



**NCN: [2024] UKFTT 167 (GRC)  
Case Reference: EA/2023/0273**

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

**Heard : Determined on the papers  
25 January 2024  
Decision given on: 26 February 2024  
Promulgated on: 1 March 2024**

**Before**

**TRIBUNAL JUDGE JACQUELINE FINDLAY  
TRIBUNAL MEMBER DAVID COOK  
TRIBUNAL MEMBER ROSALIND TATAM**

**Between**

**IAN HUDSON**

Appellant

**and**

**INFORMATION COMMISSIONER**

Respondent

## **Decision**

1. The appeal is dismissed.

## **REASONS**

### **Background and Request**

2. This appeal is brought under s.57 of the Freedom of Information Act 2000 (“FOIA”) against the Commissioner’s Decision Notice dated 4 May 2023 (“the DN”) with reference IC-188314-B6P3 which is a matter of public record.
3. The parties opted for a paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within Rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009, as amended (“the Rules”).

4. The Tribunal determined this appeal with the Appellant's two other appeals (EA/2023/0272 and EA/2023/0281) because they related to the same factual incident namely a disruption by drone sighting at Gatwick Airport ("the Airport") in December 2018.
5. In reaching its decision the Tribunal took into account all the evidence before it in the open bundle of 54 pages (A1 to D52) and a closed bundle of 2 pages lodged by the Appellant and made findings on the balance of probabilities.
6. The full details of the background to this appeal, the Appellant's request for information and the Commissioner's decision are set out in the DN.
7. On 10 May 2022, the Appellant made a FOIA request to the Sussex Police in the following terms:  
  
*"What date did Giles York personally first arrive at Gatwick Airport in December 2018 when there were reports of a drone?"*  
  
*If you can provide a rough time too that would be better."*
8. Sussex Police responded on 13 July 2022. It stated that under s.30(3) of the FOIA, it was unable to confirm or deny whether the information was held.
9. The Appellant requested an internal review on 13 July 2022. Sussex Police provided an internal review on 24 August 2022, in which it upheld its original position.
10. On 24 August 2022, the Appellant lodged a complaint to the Commissioner concerning his request.

## **The Decision Notice**

11. On 4 May 2023 the Commissioner issued the DN finding that the Sussex Police were correct to apply S. 30(3) of the FOIA to neither confirm or deny whether information was held. The Commissioner did not require further steps.
12. On 26 May 2023 the Appellant appealed the Commissioner's DN.

## **Legal Framework**

13. A person requesting information from a public authority has a right, subject to exemptions, to be informed by the public authority in writing whether it holds the information under s.1(1)(a) of the FOIA and to have that information communicated to him if the public authority holds it under s.1(1)(b) of the FOIA.
14. When determining whether or not the information is held the Commissioner and Tribunal should apply the normal civil standard of proof, on the balance of probabilities.

15. S.2(1) FOIA makes provision for the application of potential exemptions which may disapply the duty on a public authority under s.1(1)(a) and states that;

“(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that 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,

S. 1(1)(a) does not apply.”

16. S.30(1) is within Part II of FOIA and provides a specific exemption for “investigations and proceedings conducted by public authorities” and states that:

“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

1. whether a person should be charged with an offence, or

2. 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.”

17. S.30(3) of FOIA provides that: “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 subsections (1) or (2).”

18. The powers of the Tribunal in determining this appeal are set out in s.58 of the FOIA as follows:

(1) if on an appeal under s.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.

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

19. The Tribunal stands in the shoes of the Commissioner and takes a fresh decision on the evidence. The Tribunal does not undertake a review of the way in which the Commissioner's decision was made.

### **Grounds of Appeal**

20. The Appellant submits the following grounds of appeal:
- a) Mr Giles York was the Chief Constable of Sussex Police in December 2018 and has since retired.
  - b) The Appellant does not think the public interest has been given the weight it deserves.
  - c) The Commissioner assumed information is already in the public domain and gave undue weight to the movements of a Chief Constable and any consequences of disclosure.
  - d) The request is not specifically delving into the criminal investigation. The Appellant simply wants to know if Mr York went to the Airport and, if he did, the date. It is not expected that a Chief Constable is personally on site at criminal investigations. The Chief Constable's role is of overall responsibility for leading the Force, creating a vision and setting direction and culture.
  - e) The Appellant does not understand how a Chief Constable performing his duties can have any prejudice.
  - f) Mr York gave evidence at the Parliamentary Defence Committee on 29 October 2019. His answers and body language gave the impression that he was personally present at the Airport in December 2018.
  - g) When a Chief Constable is giving evidence to Parliament and MPs that are there to serve the interests of the people, then knowing the context of the evidence and whether it is true or false is of public interest.
  - h) This was one of the most significant aviation events of recent times which cost great losses to the airline industry, misery and financial loss to thousands of travellers and cost almost a million pounds of Sussex Police's spending.
  - i) The events caused and continue to cause reputational damage to the UK's drone industry.
  - j) There are concerns that Mr York's evidence was continuing a narrative that no images existed of a drone but a separate FOIA request to the Department for Transport records that images do exist and were distributed between agencies on 20 December 2018.

- k) It is key to Mr York's credibility to know if he was or was not at the Airport in December 2018. It is in the public interest to know if Mr York was or was not at the Airport in December 2018 and whether he saw the drone himself or not.

## **The Commissioner's Response**

21. The Commissioner submits that following grounds:

- a) The Commissioner is mindful of his role as an independent regulator and therefore the need to keep the merits of his decision under review (*Lubicz v IC and King's College London* [2015] UKUT 555 (AC) at [51])
- b) On 19-20 December 2018, following unannounced drone sightings close to its runways, the Airport was forced to suspend and/or cancel a number of domestic and international flights. This caused extensive disruption to a key national infrastructure resource whilst also raising a significant security threat generally.
- c) The Appellant does not appear to challenge Sussex Police's reliance on the exemption within s.30(3) FOIA. The exemption is engaged because the request concerns information potentially held by Sussex Police for the purposes of an investigation into whether a person should be charged with an offence or whether a person charged with an offence is guilty of it.
- d) The Appellant's grounds of appeal relate solely to the application of the public interest test. The Appellant asserts that the disclosure is in the public interest for the purposes of confirming whether other statements made by Mr York are true or false.
- e) There are powerful reasons in favour of maintaining the approach of not confirming or denying the information is held, the proposed disclosure does not appear to serve the purpose for which it is sought and there is little public interest in otherwise releasing the requested information to the public.
- f) Disclosure would undermine/prejudice the investigation into the disruption at the Airport. This is a serious investigation by Sussex Police and the criminal activity remains unsolved. In the event of further material information being released the investigation will continue and intensify. It is in the public interest to ensure that future information relating to the disturbance comes forward and that any future potential prosecution may proceed effectively. The release of the information could interfere with or undermine a prosecution and prevent those who caused the disruption from ever being brought to justice.
- g) Disclosure would assist would-be offenders in committing other criminal offences and/or inhibit future prosecutions. Disclosure about the circumstances, if any, in which a Chief Constable may attend the scene of a crime or suspected crime would interfere with the investigation of future offences as would disclose the level of police presence to be expected in the event of certain threats. There is public interest in such information not being known to the public as its release would assist potential offenders.

- h) Disclosure of when and how quickly members of the police force respond to certain threats may affect the willingness of members of the police force to attend crime scenes in the same way in the future. This has the potential to impact current and future policing and there is a strong public interest in preventing this from taking place.
- i) The exemption under s.30 is applicable as the information, if held, concerns an investigation into whether a person should be charged with an offence or whether a person charged with an offence is guilty of it this is because the information would, if held, relate to the ongoing and unsolved investigation (Operation Trebor).
- j) The information would, if held, relate to an ongoing and unsolved investigation arising from the interference with key aviation infrastructure represented by the drone presence at the Airport. This is a serious offence. The suspension and/or cancellation of services at the Airport arose due to genuine fears for the safety of members of the public as well as travellers.
- k) The public interest favours neither confirming nor denying that the information is held. There are significant factors in favour of maintaining that approach, largely relating to the ability of public authorities to safeguard the public by effectively investigating the incident at the Airport and by being able to decisively respond to similar threats relating to key UK infrastructure.
- l) The investigation into the events of 19-20 December 2018 involves inquiries relating to a serious unsolved crime.
- m) Disclosure is not key to testing the credibility of Mr York's evidence because confirmation of whether he attended the Airport is incapable of impacting his credibility by verifying or falsifying his reference to the appearance of the drone.
- n) There are few reasons why disclosure would be in the public interest save for preserving the general interest in the transparency of the operation of the police.
- o) The Commissioner submitted that the decision in respect of the public interest balance was correct and that the balance fell in favour of maintaining the exemption.

## **Conclusions**

- 22. In reaching its decision the Tribunal took into account all the evidence before it whether or not specifically referred to in this Decision. The Tribunal has not relied on any information in the closed bundle in reaching its decision. The Tribunal applied the legislation and case law as set out above.
- 23. In reaching its decision the Tribunal has borne in mind that in accordance with s. 58 of FOIA the role of the Tribunal is to consider whether the Commissioner's DN was in accordance with the law. Pursuant to s.58(2) the Tribunal may review any finding of fact on which the DN was based. The Tribunal can review all of the evidence provided and make its own decision.

24. The request arose from the sightings of two drones at the Airport on 19 and 20 December 2018. The Airport immediately closed its runway and suspended all flights resulting in disruption to many passengers and flights were re-routed. Sussex Police commenced an investigation into the incident in a multi-agency collaboration with other police forces and the security services. The incident attracted substantial national and international media coverage. The crime investigated by Sussex Police was an offence of 'serious disruption to an aerodrome' contrary to s.1(2)(b) of the Aviation and Maritime Security Act 1990 which carries a maximum penalty of life imprisonment. Mr Brazier, Head of Information Management, Data Protection Officer, in an email dated 2 February 2023 stated that no charges had yet been brought as a result of the investigation and the investigation will continue as new evidence becomes available.
25. In reaching its decision the Tribunal has borne in mind that s.30(3) is a qualified exemption. This means that the public interest test contained in s.2 of FOIA must be considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in confirming or denying whether the requested information is held.
26. In accordance with this guidance when considering the public interest in maintaining exemptions it is necessary to be clear what they are designed to protect. In broad terms the s.30 exemptions exist to ensure the effective investigation and prosecution of offences and the protection of confidential sources. They recognise the need to prevent disclosures that would prejudice either a particular investigation or set of proceedings, or the investigatory and prosecution processes generally including any prejudice to future investigations and proceedings.
27. The Tribunal has taken into account that for the exemption under s.30(1) to apply an investigation does not have to be ongoing and that the case may be resumed if new information came to light. Taking this into account the Tribunal considered it not relevant that the Appellant asserts that the Sussex Police are on record as saying there are no future realistic lines of inquiry.
28. The Tribunal found that releasing the requested information if held, would disclose to the public information about the circumstances, if any, in which a Chief Constable may attend the scene of a crime or suspected crime which could interfere with the investigation of future offences and could disclose the level of police presence to be expected in the event of certain threats. The disclosure could assist potential offenders.
29. The Tribunal found that disclosure which could lead to publicity and scrutiny about when and how quickly members of the police force respond to certain threats may affect the willingness of those member of the police force to attend crime scenes in the same way in future. There is the potential to prejudicially impact current and future policing and there is public interest in preventing this from taking place.
30. The Tribunal found that disclosure of the requested information would not test Mr York's credibility in the way indicated by the Appellant, which would mean there would be little or no public interest in the disclosure. The Tribunal found that the release of

information about Mr York's whereabouts would not confirm or undermine his credibility.

31. The Tribunal found that there was some public interest in disclosure in that the police service has a duty to enforce the law and investigate crime and the release of information would reinforce the commitment of the police force as an open and transparent service in respect of the information it holds.
32. However, on the basis of the findings above the Tribunal found that the public interest in favour of disclosure is outweighed by the public interest in favour of maintain the exemption.
33. The Tribunal found no error in the Commissioner's reasoning within the DN and there was no flaw in the exercise of his discretion of the public interest test.
34. Accordingly, the appeal is dismissed.

Signed: **Judge J Findlay**

**Date: 25 January 2024**