



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2018/0244

**Decided without a hearing
On 4 July 2019**

Before

JUDGE BUCKLEY

PAUL TAYLOR AND MALCOLM CLARKE

Between

EDWARD WILLIAMS

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

CHIEF CONSTABLE OF KENT POLICE

Second Respondent

INTERIM DECISION

1. For the reasons set out below the appeal is allowed. The Commissioner should have concluded that the Second Respondent ('Kent Police') was not entitled to refuse to confirm or deny whether it held the information.
2. This interim decision deals only with the issue of whether or not Kent Police were entitled to refuse to confirm or deny whether they held the requested information. A further decision and, if appropriate, a substitute decision notice, will be issued once the tribunal has heard submissions from all parties on the applicability of any exemptions.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice FS50745420 of 31 October 2018 which held that Kent Police were entitled to rely on s 30(3) of the Freedom of Information Act 2000 (FOIA) and that the balance of public interest favoured maintaining the exemption.
2. We have read and taken account of a bundle of documents and written submissions from all parties.

Factual background to the appeal

3. This 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.
4. The information placed by the government in the public domain about this incident is contained in the response to a written question in the House of Lords on 21 March 2018 and a statement from a Home Office Spokesperson in March 2018.
5. The written question (HL6552) and answer are recorded in Hansard as follows:

Q Asked by **Lord Pearson of Rannoch** Asked on: 21 March 2018

Home Office

Lauren Southern

To ask Her Majesty's Government why Lauren Southern was detained under the Terrorism Act 2000 in Calais in March; and why she has been denied entry to the UK.

A Answered by: **Baroness Williams of Trafford** Answered on: 28 March 2018

It is longstanding policy not to disclose details of records which may be held in relation to individuals' arrival in the United Kingdom, as to do so would not be in the interests of national security.

Schedule 7 helps maintain public safety by allowing an examining officer to stop and question and, when necessary, detain and search individuals travelling through ports, airports, international rail stations or the border area to determine whether an individual appears to be someone who is or has been involved in the commission, preparation or instigation of acts of terrorism.

The decision to examine an individual using Schedule 7 is an operational one, undertaken independently by the police. You will understand that the Home Office cannot comment or provide any more specific information about why Ms Southern was stopped and examined.

6. The press statement issued by the Home Office reads:
A Home Office Spokesperson said:
“Border Force has the power to refuse entry to an individual if it is considered that his or her presence in the UK is not conducive to the public good”

Background:

- Lauren Southern was refused Leave to Enter the UK by Border Force in Coquelles (Monday 12 March).
- She was refused on policy grounds that her presence in the UK was not conducive to the public good.

Request

7. This appeal concerns parts 1, 2 and 6 of the request made on 14 March 2018 by Edward Williams for the following information.

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 stopped or detained 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.
8. Kent Police responded on 5 April 2018. It refused to confirm or deny that it held the requested information citing s 30(3) (investigations and proceedings) and s 40(5) (personal information) but provided links to Schedule 7 of the Terrorism Act 2000 and guidance issued by the College of Policing on that schedule.
9. On 10 May 2018 Kent Police conducted an internal review. It concluded that only questions 1, 2 and 6 fell within the scope of s 30(3) and 40(5) and further relied on s 24(2) (national security). In relation to those questions it upheld the decision. In relation to questions 3, 4 and 5, the Police 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 questions 3 and 4 but not already in the public domain, Kent Police relied on s 24(1) and 31(1)(a)(b) (law enforcement).

10. In the course of the Commissioner's investigation the Respondent disclosed further information within the scope of parts 3 and 4, redacted in accordance with s 40(2). In relation to the remaining withheld material within the scope of parts 3 and 4, the Police relied on s 21(1), 24(1) and 31(1)(a)(b).
11. Mr Williams confirmed by letter to the Commissioner dated 10 May 2018 that he wished the Commissioner to consider parts 1, 2 and 6 of the request.

Decision Notice

12. In a decision notice dated 31 October 2018 the Commissioner decided that Kent Police 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). The decision notice does not deal with parts 3, 4 or 5 of the request.
13. 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)(i) because it would be held for the purposes of an investigation into whether a person should be charged with an offence. The exemption is therefore engaged.
14. The Commissioner held that the purpose of s 30 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.
15. In the light of her findings on s 30 she did not go on to consider the other exemptions.

Appeal

16. The Grounds of Appeal are:
 - 16.1. The decision notice is not in accordance with the law.
 - 16.2. Lauren Southern is not under criminal investigation.

The Commissioner's response

17. The Commissioner repeats its conclusions set out in the Decision Notice.

Response of Kent Police (the Second Respondent)

Section 30(3)

18. Para 13 of Kent Police's response confirms that they are no longer relying on s 40(5). The response is therefore limited to sections 30(3) and 24(2).

19. Kent Police are empowered by statute to carry out investigations into suspected criminal offences. The purposes of schedules 7 and 8 of the Terrorism Act 2000 are to allow police forces to carry out investigations into suspected terrorism offences. Schedule 7 empowers police officers to question persons at a port or in a border area entering or leaving Great Britain in order to determine whether the person is, or has been, concerned in the commission, preparation or instigation of acts of terrorism. Schedule 8 provides the power to detain individuals for questioning under schedule 7. Therefore whenever an individual is stopped and questioned under these powers, it is for the purpose of a criminal investigation and s 30 is automatically engaged when one or both of these powers are exercised.
20. Whether a named person has or has not been charged with an offence has no bearing on whether or not the person has been the subject of an investigation. An investigation does not need to be current or live.
21. The overriding public interest lies in the safeguarding of security through an NCND response. If Kent Police were to confirm or deny holding information in relation to the named person, it would place into the public domain information about a potential terrorist investigation or the lack thereof. This could be used to gather a picture of Kent Police's current or recent terror investigations and could be used to undermine its national security systems. It could also create a precedent that steadily undermines Kent Police's ability to investigate matters relating to national security, making it difficult to refuse to confirm or deny in other cases. The public interest in knowing that the named person has been or is being investigated by Kent Police is very limited.

Section 24(2)

22. It is submitted that the mere fact of information entering the public domain as to whether or not the Second Respondent is or has investigated a named person for suspected terrorist activities undeniably compromises national security.
23. There is a clear line of authority for the principle that national security 'is a matter of vital public importance in which the Tribunal should pause and reflect very carefully before overriding the sincerely held views of public authorities' (**Quayum v Information Commissioner** [2012] 1 Info LR 332 at para 42. The sincerely held view of Kent Police is that the use of NCND (neither confirming nor denying that information is held) is required to safeguard national security, because confirming or denying whether or not the information was held would enable terrorists planning attacks on the UK to gain a clearer picture of the state of police intelligence and investigations into terror activities. This would either enable terrorists to continue their activities if a denial was given, or adapt their activities to avoid further investigation and/or detection. The threat from terror plots is heightened by either confirmation or denial.

24. Confirmation or denial would create a risk of other similar requests being made, leading to an ever-growing picture of the state of Kent Police's knowledge of current terror activities. This would enable terrorists to piece together a mosaic of intelligence, enabling terror activities to be adapted to avoid detection or to be pursued if confirmation or denial indicates a lack of policy awareness.
25. In relation to the public interest, Kent Police acknowledge the important public interest in protection of privacy and promotion of openness and transparency, but there is an overriding public interest in the safeguarding of national security at a time of extreme insecurity and heightened terror threat. Further there are no compelling considerations of transparency and openness in this particular case. Applying Savic there is no or very little public interest in knowing whether or not Kent Police possess the requested information.

Appellant's reply

26. In relation to s 30(3), the Appellant argues that for the exemption to apply, the only possible reason for holding the requested information must be for the purposes of s 30(1)(a)(i). It is not sufficient that the likely reason for holding the information falls within those purposes.
27. Further, according to Beghal v Director of Public Prosecutions [2015] UKSC 49: '69. Port questioning and search under Schedule 7 TA 2000 is not part of a criminal investigation. Its purpose is not the accumulation of an evidential case against the subject, if that follows, it is a separate matter. The subject is not a person charged for the purposes of article 6, which has no application to him. The appellant was at no stage a defendant to a criminal charge and no question of a breach of a right to a fair trial arises.
28. Schedule 7 is an immigration screening provision which allows questioning by the police, Customs and Excise and immigration officers, in certain circumstances. It does not fall within s 30.
29. The use of Schedule 7 powers is not necessarily for the purpose of safeguarding national security.
30. The Home Office admitted in Parliament on 21 March 2018 that Ms Southern had been questioned under Schedule 7 powers.
31. The public interest balance favours disclosure, because there would be no prejudice or harm to Kent Police's ability to investigate crime or to safeguard national security and accountability in the use of Schedule 7 powers, particular in relation to journalists, is in the public interest.

Legal framework

32. Under s 1(1)(a) FOIA any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether

or not it holds information of the description specified in the request. The duty of a public authority to comply with s 1(1)(a) is referred in the FOIA as 'the duty to confirm or deny'. Neither confirming nor denying is referred to in this decision as "NCND".

33. Section 2(1) provides that where any provision states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that the duty does not apply where either:
 - (a) the provision confers absolute exemption, or
 - (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information.
34. Sections 24(2) and 30(3) are qualified exemptions and therefore if those sections are engaged, the tribunal must consider whether, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information.
35. We have gained assistance from the Upper Tribunal in Savic v CO [2016] UKUT 535 which considered a number of NCND provisions. From that decision we draw the following general principles:
 - 35.1. NCND is a protective concept because, as and when it applies, it stops inferences being drawn on the existence of types of information and enables an equivalent position to be taken on other occasions.
 - 35.2. There is a need in each case to identify what information derives from a 'yes' or 'no' answer and to consider whether a 'yes' or 'no' answer has the impact specified in the relevant provision.
 - 35.3. The protection that NCND gives against the disclosure of the contents of the requested information is only a pragmatic consequence of its application and not a reason for it. It is therefore impermissible to introduce contents arguments at the NCND stage.
36. When deciding what information 'derives from' a 'yes' or 'no' answer, we think that it is legitimate to consider both any information expressly communicated by the public authority and any inferences the public would draw from the information.

Section 24 (2)

37. Section 24(2) provides:

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.

Section 30(3) Investigations and proceedings conducted by public authorities

38. Under s 30 (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).
39. Sections 30(1) and (2) provide that information is exempt information if it has been held by the authority for the purposes of certain investigations and proceedings. Under s 30(1) and (2):
- (1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purpose 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,
 - (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 [...]
 - (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).
40. Sections 30(1) and (2) are class-based exemptions. There is no requirement for a public authority to demonstrate prejudice for them to be engaged.

Terrorism Act 2000

41. Section 40 provides:

Terrorist: interpretation.

(1) In this Part “terrorist” means a person who –

(a) has committed an offence under any of sections 11, 12, 15 to 18, 54 and 56 to 63, or

(b) is or has been concerned in the commission, preparation or instigation of acts of terrorism.

(2) The reference in subsection (1)(b) to a person who has been concerned in the commission, preparation or instigation of acts of terrorism includes a reference to a person who has been, whether before or after the passing of this Act, concerned in the commission, preparation or instigation of acts of terrorism within the meaning given by section 1.

42. Section 1 defines terrorism:

(1) In this Act “terrorism” means the use or threat of action where –

(a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government [F1 or an international governmental organisation] or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious [F2, racial] or ideological cause.

(2) Action falls within this subsection if it –

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person’s life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public,

or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section –

(a) “action” includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) “the government” means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

43. Schedule 7 provides that the powers under Schedule 7 to stop, question and detain can only be exercised for the purposes of determining whether a person appears to be a person falling within section 40(1)(b).

Issues

44. The scope of the appeal is limited to parts 1, 2 and 6 of the request. Kent Police have confirmed that they only rely on s 30(3) and s 24(2).

Section 24(2)

45. The issues under s 24(2) are:

45.1. Is s 24(2) engaged, i.e. is exemption from the duty to confirm or deny required for the purposes of safeguarding national security?

45.2. If so, in all the circumstances of the case, does the public interest in maintaining the exclusion of the duty to confirm or deny outweigh the public interest in disclosing whether the public authority holds the information.

Section 30(3)

46. The issues under s 30(3) are:
- 46.1. Is the request for information which is, or if it were held by the public authority would be, exempt information by virtue of subsection (1) or (2)?
- 46.2. If so, in all the circumstances of the case, does the public interest in maintaining the exclusion of the duty to confirm or deny outweigh the public interest in disclosing whether the public authority holds the information.

The role of the tribunal

47. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

Discussion and conclusions

Section 30(3)

48. We find that the request is for information which is, or if it were held by the public authority would be, by its nature exempt information by virtue of subsection 30(1) or (2). It is information which would be held by the authority for the purposes of any investigation which is conducted by the authority and which in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has to power to conduct.
49. The case of **Beghal** concerns the question of the application of the self-incrimination privilege under article 6 of the European Convention on Human Rights, and therefore the issue of whether or not information gathered through Schedule 7 questioning could be admissible as evidence in court. The statement in **Beghal** that 'Port questioning and search under Schedule 7 TA 2000 is not part of a criminal investigation' must be seen in that context and is not determinative of the scope of s 30(1).
50. The scope of s 30(1) is not simply whether or not the questioning is part of a 'criminal investigation'. The test under s 30(1)(b) is whether or not the information has at any time been held for the purposes of any investigation which is conducted by the authority and which in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has to power to conduct.

51. The powers under Schedule 7 to stop, question and detain can only be exercised for the purposes of determining whether a person appears to be a person falling within section 40(1)(b). They can only therefore be exercised for the purposes of determining whether a person appears to be a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism. On this basis the Tribunal finds that the use of powers under Schedule 7 amount to an investigation within s 30(1), and that information obtained through questioning or the use of other powers by Kent Police under Schedule 7 would be held for the purposes of that investigation, which may lead to a decision by them to institute criminal proceedings.
52. The question for us is therefore whether or not the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in confirming or denying that the information is held.
53. If Kent Police were to confirm or deny that the information was held, what would be revealed? A confirmation or denial that information was held in relation to part 1 of the request would reveal whether or not a decision had been taken to invoke Schedule 7 Terrorism Act or other powers to stop/detain. In relation to part 2 it would reveal whether or not there was a custody or similar record. In relation to part 6 it would reveal whether or not any such material was held by Kent Police.
54. We conclude that the public interest in maintaining the exclusion of the duty to confirm or deny does not outweigh the public interest in confirming or denying that the information is held. We deal firstly with parts 1 and 2 of the request. At the date of the internal review (the date at which the public interest balance must be determined), 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. There is therefore no public interest in excluding the duty to confirm or deny. In the circumstances the public interest in maintaining the exclusion of the duty to confirm or deny does not outweigh the general public interest in transparency in confirming or denying that the information is held.
55. In relation to part 6 of the request, the Notice of Refusal of Leave to Enter issued to Ms Southern states that she was 'involved in the distribution of racist material in Luton'. This letter is not stated to be confidential and has since been made public. Any member of the public would infer from this letter that, at some stage, Kent Police had held the requested material. We find that no additional harm would flow from a confirmation or denial that

the material was held at the relevant date. In the circumstances the public interest in maintaining the exclusion of the duty to confirm or deny does not outweigh the general public interest in transparency in confirming or denying that the information is held.

Section 24(2)

Is section 24(2) engaged?

56. Is exemption from the duty to confirm or deny required for the purposes of safeguarding national security?
57. We conclude that it is not, for the reasons set out above on the public interest balance under s 30. In summary, in relation to 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. Any harm to national security flows from the response to the parliamentary question.
58. In relation to part 6, it is clear from the Notice of Refusal of Leave to Enter that Kent Police at some time held the requested material. Confirmation or denial would reveal whether or not they still held the material at the relevant date, but we cannot see how this would have any impact on national security.
59. We do not need to consider the public interest balance, but would have reached the same conclusion as we did under s 30 for the same reasons.

Consistency of response

60. Kent Police argue that a decision in this case would undermine their ability to neither confirm or deny in other cases, enabling terrorists to build a 'mosaic' picture of their monitoring of terrorist activities. We do not accept that this decision creates a precedent making it more difficult for Kent Police to refuse to confirm or deny in other cases.
61. We accept that in some circumstances it is important for a public authority to consistently give a NCND response to a particular category of request: if Kent Police adopted an approach whereby they only relied on the exclusion where, for example, they held the information requested, then it is easy to see that the cat is out of the bag in any event. We find that in this case the need for consistency does not apply: the reason for not applying a NCND response is that the information which would be 'revealed' by a denial or confirmation is already in the public domain. Kent Police is not prevented by this decision from maintaining a consistent approach in cases where information is not already in the public domain and preventing a picture being built up of their activities.

Next steps

62. The tribunal considered whether or not to issue a substitute decision notice. Such a notice would have required the public authority to
- (i) issue a fresh response confirming or denying whether it held information within the scope of the response and,
 - (ii) if it does hold such information, at the same time communicating the information to the complainant or,
 - (iii) if the Public Authority is to any extent relying on a claim that information is exempt information, giving the complainant a notice under s 17 FOIA specifying the exemption in question and, stating, if that would not otherwise be apparent, why the exemption applies and, if applicable, the reasons for claiming that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
63. The tribunal has decided that in the light of the Upper Tribunal judgments in **Information Commissioner v E Malnick and The Advisory Committee on Business Appointments** [2018] UKUT 72 (AAC) and **NHS England V Information Commissioner and Dean** [2019] UKUT 145 (AAC) that the consideration of potential further exemptions should be dealt with by this Tribunal through further submissions and deliberations rather than, in effect, by remitting the matter to the public authority and, as a necessary consequence, the Information Commissioner.
64. The tribunal was unsure as to whether or not **Malnick** was intended to apply in a 'gateway' appeal such as this one, i.e. when the public authority has either given a NCND response or has relied on, for example, s 12 or s 14, because the public authority has not yet complied with the duty in s 1(1)(a) FOIA.
65. However we concluded that the general tenor of **Malnick** and subsequent Upper Tribunal decisions is that the first tier tribunal, once seized, should determine the issue. Pragmatically, the matter is likely to be resolved more quickly if we determine the issue on the basis of further submissions rather than sending it back to the public authority. We have therefore issued appropriate case management directions.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 14 August 2019