Neutral citation: [2024] UKFTT 1 (GRC)

Case Reference: EA/2022/0038

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Heard at The Royal Courts of Justice on 22 November 2022
on subsequent written submissions
Decision given on: 3 January 2024

Before

JUDGE NEVILLE
MS S COSGRAVE
MS A CHAFER

Between

DR ANDREW LOWNIE

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) THE NATIONAL ARCHIVES
(3) THE COMMISSIONER OF POLICE FOR THE METROPOLIS

Respondents

Representation:
For the Appellant: Dr Lownie in person
For the Respondent: Mr B Amunwa, counsel
Not attendance on behalf of the First and Second Respondents

Decision: The appeal is allowed.

Substituted Decision Notice:

Within 35 days of the date on which this decision is sent, the National Archives must provide the requested information to Dr Lownie with the exception of:

(a) the letter it considered to be exempt under s.40(2) of the Freedom of Information Act 2000;

(b) the document(s) under references 409/632/210 and 409/632/271; and
(c) the information described at paragraph 4 of the Tribunal's CLOSED reasons.

OPEN REASONS

1. This is an appeal against a Decision Notice issued on 24 January 2022 by the Information Commissioner pursuant to s.50 of the Freedom of Information Act 2000 ("FOIA"). These are our OPEN reasons and may be freely read by any person.

Introduction

2. Dr Lownie is a historian and published author. On 22 September 2021 he made a request to view the contents of the National Archives' file numbered HO 144/21191. The file's catalogue entry states that it relates to the following matters during the years 1929-1939:

> *Disturbances. Police protection to members of the Royal Family, members of the Cabinet and others;*
>
> *Police. Police protection to members of the Royal Family, Cabinet Ministers and others within and without the United Kingdom.*

3. The National Archives' response of 24 November 2020 refused to disclose the material, concluding that it engaged the exemption at s.31(1)(a)-(c) of the Act. This exempts information if its disclosure would, or would be likely to, prejudice: (so far as relevant in this appeal)

    a. The prevention or detection of crime;

    b. The apprehension or prosecution of offenders; or

    c. The administration of justice.

4. This was because disclosure "would provide evidence of how the police provides protection to members of the Royal Household, foreign dignitaries and British cabinet ministers", identifying both the individuals who were protected and the individuals that carried out the protection. It detailed the scope of operational procedures for the protection of these individuals and the levels and types of protection given to certain positions within government and the royal household. The National Archives had consulted with the Metropolitan Police ("MPS") and the Home Office to conclude that disclosure would prejudice the detection of crime, the prosecution of offenders and might assist in the commission of terrorist offences. While the material might be old, the type and level of protection given to the persons holding the identified positions had changed very little over time. The Metropolitan Police Royalty and Specialist Protection ("RaSP") Unit had confirmed that disclosure would compromise the ability of the police to provide the protection to principals, as the methodology remains relevant today. The public interest in maintaining the exemption outweighed the public interest in disclosure.

5. The National Archives also concluded that the information constituted personal data and engaged the exemption at s.40(2). This had later been clarified as relating to a single letter, the author of which would be 98 years old if the letter had been written at the age of 16. Disclosure of the letter would therefore reveal the author's sensitive personal data – here, political views – in breach of data processing principles.

6. Dr Lownie's subsequent complaint to the Commissioner was rejected, so he has exercised his right of appeal to the Tribunal. The Commissioner, National Archives and MPS all continue to argue that the material is exempt from disclosure.

The appeal

7. Dr Lownie lodged his notice of appeal on 6 February 2022. The grounds of appeal listed 13 files which he claimed were more recent and contained similar detail, and further asserted that the Duke of Kent's wartime security details were also available in the public domain[1]. The narrative to the grounds continues:

> *Given technology, everything about protection and security has changed and the techniques and methodology of 1929 are either self-evident or a thing of the past. Releasing the file is not going to affect prevention of crime or administration of justice.*
>
> *The identity of protection officers is well known from court circulars, authorised books and memoirs.*

8. As to s.40(2), Dr Lownie argued that it was highly improbable for someone to have both written to the MPS about politics at the age of 16 and to still now be alive at the age of 98. Rule 23 responses were provided by all three respondents, and we shall set out the parties' positions insofar as it necessary to explain our own conclusions.

Procedural issues

9. As part of his preparation for the appeal, Dr Lownie requested the some of the files mentioned above. This was to demonstrate that similar and more recent information was already in the public domain. The National Archives, it appears at the behest of MPS, refused to release those files on the basis that they attracted the same exemptions as those with which this appeal is concerned. They had previously been available for public inspection for many years, without objection or concern. Dr Lownie has expressed his frustration at this, and described it as an attempt by one side in litigation to withhold evidence simply because it undermined their case. The Tribunal ordered that a selection of that material would be considered as CLOSED material pursuant to rule 14 of the Procedure Rules. There is no reason, we find, to find bad faith on the part of either National Archives or MPS. In the end, we have not found it necessary to have regard to the selection of material from other files.

10. We must also criticise the way in which the CLOSED material was provided. The original files have been photocopied, badly. They were unindexed and not clearly

[1] We assume that this refers to the present Duke's father, Prince George, who died in a military air crash in 1942.

separated. There was also a requirement to seek further submissions from MPS as described below and an inconsistent approach by MPS to the data security arrangements that need to apply to the CLOSED material, They are the principal cause of the delay in producing this decision. As we have had cause to remark in other cases, at the very least the Tribunal should be able to determine how an original file was structured. It should also be brought to the hearing of the appeal so that it can be inspected if necessary.

The hearing

11. At the hearing of the appeal, Dr Lownie represented himself and the MPS was represented by Mr Amunwa. Neither the Commissioner nor the National Archives was represented at the hearing, having indicated in advance that they were content to rely on their written submissions. The OPEN documents before the Tribunal were a hearing bundle produced on 18 November 2022, which included witness statements from MPS's witness Superintendent Ben Clark and Dr Lownie's witness Mr David Davies. Mr David Davies had not attended to give oral evidence. Mr Amunwa took no objection to Dr Lownie relying upon Mr Davies' statement, subject to any submissions he might wish to make about the weight that could be afforded to evidence that was untested by cross-examination.

12. We were also provided with helpful skeleton arguments from Dr Lownie and Mr Amunwa. Dr Lownie is not legally qualified, and his skeleton argument blended factual evidence with argument. It was agreed that he would adopt it as his witness statement so that he could be cross-examined on its factual content by Mr Amunwa. This took place, following which Superintendent Clark gave oral evidence and was likewise asked questions about his evidence.

13. MPS also sought to rely on CLOSED evidence, comprising:

    a. Correspondence between the National Archives and the Information Commissioner;

    b. Two witness statements made by Superintendent Ben Clark;

    c. The information requested by Dr Lownie in this appeal (file reference HO/144/21191);

    d. National Archives files MEPO2/2828; MEPO2/2832; MEPO3/557; MEPO3/558 (as previously directed).

14. It is well-established that use of a CLOSED material procedure is to be exercised sparingly because its use derogates from the principle of open justice, which is essential in any free and democratic society: Bank Mellat v Her Majesty's Treasury (No. 1) [2013] UKSC 38 at [2]-[3], and (specifically in relation to FOIA appeals) Browning v The Information Commissioner [2014] EWCA Civ 1050. Use of the procedure was previously authorised in this appeal and, keeping that order under review, we remained satisfied that regard to CLOSED material was necessary to

protect against any prejudice to the law enforcement interests claimed in the appeal, and so that we could understand the nature of the requested information without the very purpose of the appeal being confounded by its disclosure. The Tribunal therefore considered the material and, following the conclusion of Supt Clark's evidence, held a short CLOSED session from which everyone save for him and Mr Amunwa were excluded. We did our utmost to minimise the disadvantage to Dr Lownie by seeking his views on issues that he would wish to be raised in that session, and afterwards disclosing as much as possible of what transpired so that it could inform his closing submissions.

15. As indicated at the head of this document, our decision is that the appeal should be allowed and that the majority of the requested information should be disclosed. We nonetheless recognise that one or more of the respondents may wish to challenge this decision by onward appeal. This OPEN decision has therefore been provided to the parties without disclosing any material covered by the existing rule 14 direction. An embargoed draft version of the OPEN reasons were provided to the respondents to ensure that no information was wrongly disclosed in OPEN. This did not result in any substantive changes. The CLOSED annex also contains discussion of the material which we have found to be exempt, and it remains appropriate to maintain the direction.

Legal Principles

16. In Information Commissioner v Malnick and Anor [2018] UKUT 72 (AAC) at [45] and [90] it was confirmed that the Tribunal exercises a full merits appellate jurisdiction. In deciding whether the claimed exemptions apply, we make any necessary findings of fact and decide for ourselves whether the provisions of the Act have been correctly applied. But the Tribunal does not start with a blank sheet: the starting point is the Commissioner's decision, to which we should give such weight as we think fit in the particular circumstances. The proceedings are inquisitorial, save that the Tribunal is entitled to respect the way in which the issues have been framed by the parties.

Law enforcement – s.31

17. Section 31(1) provides as follows:

> *31. Law enforcement*
>
> *(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –*
>
> *(a) the prevention or detection of crime,*
>
> *(b) the apprehension or prosecution of offenders,*
>
> *(c) the administration of justice,*
>
> …

18. It is a prejudice-based exemption, that should be approached as follows:

    a. One or more of the interests at (a)-(c) must be engaged by disclosure.

    b. The prejudice claimed must be real, actual or of substance. If the harm (or potential for harm) is only trivial then the exemption will not be engaged.

    c. The public authority must be able to demonstrate a causal link between disclosure and the harm claimed.

    d. The public authority must then decide what the likelihood of the harm actually occurring is, ie would it occur, or would it be likely to occur.

19. In APPGER v Information Commissioner & Ministry of Defence [2011] UKUT 153 it was held that the Tribunal should pause and reflect very carefully before overriding the sincerely held views of relevant public authorities on questions of national security. In our view, that consideration applies with equal force to the s.31 exemption in its present context. RaSP is charged with a policing function of vital national importance, and we must afford great respect to its knowledge and expertise. While its view is not dispositive, the Tribunal will only disagree after careful consideration and the greatest circumspection.

Personal data – s.40(2)

20. Section 40 provides as follows:

> *40 Personal information.*
>
> *(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.*
>
> *(2) Any information to which a request for information relates is also exempt information if –*
>
> *(a) it constitutes personal data which does not fall within subsection (1), and*
>
> *(b) the first, second or third condition below is satisfied.*
>
> *(3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act –*
>
> *(a) would contravene any of the data protection principles, or*
>
> *(b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.*
>
> *(3B) The second condition is that the disclosure of the information to a member of the public otherwise than under this Act would contravene Article 21 of the GDPR (general processing: right to object to processing).]*

(4A) The third condition is that –

(a) on a request under Article 15(1) of the GDPR (general processing: right of access by the data subject) for access to personal data, the information would be withheld in reliance on provision made by or under section 15, 16 or 26 of, or Schedule 2, 3 or 4 to, the Data Protection Act 2018, or

(b) on a request under section 45(1)(b) of that Act (law enforcement processing: right of access by the data subject), the information would be withheld in reliance on subsection (4) of that section.

(5A) 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).

(5B) The duty to confirm or deny does not arise in relation to other information if or to the extent that any of the following applies –

(a) giving a member of the public the confirmation or denial that would have to be given to comply with section 1(1)(a) –

(i) would (apart from this Act) contravene any of the data protection principles, or

(ii) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded;

(b) giving a member of the public the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene Article 21 of the GDPR (general processing: right to object to processing);

(c) on a request under Article 15(1) of the GDPR (general processing: right of access by the data subject) for confirmation of whether personal data is being processed, the information would be withheld in reliance on a provision listed in subsection (4A)(a);

(d) on a request under section 45(1)(a) of the Data Protection Act 2018 (law enforcement processing: right of access by the data subject), the information would be withheld in reliance on subsection (4) of that section.

(6). . . . . .

(7) In this section –

"the data protection principles" means the principles set out in –

(a)Article 5(1) of the GDPR, and

(b)section 34(1) of the Data Protection Act 2018;

"data subject" has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act);

"the GDPR", "personal data", "processing" and references to a provision of Chapter 2 of Part 2 of the Data Protection Act 2018 have the same meaning as in Parts 5 to 7 of that Act (see section 3(2), (4), (10), (11) and (14) of that Act).

(8) In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted.]

21. Article 6 of UK GDPR sets out when processing is lawful. Article 9(1) sets out a prohibition on the processing of special category data, including personal data containing political opinions, subject to ten separate conditions in Article 9(2).

The parties' cases

The Commissioner

Law enforcement

22. In response to Dr Lownie's complaint, the Commissioner agreed with the National Archives that the material was exempt from disclosure under s.31(1)(a)-(c). The National Archives accepted that there is a general public interest in transparency and openness in government, and a benefit to deeper public understanding and awareness in matters relating to law enforcement. Disclosure of the information would provide transparency and open the police services up to public scrutiny and provide an insight into their operational procedures. It would also engender trust between the public and law enforcement agencies, and provide reassurance that their role is carried out adequately and proportionately. Nonetheless, the Commissioner found that this public interest was outweighed by the risks that would eventuate from disclosure of the information and that it would enable those who would wish to cause harm to deduce which individuals are likely to be receiving protection, and the scope and limitations of that protection. The Commissioner had considered examples within the information of where this might be the case, and agreed. Given his conclusion on s.31(1)(a)-(c), the Commissioner declined to consider the exemption at s.40(2).

23. In his rule 23 response the Commissioner repeated and maintained the reasons given in the Decision Notice. In response to the grounds of appeal, the Commissioner stated that he was in no position to verify whether the listed disclosures revealed the same or similar matters as the requested information, nor whether those disclosures had previously been made in error. The Commissioner suggested that the MPS and/or the Home Office were in a better position to comments on these issues, and that the

Tribunal ought to direct them to provide submissions. As to Dr Lownie's point on s.40(2) as to the likelihood of the author of the letter still being alive, the Commissioner cited Sygulska v The Information Commissioner (2) The Ministry of Defence (Information rights - Data protection) [2019] UKUT 269 (AAC) in which the Upper Tribunal had upheld a similarly cautious approach to records of service personnel.

Personal data

24. The Commissioner supports the MPS's submissions on this exemption.

National Archives

25. National Archives has been content to rely on the submissions made by MPS, and has played no part in the substantive appeal

MPS

26. MPS was joined as a respondent on 4 April 2022. Its rule 23 response supports the reasoning contained in the Decision Notice. On s.31, it averred that Dr Lownie's assumptions concerning modern police protection methods were mistaken. In support it cites an attached witness statement from Superintendent Ben Clark of RaSP.

27. In the OPEN part of the hearing, Supt. Clark gave further oral evidence and was cross-examined by Dr Lownie. We can summarise his OPEN evidence as follows:

    a. The decision on who receives protection is taken by the RAVEC committee within the Home Office, according to threat, harm and risk. These vary according to the principal, their role, lifestyle and other factors. Disclosing who is protected could also, therefore, reveal what MPS and other bodies know (specifically or in general) about risks posed by harmful actors and the lifestyles of the principal concerned. For this reason, there is a longstanding policy never to publicly acknowledge that protection is provided to anyone but the Sovereign and the Prime Minister.

    b. Disclosure of any historical records that showed protection having been given to anyone other than the Sovereign and Prime Minister would therefore:

        i. Reveal that protection is provided to other people from time to time, giving an insight into protection arrangements; and

        ii. Given the nature of the documents requested, amount to official acknowledgement that such protection has been provided and weaken the integrity of the policy.

        iii. The same can be said of operating methods and the types and nature of protection arrangements. These are never publicly disclosed, and the

integrity of that policy is undermined by the disclosure of such details even if they bear no relevance to what happens in the modern day.

iv. Effective protection requires disclosure by the principal of all facts that might be relevant to protection. This requires confidence that sensitive information (in both the personal and official sense) given to RaSP will not be publicly disclosed. Where the requested information contains such details, disclosure would undermine that trust.

28. Superintendent Clark had been initially sceptical himself that the requested material could continue to be prejudicial after so long. Nonetheless, on reviewing the file he had reached what MPS are is a "balanced, compelling and accurate assessment of the risk" of disclosure. It would provide those who would seek to harm principals with potentially relevant information as to police measures likely to be in place in the modern day. As put in MPS's response:

> *Disclosure would aid those who wish to identify the likely nature and type/s of police protection available at certain locations, the times at which protection is likely to be in place, which Cabinet Ministers and members of the Royal Family are provided protection and in what circumstances. Due to the continuity of the roles, locations and the levels and type of protection provided to principals, disclosure of the requested information would reveal information and patterns of information with relevance to police protection arrangements and decision-making today. This information retains significant value for criminals and could be exploited by those with criminal and/or terrorist intentions to maximise their opportunities to bring serious harm to principals, the police and/or the wider public. This in turn would undermine the prevention of crime and by extension the administration of justice. The evidence is sufficient to establish a causal link between the disclosure and the harm identified above.*

29. MPS rejected that any contents of the file had already been publicly disclosed and argued that, even if they had, the potential harm that would arise from disclosure of this file would not be diminished. In his CLOSED evidence, Supt Clark gave examples from the requested material that he said illustrated the potential for its disclosure to cause harm today. He also drew attention to how such information may assist harmful actors by way of a mosaic or jigsaw effect. Supt. Clark confirmed that his views of the requested information and the MEPO files was based on an individual risk assessment in relation to that material rather than a blanket approach.

30. On s.40(2), MPS maintained that it was appropriate for the National Archives to have applied the '100 year rule', whereby a data subject is assumed to be alive until their hundredth birthday. On that basis, disclosure would only be appropriate if it met a lawful basis for processing the data within the UK General Data Protection Regulation. Relevantly here, Article 6(1)(f) provides that processing will only be lawful if:

> *(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the*

> *interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.*

31. Disclosure would neither serve a legitimate interest nor, even if it did, could it be shown to be necessary. Further, Article 9(1) sets out restrictions on the processing of special category data, including personal data containing special category data. The Data Protection Act 2018 at s.10, read with Parts 1 and 2 of Schedule 1, set out the different prescribed lawful purposes for the lawful processing of special category data but none was applicable.

Dr Lownie

32. In his skeleton argument, evidence, and oral submissions Dr Lownie essentially reiterated his two key propositions. First, the age of the information made it very unlikely that it would be of use to anyone wishing to do harm. Second, even if it did then that information was already well established in the public domain. In support he relied upon the now-closed National Archives files already mentioned, and referred to other books and media.

33. One example given by Dr Lownie is the BBC television series *Bodyguard*. This is a 2018 six-part thriller concerning a fictitious Police Sergeant who works for RaSP. While we were not asked to watch the series, Dr Lownie's skeleton arguments refers to its Wikipedia page, which contains a synopsis of each episode. Dr Lownie asserts that RaSP officers advertised on the series and (having been given fair opportunity) MPS does not demur. He also sets out a list of other National Archives files that he asserts are in the public domain, contain information that cannot realistically be more damaging than that in the requested information, and that have fed into historical and creative works for decades. He has described his own recollection of one of the files that was closed in response to his appeal, and describes it as innocuous. Citing another file, MEPO3-1899, concerning the activities of HRH Prince George in 1939, Dr Lownie says that it:

> *… gives very detailed information on what his detective was doing, including all his filed reports to Cannon Row – and this at a time when the Duke was working in a bunker in naval intelligence and it was feared Nazi hit squads might parachute into Rosyth, times, duties etc and reveals that Evans, his protection officer, didn't even travel in the same car and was refused access to military bases.*

34. Dr Lownie also refers to several popular books on Winston Churchill, and to his own book on Lord Mountbatten. More recently, books on the Duchess of York and the late Diana, Princess of Wales, have disclosed significant details of those individuals' police protection arrangements. We have not read those books, but doing so was unnecessary to reach our eventual conclusions. Were it necessary, we would have accepted Dr Lownie's summary of those books and the other material. MPS has disputed none of it, and we have no reason to doubt either Dr Lownie's sincerity or his reliability as a historian and author who has carried out extensive research in this area.

35. A witness statement was provided in support of Dr Lownie's case by Mr David Davies. Prior to retirement, Mr Davies was a Chief Superintendent in MPS. His distinguished career in policing and anti-terrorism includes being the operational commander who, in 1994, merged two royal protection commands into the present-day RaSP. While he had not read the requested materials specifically, he states that "it is ridiculous to suggest that techniques for guarding the Royal Family are the same as over eighty years ago or that information in such an historical file could put the security of the Royal Family at risk today." He expresses his full support for Dr Lownie's case.

36. Dr Lownie further alleges inconsistency in approach, as set out in his skeleton argument:

> *There seems to be no consistency. The disputed file on police protection for the Prince of Wales for 1929-1939 is closed but there are still open files for the same or later periods and other members of the Royal Family. It seems strange that this one file, amongst the myriad of files available at the TNA, has uniquely highly sensitive material which still needs to be kept secret almost a hundred years later. Examples of these open files, which I argue must be similar, include:*
>
> *MEPO 3/566 King George V and Queen Mary: protection 1936.*
>
> *MEPO 38/149 HRH The Duke of Gloucester: visits to Australia and Italy: protection 1934-1955.*
>
> *MEPO 3/563 H.R.H. The Duke of Gloucester: protection 1934.*
>
> *MEPO 38/126 Scale of protection by Special Branch officers to Royalty, Cabinet Ministers and other prominent personages 1922-1926.*
>
> *MEPO 3/560 Buckingham Palace: permanent protection 1929-1932.*

37. We do not have these files in front of us, but the names (chosen by TNA and agreed as being visible in the public TNA catalogue) obviously advert to protection being provided by MPS to someone other than the current Sovereign or Prime Minister[2].

38. Supporting the public interest in disclosure comment should a balancing test prove necessary, Dr Lownie put forward the ability of historians to research these matters and the general public interest in openness.

39. On the data protection exemption concerning the author of the letter, Dr Lownie reiterated his complaint to the Commissioner, already set out above.

[2] In 1934 the reigning monarch was George V. Prince Henry, Duke of Gloucester, was his son.

After the hearing

40. Having considered the parties' cases after the hearing, we were concerned that MPS's arguments were focused on matters of general principle. The examples given in Supt. Clark's CLOSED evidence only purported to be *illustrative* of the risks posed by disclosure of the requested information, rather than a comprehensive list. Being minded to reject MPS's case on principle, we were concerned that other material might potentially engage one or more exemptions. The size and poor quality of the copy files made it unrealistic for us to simply go through everything in detail ourselves, and we considered it appropriate to require further comprehensive submissions from MPS. It must be questioned whether even the subsequent response engages with every single item in the files, but MPS has been given a fair opportunity. As was made clear in our directions, we shall therefore assume that no other individual item is objectionable. MPS's rule 23 response also makes it clear that their case has been presented in conjunction with the Home Office, to which a number of documents relate, so there has been no need to seek its input. This is as much detail on this process as we are presently able to openly disclose.

Consideration – s.31(1)

41. We turn first to MPS's case that prejudice would arise from disclosure that breaches the integrity of its policy never to disclose either specific protection arrangements or the identity of any of the principals it protects (save for the Sovereign and the Prime Minister). As well as the summary given above, we take particular account of the following description in Supt Clark's OPEN witness statement:

> 4. *There are a number of individuals to whom RaSP provide protective services. The MPS and RaSP do not decide who receives protection. The decision in that respect is taken by the Executive Committee for the Protection of Royalty and Public Figures (also known as RAVEC) within the Home Office. They will make their decision based on threat, harm and risk. Because the natures of these risks vary according to the principal, their role, their lifestyle and any number of other factors, to disclose who RaSP protects and to what level protection is given could show what police and security agencies know about the threats being considered against them. Knowledge of this by offenders could be used to thwart some of the protective measures in place to mitigate against the risks. Historically, therefore, it has been the position of the MPS and RaSP that we only disclose that we protect the Monarch and the Prime Minister. This position has been in place for many years and continues to remain valid.*
>
> 5. *Furthermore, the same principle applies to the release of other information – be it around protection tactics, decision making, operational deployments and other information. Unless the information is of a broad nature and is unlikely to relate to threat, harm and risk or the mitigation thereof, we would usually adopt a neither confirm nor deny approach to requests for information and do not usually publicly comment on matters relating to security.*

42. We agree that the overall integrity and effectiveness of RaSP fall within the interests protected by s.31. We also agree that non-disclosure of some information may, in a particular case, be justified even where it does not create any specific risk by itself. Without doubt, the interests specified in s.31 include the effectiveness and integrity of the systems employed to support them. That principle is amply explained in authorities concerning 'neither confirm nor deny' responses to requests, for example Savic v Information Commissioner [2017] UKUT AACR 26.

43. The effectiveness of the work of RaSP carries great importance, beyond that usually encountered in the majority of appeals concerning s.31. The qualifier "likely to" must be approached on that basis, the potential harm that could eventuate from damage to RaSP's effectiveness being so great as to make even the smallest risk significant. We have approached both the engagement of s.31 and the subsequent public interest balancing test on that basis.

44. Supt. Clark genuinely considers that disclosure of the requested information would be of assistance to someone who intends to harm one of the principals that RaSP wishes to protect. Having carefully considered the examples he has given, and other matters to which he drew our attention, and having afforded his view as much deference as we are rationally able, we are simply unable to agree with him. We cannot set out here how that conclusion rests on our assessment of the individual illustrative examples in Supt. Clark's CLOSED evidence. We can, however, give our assessment on matters of principle.

45. The policy of never acknowledging who RaSP protects, save for the Prime Minister or the Sovereign, is no doubt of great importance. If a person were to inquire about whether a particular member of the Royal Family, Minister, judge or visiting diplomat, or anyone else, were currently protected, it is difficult to imagine a case where s.31 would not operate to prevent disclosure. Yet we cannot accept that the principle would be undermined by acknowledging that anyone has ever been protected except for those two individuals, throughout history. Even if the *principle* is really intended to extend that far, which we doubt is actually the case, in *practice* MPS has failed to apply it as policy. This is shown by, for example:

    a. The names of the files being requested confirm that their contents relate to members of the Royal Family and Cabinet Ministers, in the plural.

    b. As observed by Dr Lownie, even the files that are now closed are still publicly listed on the National Archives' catalogues. The ones he cites identify junior members of the Royal Family, of foreign royal families, ministers and others. There are, we accept, countless others that do likewise on their catalogue entries and which remain open to public inspection.

    c. Even Supt. Clark's open evidence candidly acknowledges that protection is provided to others, as shown in paragraphs 4 and 5 of his witness statement already set out above.

d. Much of what Supt. Clark says in his open evidence, and more, has been publicly acknowledged by MPS and the Home Office previously. The most recent noteworthy example is recorded in the judgment of Chamberlain J in R. (The Duke of Sussex) v Secretary of State for the Home Department [2023] EWHC 1228.

e. There are many other examples in the evidence and in the public domain more generally.

46. We recognise that public acknowledgment by the state itself is qualitatively different to external reports, the former more apt to give rise to the prejudice mentioned in s.31. Yet much of the evidence put forward demonstrates direct acknowledgment by the state. That protection is provided to individuals other than the Prime Minister and the Sovereign, as a bare statement of fact, is inescapably already in the public domain and has been put there by the state itself.

47. For the above reasons, we cannot find that information would, or would be likely to, prejudice any of the matters listed in s.31 for no other reason than it would reveal that protection was provided at some point to someone other than the Prime Minister or the Sovereign, or that the level of protection is decided on an individual basis based on threat, harm and risk. MPS really puts forward the type of justification that might support a 'neither confirm nor deny' position, in circumstances where the fact has been repeatedly confirmed.

48. The same applies to the fact that different individuals may receive different levels of protection. Again, the public domain material and OPEN evidence confirms that protection is provided according to what Supt. Clark describes as "threat, harm and risk". One can apply the information in the public domain to readily formulate any number of hypothetical scenarios. For example, a prominent dissident living in exile from a repressive regime might visit the UK to address a large rally of political supporters. If intelligence comes to light that someone will try to assassinate him during his visit, in a particular way, or at a particular place or time, then RAVEC might decide that protection at a particular level should be provided by RaSP. In turn, RaSP will make operational decisions about how best to tailor that protection to the threat that has been identified. All this is in the public domain already.

49. Given the public acknowledgement that the system exists, and that from time to time it does provide protection to individuals such as those identified in the (purely hypothetical) example in the above paragraph, the question arises as to how a purely historical example can pose any risk. While our full consideration of Supt. Clark's illustrative examples from the requested material is contained within our closed reasons, we can say that we have rejected those that simply put forward historical examples of the system operating as has already been publicly confirmed. This has been in light of the age and historical context of the requested information. It concerns protection provided nearly a century ago, in the years leading up to World War II. Our full consideration of Supt. Clark's illustrative examples, and his closed evidence more generally, recognises those factors and is fully set out in our CLOSED reasons.

50. We also take into account the power of 'jigsaw' identification. Seemingly irrelevant and minor details may come up when put together by a motivated individual or group, reveal unanticipated levels of detail. Indeed, this is how Dr Lownie spends much of his time as a historian. A harmful actor might do likewise. But there must still be *some* discernible risk that information could cause harm, rather than simply a blanket assertion. There comes a point when the Tribunal can no longer conscientiously find that the statutory language is engaged. In the great majority of this near century-old information, that point has been reached. If Parliament had intended the work of RaSP to be subject to such a blanket exemption as is (in reality) claimed by MPS, it would have included it in the list of bodies specified at s.23(3).

51. We should not be misunderstood as holding that information from so long ago must inevitably fall outside the s.31 exemption on the grounds of age, and disagree with Mr Davies' observations to that effect. We accept that even very old information might contain matters that are still of concern in the current day. This is still unlikely, and (as was acknowledged by Supt. Clark in his evidence) it is unlikelier still that this would be recognised by a hostile actor, but we do accept that in specific cases there might be a sufficient risk such as to engage the s.31(1) exemption. Applying very great caution, and arising from our respect for Supt. Clark's assessment, we have accepted that a small part of the requested information does so.

52. For that small part of the requested information that does potentially engage the exemption, we have applied the public interest balancing test. The factors pointing away from disclosure can only be explained in our closed reasons. We accept and give full force to the factors going the other way, as identified by Dr Lownie. There is a public interest in transparency. While the whole body of requested information is likely to be of legitimate interest and value to historians, this potentially exempt part does not appear to have any particular historical interest by itself. We conclude that the risk it poses tips the balance against disclosure.

Consideration – s.40

53. We agree with the respondents on this issue. Having read the letter for ourselves, we agree that the author may still be alive and that disclosure of the letter would risk their identification. The views expressed in the letter constitutes special category data by virtue of their political nature. The potential lawful basis for the processing of the data is contained in Article 6(1)(f) of UK GDPR, being that processing is necessary for the purposes of the legitimate interests pursued by a third party, subject to the interests or fundamental rights and freedoms of the data subject. We cannot see that this letter's content discloses any legitimate interest, but if it did then there is nothing about the letter that makes its disclosure 'necessary'. The letter is simply an unremarkable expression of personal political views by an individual to a politician. There would be an expectation that such sensitive information would be kept confidential. We conclude that there is no lawful basis for disclosure under Article 6(1), and that disclosure would be prohibited under Article 9, and that the letter is therefore exempt from disclosure under s.40(2). Our reasons for that conclusion are entirely stated within these OPEN reasons.

Signed

Judge Neville

Date:

3 January 2024