



Neutral citation: [2024] UKFTT 342 (GRC)

Appeal Number: EA/2023/0165

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

**Heard at Field House  
On 8 and 9 November 2023**

**Decision given on: 26 April 2024**

**Before**

**JUDGE OF THE FIRST-TIER TRIBUNAL GRIFFIN  
JUDGE OF THE FIRST-TIER TRIBUNAL SWANEY**

**Between**

**DAVID PEGG**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

First Respondent

**and**

**THE HOME OFFICE**

Second Respondent

**Representation:**

For the Appellant: Mr S Cragg KC  
For the First Respondent: Mr R Reichhold, of counsel  
For the Second Respondent: Mr C Knight, of counsel

**DECISION**

- 1. The appeal is dismissed.**
- 2. The decision to refuse to disclose the requested information on the basis that it is exempt pursuant to section 24(1) of the Freedom of Information Act 2000 (FOIA) is confirmed.**

**OPEN REASONS**

3. A separate annex containing the CLOSED reasons has been provided to the respondents which set out which exemption applies, and why. The annex containing the CLOSED reasons is subject to an order made by this Tribunal pursuant to rule 14 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, prohibiting its dissemination to any person or body other than the respondents to this appeal and their legal teams. In the interests of open justice, we have nonetheless sought to include as much detail as possible in these OPEN reasons, which may be freely read by anyone.

## **Background**

4. The appellant is an investigations correspondent at Guardian News & Media Ltd, which is the publisher of The Guardian and The Observer newspapers as well as theguardian.com. In 2020 the appellant, together with a colleague, began reporting on the British monarchy with a particular focus on the finances and political influence of the British royal family.
5. As part of his broader interest in reporting on issues relating to the monarchy including its cost to the public, the appellant made a series of requests to the second respondent (the Home Office) for information pursuant to the Freedom of Information Act 2000 (FOIA) to obtain a figure for the cost to the public of royal security.
6. The first request was made on 7 October 2020 and was for the cost of the provision of security to the royal family in each of the years 2017/18, 2018/19 and 2019/20. The Home Office gave a neither confirm nor deny response, citing exemptions on grounds of national security and health and safety contained in sections 24(2) and 38(2) of FOIA. The appellant requested an internal review and on 21 November 2020 the Home Office upheld its decision.
7. The appellant complained to the first respondent (the Commissioner). During the course of the Commissioner's investigation, the Home Office accepted that it did in fact hold the information but withheld it citing the exemptions contained in sections 24(1) and 38(1) of FOIA. On 24 January 2022 the Commissioner issued a decision notice (the January 2022 decision) upholding the Home Office's application of the exemptions.
8. The second request was made on 5 April 2022 and was for a single aggregate figure for the cost of security provided to the royal family for a ten-year period from 2011 to 2020 inclusive. The appellant hoped that by broadening the scope of the request, it would mitigate the Home Office's security concerns. The Home Office confirmed that it held the information, but rejected the request, stating that the cost of complying would exceed the appropriate limit. The Home Office suggested that the appellant refine his request so that the cost of complying was more likely to fall under the appropriate limit.
9. The appellant therefore made a further request, this time for a single aggregate figure for the cost of providing security and protection to the royal family for the five-year period from 2016 to 2020. This was rejected on the basis that the cost of complying would exceed the appropriate limit. Once again, the Home Office suggested that the appellant should further refine his request to reduce the cost of complying below the appropriate limit.
10. On 6 June 2022 the appellant made his fourth request for information to the Home Office in the following terms:

A single, total aggregated figure for the cost of providing security and protection to the royal family for the three-year period covering 2017/18, 2018/19 and

2019/20. Please provide this as a single aggregate figure for the three-year period, and NOT separate figures for each year in the period.

11. By letter dated 2 August 2022 the Home Office responded, refusing to provide the requested information relying on sections 24(1), 31(1) and 38(1) of FOIA. On 3 August 2022 the appellant requested an internal review of that decision. The Home Office maintained its decision in a letter dated 16 November 2022.
12. On 28 November 2022 the appellant complained to the first respondent (the Commissioner).
13. The Commissioner made a decision on 16 February 2023. That decision is the subject of this appeal, which was lodged on 16 March 2023.

### **The Commissioner's decision**

14. In his notice dated 16 February 2023 the first respondent gave the following reasons for his decision:
  - (i) The appellant made a previous request for the costs of security and protection for the royal family for three separate years. The Commissioner relies on his decision in case IC-81552-H4L0 as the request in that case concerned similar data and the arguments and principles applied there also apply directly in the present case.
  - (ii) There is an obvious and weighty public interest in safeguarding of national security.
  - (iii) Section 24 is not an absolute exemption and the public interest may favour disclosure.
  - (iv) Having considered the appellant's arguments, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption.
  - (v) In light of the decision in respect of section 24(1), the other exemptions have not been considered.
15. In IC-81552-H4L0 the Commissioner gave the following reasons for his decision:
  - (i) The Home Office was wrong to neither confirm nor deny holding the requested information, as it accepted during the investigation that it did in fact hold the information.
  - (ii) The Home Office acted correctly in relying on section 24(1) of FOIA.
  - (iii) The balance of the public interest favoured maintaining the exemption.
  - (iv) The observations made by the House of Lords in SSHD v Rehman [2001] UKHL as summarised in EA/2006/0045 regarding 'national security' are relied on.
  - (v) In line with established caselaw, the word 'required' in section 24(1) means 'reasonably necessary'.
  - (vi) It is not necessary to show that disclosing the information would lead to an immediate threat to the UK, the exemption can also be engaged to prevent a disclosure that would have adverse consequences.

- (vii) Disclosure of the requested information would be of interest and of value to an individual or organisation intent on criminal or terrorist activity against members of the royal family. This, in turn, would threaten national security.
- (viii) Membership of the royal family extends much further than HM The Queen to others who work, often in a wide range of social contexts, which is also of national significance and therefore of direct and immediate relevance to national security.
- (ix) The appellant's international comparison data is not directly analogous.
- (x) The Home Office evidence of past motivated intruders whose activities had posed a real and immediate threat to relevant individuals was persuasive. Disclosing the requested information would add to the danger to members of the royal family from any other individuals who would be likely to emerge in the future.
- (xi) There is weighty public interest in the Home Office being open and transparent about its expenditure including, where possible, on security matters. General information about the royal family is of interest to the public and widely reported in the media.
- (xii) Safeguarding national security is a matter of fundamental public interest and its weight can be matched only where there are also equally fundamental public interests in favour of disclosure.
- (xiii) Taking into account the submissions and the withheld information, the balance of the public interest lies in withholding the information because disclosure would be or would be likely to be detrimental to national security.
- (xiv) The Home Office correctly applied section 24(1) and light of that, it was not necessary to go on and consider the exemption pursuant to section 38(1) of FOIA.

### **The appellant's case**

16. The appellant essentially contends that the Commissioner has erred in his application of the public interest test and has wrongly concluded that the weight of the public interest falls in favour of maintaining the exemption.

### **The appeal hearing**

17. The hearing of this appeal took place on 8 and 9 November 2023. The appeal was heard by a panel of two judges of the First-tier Tribunal rather than the usual composition of a judge and a lay member or a judge and two lay members. This was because the Home Office asserted that there was a risk of the appearance of bias. The risk arose because counsel for the appellant, Mr Stephen Cragg KC, is a fee paid judge of the First-tier Tribunal who sits in the General Regulatory Chamber, including on information rights appeals. The Home Office concern was that the appearance of bias arose in relation to tribunal lay members who had sat with Mr Cragg in his judicial capacity, not that there was any actual bias.
18. On 3 August 2023 the Chamber President made a direction pursuant to paragraph 6 of the Composition Statement that the composition of the hearing would be varied by substituting a judge in place of 'another member'.
19. The hearing consisted of an OPEN session and a CLOSED session.

## The evidence

20. We had an OPEN bundle consisting of 539 pages and a CLOSED bundle which included a letter dated 26 October 2021 from the Home Office to the Commissioner (the Home Office's response to the complaint) and the CLOSED witness statement of Mr Thomas Rutherford. We were also provided with detailed skeleton arguments by Mr Cragg and Mr Knight and a bundle of authorities. During the hearing we were provided with a copy of a provision of US law which specifies the powers, authorities and duties of the United States Secret Service. This was adduced in response to a question from the Tribunal about whether there was any statutory obligation upon the United States Government to publish details of its spending in relation to the persons the Secret Service is required to protect.
21. The appellant provided a witness statement but was not cross-examined and the tribunal had no questions for him. Mr Rutherford gave evidence for the Home Office in both the OPEN and CLOSED sessions. Mr Rutherford is a senior civil servant within the Home Office with responsibility for the Royalty, VIP and MP Security Unit (RVIP). RVIP is responsible for developing and delivering the Government's system to mitigate the risk of assassination of high-profile figures through protective security measures and provides the secretariat to the Executive Committee for the Protection of Royalty and Public Figures (RAVEC). As head of RVIP Mr Rutherford has overall responsibility for and oversight of FOIA requests received by the Home Office in relation to Royal and VIP protection matters.
22. In the OPEN session Mr Rutherford was cross-examined as to the three examples of attacks/attempted attacks on members of the royal family contained in paragraph 18 of his statement. He stated that were the requested information to be disclosed there would be two main consequences:
  - (i) the ability of an individual to use the requested information together with other publicly available information, known as the mosaic effect; and
  - (ii) the increased confidence of an individual in being able to carry out an attack that comes with that combined information.
23. Mr Cragg explored the following in his cross-examination:
  - (i) Whether there was a direct link between the high-level budgetary information requested and the attacks referred to in paragraph 18. Mr Rutherford confirmed that there was not.
  - (ii) That none of the attacks referred to in paragraph 18 were deterred by a lack of information. Mr Rutherford accepted this but stated that in his view, the less information that is publicly available, the smaller the opportunity for attacks. He acknowledged that reducing the amount of publicly available information will not prevent all potential attacks.
  - (iii) What harm could come from the disclosure of high-level budgetary information. Mr Rutherford indicated that the money spent on protection covers a range of activities over and above simply manpower and that he could provide a more detailed response in his CLOSED evidence.

- (iv) Why the requested information would be of substantial interest to an attacker. Mr Rutherford indicated that in the examples referred to in his statement, the individuals had used seemingly innocuous information which would not obviously give rise to an ability to draw inferences. Mr Rutherford explained that this information together with the requested information could give rise to a greater level of confidence as to who may or may not be subject to security arrangements.
- (v) Whether the examples cited demonstrate that the requested information if disclosed would lead to a real and substantial increase in risk. Mr Rutherford stated that they do in part.
- (vi) Whether the requested information would show where protection capacity may or may not be focused. Mr Rutherford stated that the Home Office's concern is not solely about the royal family. This is because the total amount granted to the police for security is in the public domain. If the amount used for the protection of the royal family were disclosed, this would provide valuable information about the remainder as a result of the mosaic effect by combining the requested information with other publicly available information. Mr Rutherford indicated that he would be able to amplify this point in his CLOSED evidence.
- (vii) The appellant's contention at paragraphs 34 and 35 of his statement that the Home Office's argument for refusing to release even an aggregate figure is mathematically unsound. Mr Rutherford stated that what those paragraphs do not do is deal with the confidence of potential attackers and what information that they are likely to consider useful. Mr Cragg explained that he was dealing with the point that future requests might reveal something when combined with the present request. Mr Rutherford accepted that any future requests would be considered separately and that an exemption could be engaged to mitigate the risk arising from the mosaic effect at that point.
- (viii) The Home Office's approach to the appellant's example of the budgetary information released by the US Secret Service. Mr Rutherford stated that what information the Secret Service discloses is a matter for them. He stated that the US and the United Kingdom have very different security systems. Mr Rutherford indicated that he could explore why the nature and detail of information disclosed by the Secret Service was not a useful comparator in more detail in his CLOSED evidence.
- (ix) The relevance of the four specific examples referred to in paragraph 35 of his statement. Mr Cragg suggested that the research carried out was relatively low level and involved actual physical observation of security measures and that there was no suggestion that the individuals were motivated by high level budgetary information. Mr Rutherford accepted that there was an element of this, but not that the reconnaissance was necessarily low level. He also stated that there was detailed online research in which a significant interest in the security presence was shown. Mr Rutherford once again emphasised the seemingly innocuous information that can be combined creating the mosaic effect.

In re-examination Mr Rutherford was taken to the sentencing remarks in respect of two of the examples. He stated that they demonstrate the lengths that a motivated individual will go to by way of research before carrying out an attack. He reiterated the potential seriousness of an incident and the potential harm that could be caused.

The second of the two examples revealed a person who was concerned about how he would overcome security measures, which in Mr Rutherford's view goes to the heart of the concern about the drawing of inferences and the confidence in carrying out an attack.

- (x) How the high-level requested information could have assisted in the examples given. Mr Rutherford indicated that he could provide more detail in his CLOSED evidence but stated that the requested information could be combined with publicly available information such as police salaries to work out the number of individuals that might be involved in providing security. He stated that such information may also enable inferences to be drawn about who does not receive security. Mr Rutherford stated that he could not give examples of people who had used information such as the requested information.
- (xi) How the requested aggregated figure for a three-year period could enable an individual to draw a reasonably accurate picture. Mr Rutherford indicated that the more important point here is the confidence point. He stated that when the requested information is combined with other publicly available information, such as about police salaries, it increases the level of confidence the individual can have in the inferences they are drawing from the information. Mr Rutherford emphasised that it was not the accuracy of the inferences that was in issue, but the increased confidence that an individual may feel, i.e. that they would believe that their research had provided reliable conclusions rather than speculative guesswork, thereby increasing their confidence in carrying out an attack.
- (xii) Whether by saying that the requested information would not add much to public scrutiny, the Home Office is accepting that the information is not useful to anyone. Mr Rutherford rejected this suggestion. He acknowledged that the appellant seeks to create an accurate picture of what is being spent and how it is being spent. The Home Office concern is how a potential hostile actor might use that information.
- (xiii) Whether Mr Rutherford could give more detail about his personal experience. Mr Rutherford stated that he had been at the Home Office since 2009 in a variety of operational, policy, and information management roles and had experience in handling FOIA requests over a number of years in a variety of contexts. He stated that he would be able to provide more details in his CLOSED evidence.
- (xiv) Whether the figure of £128 million referred to in paragraph 15 of his statement as referenced in Summers v Information Commissioner & The Commissioner of the Police for the Metropolis (EA/2011/0186) was the total figure for diplomatic and royal protection for 2010 and whether that was a slice of the total budget for that year. Mr Rutherford confirmed that this was the case.

In re-examination Mr Knight asked to what extent the evidence in Summers that 80-90% of costs attributed to SO16 (the diplomatic protection group) related to manpower was accurate. Mr Rutherford confirmed that the figure rang true and that he could comment further in his CLOSED evidence. Mr Knight also asked about the figure of £128 million and whether what is set out at paragraph 45 in Summers assists in understanding the extent to which the figure covers the same/different/slightly different ground to the requested information. Mr Rutherford stated that it was broadly

similar and that it was a total figure that covered a range of security for a range of individuals beyond just the royal family.

24. For the purposes of the CLOSED session, Mr Cragg provided a list of points to be raised with Mr Rutherford as follows:
- (i) Paragraph 14 – redacted. Who are the people mainly protected?
  - (ii) The particular assertions in both para 22 and para 23 need to be explored to see if there is any evidence to support what is said.
  - (iii) In relation to paragraph 24, what is the evidence relied upon, and taking into account Mr Pegg’s points at para 34 of his witness statement.
  - (iv) Test the assertions in 29-33 as to whether in fact any confidence and perception issues would be raised by the disclosure of this information, in particular the redacted information at paragraph 31.
  - (v) The points made about the availability of the information are unclear in the open versions of paragraph 48 and 49.
  - (vi) Explore the redaction at para 56 as to why the information would not be useful for indicating whether money is spent proportionately, where the same information would be of great use to those with malign intent.
25. At the conclusion of the CLOSED session, we confirmed that we were satisfied that the points had been adequately explored and asked that Mr Knight prepare a gist of the CLOSED session for the appellant. We are grateful to Mr Knight for doing this and confirmed our approval of the gist in the following terms:

Counsel for the Home Office, the Information Commissioner and the Tribunal explored with Mr Rutherford each area of his open evidence in which he indicated that he could give more detail in closed session. At the close of the session, the Tribunal and counsel for the Information Commissioner, checked what had been covered against the six points specified by the Appellant to be raised with Mr Rutherford in closed, and asked a small number of additional questions to ensure all aspects had been sufficiently raised.

The areas Mr Rutherford revisited in his closed evidence were:

- His personal experience and expertise in different roles within the Home Office, which he also explained had been the subject of security advice not to be discussed in open.
- The redacted text in paragraph 14 of his statement, discussing the cohort in receipt of protective security authorised by RAVEC.
- Further detail, arising from paragraphs 22-23 of his statement, as to why he was confident that disclosure would be useful to hostile actors and why the level of risk would rise in the light of disclosure. It was pointed out that part of the picture which would inform the inferences hostile actors might draw was media speculation in connection with protective security matters



(notwithstanding a lack of official confirmation), including speculation as to what the disclosed information would show.

- Exploration of the redacted text in paragraph 24 of his statement and the use of aggregation in the request more generally.
- Emphasis on the point that disclosure would reveal not just the sum attributable to the royal family, but also the sum attributable to the remainder of the cohort, and the particular security risks arising from that.
- Discussion of the reasons why the comparison with the US Secret Service budget information was not a helpful one.
- A detailed explanation of the particular operational model used for protective security provision in the UK.
- Some further discussion of the examples of attacks set out in the statement and the utility of disclosure to attackers in a similar context, and what the PSG is used for.
- In consideration of the evidence given in paragraphs 48-50 of the statement, Mr Rutherford was content that the redacted text in paragraphs 48 and 50 could be put in open.
  - The redacted text in paragraph 48 reads: “Budget models can be broken down by principal, events, and location, as well as by operational support (e.g. equipment) and enabling functions (e.g. training and IT) on a proportionate basis.”
  - The redacted text in paragraph 50 reads: “Protection officers move between teams protecting principals, and the MPS cost reporting systems do not allow them to record their time (or subsistence or accommodation) by principal.”
- There was exploration of the redacted text in paragraph 52.
- The redacted text in paragraph 56 was minor, reflecting the redactions in paragraph 14, and did not materially affect the point being made in open in that paragraph.
- The other comparisons relied on by the Appellant which had not been put in the open session. As to these, Mr Rutherford commented that:
  - Both the MoD and Security and Intelligence Account approaches were closely comparable to the disclosure provided by the MOPAC accounts, and similarly revealed no information attributable to operational matters of any detail.
  - The overall spend on MP security published by IPSA was distinguishable, because it was a single sum attributable to a large cohort of some 650 individuals, with no context as to the type or

nature of security provision covered (or who by). There were some further short closed observations on the IPSA analogy and the security concerns arising from disclosure in this case.

Counsel for the Home Office and for the Information Commissioner made short closed submissions, emphasising what they submitted were the key aspects of Mr Rutherford's closed evidence.

Those points particularly concerned:

- The nature, size and make-up of the RAVEC cohort.
- The UK's operational model of protective security.
- The connection between that model and the approach to disclosure taken by the Home Office in response to this request (and earlier requests).
- What disclosure of a subset figure of PSG sum published by MOPAC would indicate about the relative positions of the royal family and others in the cohort in protective security terms.

## The law

26. Section 1(1)(b) of FOIA imposes a duty on a public authority, upon request, to provide information held by it. Section 2(2)(b) provides that duty does not extend to information which falls within an absolute exemption, or a qualified exemption and the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
27. The Home Office relied on three exemptions in withholding the requested information. They are contained in sections 24(1), 31(1) and 38(1) of FOIA. Each of those exemptions is a qualified exemption, which means that in the event they are engaged, it is necessary to go on and carry out a balancing exercise to determine where the public interest lies.
28. Section 24(1) provides:
  - (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.
29. The exemption in section 31(1) applies where disclosure of the requested information would or would be likely to prejudice the prevention or detection of crime. The exemption in section 38(1) applies where disclosure would or would be likely to endanger the physical or mental health of any individual, or endanger the safety of any individual.
30. The appellant's appeal is brought pursuant to section 57 of FOIA. The role of the tribunal on an appeal is set out in section 58 of FOIA. The appeal is a full merits appeal as to whether on the facts and the law the public authority's response to the request is in accordance with Part I of FOIA.
31. As at the date of hearing before us, a challenge to the Upper Tribunal's decision in Montague v Information Commissioner and DIT [2022] UKUT 104 (AAC) had been heard in the Court of Appeal, but judgment had not been handed down. Since the hearing, and before this

decision was finalised, the Court of Appeal handed down its judgment. Accordingly, in determining this appeal, we have applied the findings of the Court of Appeal.

32. The Court of Appeal considered a single issue which was whether the public interest recognised in two or more different statutory provisions exempting information should be assessed in combination or aggregated in determining whether that public interest outweighs the public interest in disclosure; or whether the public interest in each provision is to be weighed separately against the public interest in disclosure. The Court of Appeal held that the former is the case.

### **The issue in the appeal**

33. The issue for determination in this appeal is whether the Home Office correctly applied the public interest test and, in particular, whether the Home Office was correct to find that the balance of the public interest lay in favour of maintaining the exemption.

### **The submissions**

34. The appellant and the Home Office provided written submissions and we do not repeat them here. The oral submissions are summarised below.

#### *The appellant's submissions*

35. The appellant accepts that:
- (i) the security of the royal family is a matter which is capable of engaging national security for the purpose of section 24(1) of FOIA;
  - (ii) the term 'required' in section 24(1) should be interpreted as meaning 'reasonably necessary';
  - (iii) it is not necessary to show that disclosure of the requested information would lead to an immediate threat to national security;
  - (iv) weight should be accorded to the public authority's view as to what is in the interests of national security as held in FCDO v Information Commissioner and others [2023] UKUT 248 (AAC); [2022] 1WLR; and
  - (v) the additional exemptions under sections 31(1) and 38(1) of FOIA are unlikely to add anything material.
36. The appellant argues that:
- (i) Although weight should be accorded to the public authority's view as to what is in the interests of national security, the public authority's view is not a trump card.
  - (ii) On the basis of the OPEN evidence, the Home Office cannot maintain the exemption under section 24(1) of FOIA. There is nothing to show that any individual has tried to obtain high level budgetary information or use such information in planning an attack.
  - (iii) The tribunal is required to ensure that there is a connection between the interests of national security and the information requested, which is established by the evidence.

Furthermore, the tribunal must not allow the mosaic effect to prevent disclosure of specific information where the reality is that disclosure would not lead to a real and substantial increase in the risk to national security.

- (iv) In respect of the mosaic effect, the Home Office's arguments must be supported by evidence, which he submitted must be specific evidence, already in the public domain. While there is evidence in the public domain that the three individuals in the examples relied on by the Home Office conducted research; there is no evidence that they or any offenders had sought or used high level budgetary information in planning their attacks. When his submission on this point was clarified by the tribunal, Mr Cragg agreed that the lack of evidence that such information had been used went to the cogency of the risk and that if the risk was less cogent, that meant we should give less weight to the examples relied on by the Home Office.
- (v) The case of Summers is not analogous to the present case, and it would be wrong for the tribunal to apply directly the reasoning in that case to the present facts without a careful analysis of whether disclosure of the requested information would have the same impact as was found it would have in Summers. The decision is not binding on this tribunal; it was made some eleven years ago; and that it is not clear as to what closed evidence was considered or the extent to which it was the same or different as in the present case.
- (vi) Because the information previously sought had not been provided, there is no explanation as to how the information requested in 2022 could be combined with other information to create the mosaic effect as claimed. Accordingly, the public interest in withholding the information is reduced.
- (vii) The comparators given by the appellant in his witness statement show that it is difficult to glean anything from the high-level information requested. In respect of the IPSA figures, there is nothing to suggest that any of the attacks on MPs had involved high level budgetary research.
- (viii) The fact that inferences may be wrongly drawn from disclosed information was not a sufficient reason for withholding that information and would represent an overly cautious approach to assessing the public interest.
- (ix) In relation to the level of confidence a potentially hostile actor may have, the tribunal must look at whether there is a real and substantial risk and not just speculate about what such a hostile actor may mistakenly think is the case.

#### *The respondents' submissions*

- 37. The CLOSED submissions of both the Home Office and the Commissioner are summarised in the gist as set out above.
- 38. The Commissioner's OPEN submissions can be summarised as follows:
  - (i) The appellant is wrong to contend that the Commissioner simply adopted a non-critical acceptance of the Home Office case. The Commissioner did in fact weigh up the case considering the appellant's complaint and has kept his position under review throughout

the proceedings. Both the OPEN and CLOSED evidence fortifies the Commissioner's view that the exemption was correctly applied.

- (ii) Although R (Campaign Against Arms Trade v Secretary of State for International Trade [2017] EWHC 1754 (Admin) involves a different test to that in section 24, the principles set out in paragraphs 29 to 35 of the judgment are analogous and apply with equal force in the present case. The tribunal should afford considerable respect to the Home Office view and to the evidence of Mr Rutherford.
- (iii) The past examples demonstrate the lengths to which fixated or obsessed individuals may go to in order to plan and potentially carry out an attack. The fact that such individuals may be irrational is relevant to the significance of the level of confidence they may have in the information.
- (iv) The Commissioner has not given any inherent importance to the public interest in maintaining the exemption but has carried out a careful consideration of the relevant public interest factors both for and against disclosure.

39. The Home Office's OPEN submissions can be summarised as follows:

- (i) The evidence of Mr Rutherford has addressed the totality of the Home Office case; was considered, measured, and realistic and should be given considerable weight.
- (ii) The Commissioner's oral submissions in respect of section 24 are correct and are adopted by the Home Office. Reliance is placed on the principles identified in Foreign, Commonwealth and Development Office v Information Commissioner & Williams & ors [2021] UKUT 248 (AAC).
- (iii) Sections 31(1) and 38(1) of FOIA are engaged and it is maintained that they apply albeit that all three exemptions overlap significantly and there is little more to say about them.
- (iv) The judgment in Summers is not relied on because it is binding, but because it was right, for the reasons given in the OPEN judgment. There has been no serious attempt to attack the reasoning in Summers. Accordingly, because the information requested in Summers was similar to the information requested in the present case, it would be irrational for the tribunal not to reach the same conclusion. The information requested in Summers was for one year whereas it was for three years in the present case and no other material points of difference have been made out.
- (v) There is a disconnect between the approach of the appellant and the Home Office. The appellant is a responsible journalist who is used to seeking out information and drawing conclusions from it where he can be certain that those conclusions are correct. The Home Office concern is that a potential hostile attacker will draw inferences from the information together with other information already in the public domain (including potentially inaccurate information), the effect of which will be to give greater confidence to the potential attacker, thus increasing the likelihood of an attack being carried out.

It is not correct to say that the mosaic effect point is central. The mosaic effect point informs the confidence point but is not determinative of it. The appellant's arguments

about the information being somewhat historic and about there being multiple variables fall away in light of the core confidence point. This is the point that is not properly understood by the appellant.

The tribunal must consider the effect of disclosure in the real world. It is irrelevant that the inferences drawn from the information are wrong or that a rational person could reasonably be expected to know they are wrong. The risk arises from those fixated individuals who are unable to or who will not ask themselves whether the inferences they are drawing are reasonable.

- (vi) There is no serious dispute as to the existence of or the nature of threats posed to the royal family. There have been attacks in the past, including recently, which have been both successful and unsuccessful. There has been no diminution of the threat. The royal family is particularly exposed because their attendance at public events is published in advance.
- (vii) It is not disputed with any force that there is a variety of information in the public domain that would form part of a mosaic. The Home Office cannot control any of those parts of the mosaic and therefore it seeks to control more carefully those parts of the mosaic which it is within its ability to do so.

Caution has been shown by the higher courts as to what matters go to security, as can be seen from R (Duke of Sussex v SSHD [2022] EWHC 682 (Admin). That informs but does not determine the approach to be taken in this case.

The appellant's argument that the Home Office's evidence is not sufficiently cogent if it does not show a specific example of someone using or seeking to use this kind of information despite the information never having been published imposes too high a bar and one that is impermissible.

- (viii) The four comparators relied on by the appellant are of no utility in this case. There are multiple points of distinction including differences between the type of agencies involved; the lack of detail about how funds (in the comparators) were spent; the difference in overall budget between countries; and the fact that there is a requirement to publish some of the information contrary to the situation in the present case.
- (ix) There is no dispute that there is public interest in accountability and transparency; however, that is provided by the publication by the Mayor's Office for Policing and Crime (MOPAC) of the amount the Metropolitan Police Service receives from the relevant Home Office grant. It does not provide a complete answer to the question of the cost to the public purse, but it materially informs the public.
- (x) The information requested is not revelatory of the royal family's finances and is therefore not relevant to the appellant's ongoing work in relation to the royal family's wealth, role in law making, or the continued existence of the monarchy. The requested information goes to just one aspect of the cost of the royal family to the public purse.

#### *The appellant's reply*

40. In reply to the respondents' submissions, the appellant made the following points:

- (i) The IPSA figures enable an estimate of protection for MPs because there is a known number of MPs and a known total sum. By contrast, the information sought is for a three-year period, so is even higher-level information than the IPSA figures.
- (ii) Although ‘required’ in section 24 may mean ‘reasonably required’, the test should not be diluted. The test is an objective one and the exemption is not one which must be considered from the point of view of the public authority, i.e. the test is not whether the public authority requires or believes that exemption is required.
- (iii) The respondent goes too far in suggesting that it would be irrational for the tribunal to depart from the conclusion in Summers, although it is accepted that the tribunal should have regard to it.
- (iv) The appellant has said as much as possible on the confidence point, but the information relied on by the respondent is contained in the CLOSED evidence and therefore the appellant cannot determine the strength of that point. It is for the tribunal to determine whether the evidence is sufficiently strong to support the contention that the risk arises from a person acting in an irrational way.

41. In correspondence dated 18 December 2023, the Home Office submits that following the handing down of the Court of Appeal’s judgment in The Department for Business and Trade v Information Commissioner & Brendan Montague [2023] EWCA Civ 1378 the tribunal can and should aggregate the public interest in respect of all three exemptions relied on.

### **Findings and reasons**

42. As set out above, the issue for determination in this appeal is whether or not the Home Office correctly applied the public interest test in section 24(1) of FOIA. In Foreign, Commonwealth and Development Office v Information Commissioner & ors [2021] UKUT 248 (AAC), the Upper Tribunal approved six principles for approaching the exemption in section 24(1). For the purposes of this appeal, the sixth principle is key:

- (vi) Even where the chance of a particular harm occurring is relatively low, the seriousness of the consequences (the nature of the risk) can nonetheless mean that the public interest in avoiding that risk is very strong. The reality is that the public interest in maintaining the qualified national security exemption in section 24(1) is likely to be substantial and to require a compelling competing public interest to equal or outweigh it. That does not mean that the section 24 exemption carries ‘inherent weight’ but is rather a reflection of what is likely to be a fair recognition of the public interests involved in the particular circumstances of a case in which section 24 is properly engaged.

43. In other words, the exemption will only apply if the public interest in withholding the information outweighs the public interest in disclosure.

44. It was not disputed that there is public interest in disclosure of the requested information, and we find that there is. The public interest in disclosure goes to transparency in how public funds are spent; to the accountability of those who are charged with the protection of the royal family and as the appellant would argue, the accountability of the royal family themselves as recipients of public funds.

45. We find that the OPEN and CLOSED evidence of Mr Rutherford is credible, and we attach significant weight to it. We base this finding in part on the CLOSED evidence to which we cannot refer in this OPEN decision. We are satisfied as to his experience and ability to comment on the issues in the appeal. His evidence was thoughtful and considered and he dealt comprehensively with the issues put to him. In addition, Mr Rutherford was able to reflect on his evidence and was prepared to revise which aspect of that evidence required redaction. This demonstrates his understanding of the issues in the appeal.
46. We took the appellant's evidence and arguments into account when reaching our decision, but ultimately found that we could not attach significant weight to the four comparators he gave in support of his argument that the public interest favours disclosure. This is because they are not on all fours with the present situation and there are multiple points of distinction. We accept the Home Office's submissions in this regard. In addition, our conclusion in respect of the four comparators is based on the CLOSED evidence of Mr Rutherford, which cannot be disclosed in this OPEN decision.
47. The appellant sought to argue that the mosaic effect was not sufficient to mean that that the public interest in disclosure was outweighed by that in maintaining the exemption. He argued that it was necessary for the Home Office to show that individuals had in fact sought to use high level information such as the requested information. Mr Rutherford gave OPEN evidence about this, disputing that the individuals' research was low level. In addition, Mr Rutherford gave CLOSED evidence, in which he amplified his OPEN evidence. We accept his CLOSED evidence. We do not agree with the appellant's submission and find that it is sufficient for the Home Office to show that use of the information would give rise to a real and substantial increase in the risk of an attack on national security. This is the test which we must apply according to the caselaw that is binding upon us.
48. It is clear from the evidence and submissions that it is not the mosaic effect of itself that is central to the Home Office's reasoning in applying the public interest test. What is central is the effect that disclosure of the requested information would have on the confidence of a potential hostile actor. The Home Office asserts that the requested information would form part of a mosaic of other publicly available information. The effect of the disclosure of the requested information would be to increase the confidence of the potential hostile actor in the information as a whole and the inferences they may draw from that information. The consequence of this is that their confidence in their ability to carry out a successful attack is increased, rightly or wrongly, and it is this increased level of confidence that gives rise to the real risk of the potential hostile actor in fact carrying out an attack. It is apparent from the CLOSED evidence that the Home Office's concerns about the risk(s) arising from disclosure of the withheld information relate not only to the royal family, but to the remainder of protected persons to whom the requested information relates (see gist set out above). We accept that this is the case.
49. The appellant disputed that the requested information could reasonably be of any use to a potential hostile actor. Mr Rutherford gave cogent reasons in his CLOSED evidence as to why the requested information would be of substantial interest and how it could be of use such that it would give rise to a significant risk of an attack. In particular, he gave evidence about what inferences could be drawn from the requested information together with the information already in the public domain. We accept that evidence. We also heard CLOSED evidence from him about the nature of individuals motivated to carry out research; how the inferences they may draw could lead them to have an increased level of confidence in the results of their



research; and why this increased level of confidence is significant. We also accept that evidence.

50. We have carefully balanced the public interest in disclosure and the public interest in maintaining the exemption. The public interest in disclosure carries weight and we bear in mind that the views of the public authority are not a trump card. We have not accepted that the appellant's examples about disclosure in other situations are apposite, so they carry very little weight. We have found that the risks identified by the Home Office are well-founded and therefore they carry significant weight. Our finding that the disclosure of the requested information gives rise to a real risk that a potential hostile actor will in fact carry out an attack, even if the risk is not imminent, carries significant weight. For these reasons, we are satisfied that public interest in the disclosure of the requested information is outweighed by the public interest in maintaining the exemption.
51. In summary, we find that:
- (i) The risks arising from the disclosure of the requested information relate not only to the royal family but to the remainder of the cohort of protected individuals.
  - (ii) The requested information relates to matters of national security.
  - (iii) The exemption in section 24(1) FOIA is engaged in relation to the requested information.
  - (iv) There is public interest in the disclosure of the requested information.
  - (v) The requested information is capable of forming part of a mosaic of other publicly available information.
  - (vi) The disclosure of the requested information is reasonably likely to have the effect of increasing the confidence of a potential hostile actor in the available information and the inferences that they can draw from it.
  - (vii) Whether the increased confidence is well-founded or not, it gives rise to a real risk that a potential hostile actor will in fact carry out an attack.
  - (viii) The risks identified by the Home Office are well-founded.
  - (ix) The withholding of the requested information is reasonably necessary to prevent a real and substantial increase in the risk of an attack on national security.
  - (x) There is a stronger public interest in maintaining the exemption from disclosure than in the release of the information.
  - (xi) The balance of the public interest lies in maintaining the exemption.
52. The requested information is exempt from disclosure on the basis of section 24(1) of FOIA. Exemption from section 1(1)(b) FOIA is required for the purpose of safeguarding national security. It follows therefore that this appeal falls to be dismissed.
53. We have not gone on to consider the two further exemptions in sections 31(1) and 38(1) of FOIA because it would not materially affect the outcome of the appeal.

Signed J K Swaney

Date 3 April 2024

Judge J K Swaney  
Judge of the First-tier Tribunal