bodies, including the audit commission (under the Audit Commission Act 1998) and the Surveillance Commissioner (under the Regulation of Investigatory Powers Act 2000).
- (iii) There is very considerable information in the public domain about the value of human sources to the police and intelligence agencies. Disclosure of the disputed information would not materially advance the public interest given the extent of the information already in the public domain.

76. We heard evidence that those operating as CHIS often have close links to criminality; it seems to us that is almost inevitable. DI D explained that some CHIS may see informing about crime as an alternative route to funding a lifestyle *through* crime. We accept that it is a matter of public interest that payments to these individuals are made out of public funds. We consider that there is not much public interest in disclosure of the borough figure as there is already annual force-wide disclosure. The disclosure of the borough figure would not provide much further information as to the expenditure of public funds. To make the disputed information in this case meaningful, it would need to be considered in light of further information, such as, for example, the number of informants the payments relate to, how much each was paid, what information they had provided, how many convictions followed or how many offences prevented or disrupted, what the nature of those offences were. Without more information, there is no further debate to be



had about value for money. We therefore consider that this factor is of little, if any, relevance in this case.

*The Public Interest Test: Factors in favour of maintaining the exemption*

77. We consider that the factors in favour of maintaining the exemption are:

- i) The potential adverse effect on the retention of existing CHIS;
- ii) The potential adverse effect on the recruitment of future CHIS;
- iii) The potential risk that operational vulnerabilities will be identified;
- (iv) The potential risk of individuals being identified, rightly or wrongly, as CHIS.

78. The MPS argued in its grounds of appeal that the Commissioner failed to accord sufficient deference to its views on these matters, that disclosure of the disputed information would have a significant disruption on police operations. In particular it submits that the MPS and its witnesses have considerable experience in dealing with CHIS and are experts whose evidence can only be undermined by other cogent evidence.

79. The Commissioner submits that it is for the Tribunal to decide whether the MPS is entitled to rely on any of the claimed exemptions and in this context it is not strictly relevant whether or not the Commissioner accorded sufficient deference to the MPS's views. In particular he submits that under FOIA (and save where section 24(3)<sup>9</sup> applies) Parliament gave the Commissioner and not the MPS, or any other public authority, the function of determining whether the exemptions apply in any particular case.

80. He accepts that weight should be given to the MPS's opinion as to the effect of disclosure but how much weight is given will depend on the circumstances of the case. He submits that it is not sufficient for the MPS to assert that harm will follow disclosure and assert that the Tribunal must accept that assertion. There must be, he submits, a reasoned explanation as to why the disputed information should not

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<sup>9</sup> Where a Minister signs a certificate requiring exemption under section 24 that shall be conclusive evidence of that fact.

be disclosed. As we have already stated, the significant evidence from the MPS witnesses was not known until the first day of the hearing. The Commissioner does not urge us to reject that evidence and has suggested no basis upon which we could do so. He submits that if a reasoned explanation is forthcoming, the Tribunal should accept that explanation and not reject it without strong or cogent reasons of its own.

81. We have accepted the evidence that the disclosure of the amounts spent by Croydon police in a given year would have the impact DI D described on the retention of existing CHIS, the recruitment of potential CHIS and the highlighting of areas of operational vulnerability to the extent that law enforcement agencies would lose, and would have more difficulty in recruiting, CHIS. This would be contrary to the public interest in protecting the ability of law enforcement agencies to use their operational expertise, including the use of CHIS, to fully investigate and prevent crime, not least acts of terrorism. We therefore consider that these factors in favour of maintaining the exemption provided in both section 24 and section 30(2) of FOIA should be given great weight.

*The Public Interest Test: Where does the balance lie?*

82. In making sections 24 and 30 of FOIA qualified exemptions, we accept that Parliament considered that disclosure of information protected by these exemptions (including information where the exemption is required for the purposes of safeguarding national security) would only be withheld from disclosure if the public interest balance lies in favour of maintaining the exemption. Having examined each in turn, we do not consider that the factors favouring disclosure carry great weight when applied to the disputed information in the instant case.

83. There is a presumption in favour of disclosure: information falling within section 24 or section 30(2) of FOIA must be disclosed unless in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure. Therefore, even though we consider that the factors favouring disclosure do not carry significant weight in this case, the information must be disclosed unless we consider that the factors in favour of maintaining the exemption are greater.

84. The balance here is between the public interest in transparency on the use of informants by law enforcement agencies and the accountability of the MPS in spending public funds and, on the other, the public interest in allowing law enforcement agencies to recruit, retain and deploy CHIS and so sustain an important tool in carrying out their work, in particular with regard to national security.

85. The Commissioner submits that if the Tribunal finds that section 24 is engaged, then the public interest in maintaining the exemption outweighs the public interest in disclosure. He maintains his position regarding the balance of the public interest in respect of section 30(2). As set out above, we have found that the exemption provided for in section 24 is engaged, and we agree with the Commissioner's submissions. For the reasons given already, we consider that disclosure of the disputed information would have a significant effect on the retention and recruitment of CHIS.

86. Disclosure on a force wide basis is already made and we are satisfied that meets the public interest in disclosure. In our opinion borough breakdown would not reveal anything further towards the public interest in accountability or transparency or enhancing public debate, but would have significant impact on the four areas as identified above (retention, recruitment, operational vulnerability and, to a lesser extent, identification).

87. We accept that we should consider the effect of disclosure of the disputed information on existing or potential CHIS, including in particular those in the Croydon area. Such individuals are likely to be members of criminal groups or closely connected with criminals. CHIS are given strong guarantees that their identities will be protected. In some instances, a prosecution may be stopped rather than risk the identity, or in some cases even the existence, of a CHIS being revealed. We accept the evidence of DI D as to the "paranoia" of those acting, or contemplating acting, as a CHIS and accept that they would view the disclosure of the disputed information as a breach of confidence that would significantly undermine their confidence in having their identities protected.

88. We are satisfied that the public interest in maintaining each exemption in isolation overwhelmingly outweighs the public interest in disclosure of the disputed information.

Conclusion and remedy

89. For the reasons given above we find that the exemptions provided for in sections 24 and 30(2) of FOIA are engaged and, in relation to each exemption, the public interest in maintaining that exemption outweighs the public interest in disclosure of the disputed information.

90. We therefore allow this Appeal and issue a Substituted Decision Notice.

91. Our decision is unanimous.

92. An appeal against this decision may be submitted to the Upper Tribunal. A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal within 28 days of the date of this decision. Such an application must identify the error or errors of law in the decision and state the result the party is seeking. Relevant forms and guidance for making an application can be found on the Tribunal's website at [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk).

Signed

Annabel Pilling  
Judge

Date 9 July 2010