



**NCN: [2024] UKFTT 166 (GRC)
Case Reference: EA/2023/0272**

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

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

Before

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

Between

IAN HUDSON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision

1. The appeal is allowed.
2. Decision Notice IC-193121-Z5F4 is not in accordance with the law. The public authority is not entitled to rely on s.30(3) of the Freedom of Information Act 2000 ("FOIA") to confirm or deny whether the information is held.

Substituted Decision Notice

In response to the request dated 1 June 2022 from Ian Hudson the Sussex Police to provide the date when their Unmanned Aerial Vehicle ("UAV") Detect and Warn Capability deployed on 20 December 2018 was purchased or if rented the dates of the rental period, if this information is held.

The public authority must take this step within 28 calendar days of the date of this decision. Any failure to abide by the terms of the Tribunal's substituted decision notice may amount to contempt which may, on application, be certified to the Upper Tribunal.

REASONS

Background and Request

3. This appeal is brought under s. 57 of the FOIA against the Commissioner's Decision Notice dated 24 May 2023 ("the DN") with reference IC-193121-Z5F4 which is a matter of public record.
4. The parties opted for a paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within Rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009, as amended ("the Rules").
5. The Tribunal determined this appeal with the Appellant's two other appeals (EA/2023/0273 and EA/2023/0281) because they related to the same factual incident namely a disruption by drone sighting at Gatwick Airport ("the Airport") in December 2018.
6. In reaching its decision the Tribunal took into account all the evidence before it in the open bundle of 115 pages (A1 to D112) and a closed bundle of 2 pages lodged by the Appellant and made findings on the balance of probabilities.
7. The full details of the background to this appeal, the Appellant's request for information and the Commissioner's decision are set out in the DN.
8. On 1 June 2022, the Appellant made a FOIA request to the Sussex Police in the following terms:

"In FOIA responses from the Ministry of Defence, it was noted that. "Sussex Police are leading the investigation, and have deployed their own UAV Detect & Warn capability to Gatwick Airport." which was prior to the arrival of MOD assets, so on 20/12/18.

It is in the public domain that the Sussex Police "UAV Detect & Warn capability" was DJI's AeroScope so I don't require the force to name the equipment in use, I require the date that the "UAV Detect & Warn capability" was purchased or rented by Sussex Police. If the cost and retailer can be provided too, that would be appreciated. but the date alone will be fine. If it was a rental, the period to and from of the rental is required."
9. Sussex Police responded on 13 July 2022. It stated that under s. 30(3) of the FOIA, it was unable to confirm or deny whether the information was held.

10. The Appellant requested an internal review on 13 July 2022. Sussex Police provided an internal review on 24 August 2022, in which it upheld its original position.
11. On 22 September 2022, the Appellant lodged a complaint to the Commissioner concerning his request.

The Decision Notice

12. On 24 May 2023 the Commissioner issued the DN finding that the Sussex Police were entitled to rely on s.30(3) of the FOIA to neither confirm or deny whether information was held. The Commissioner did not require any steps to be taken.
13. On 25 May 2023 the Appellant appealed the Commissioner's DN.

Legal Framework

14. A person requesting information from a public authority has a right, subject to exemptions, to be informed by the public authority in writing whether it holds the information under s.1(1)(a) of the FOIA and to have that information communicated to him if the public authority holds it under s.1(1)(b) of the FOIA.

15. When determining whether or not the information is held the Commissioner and Tribunal should apply the normal civil standard of proof, on the balance of probabilities.

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

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

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,

S. 1(1)(a) does not apply.”

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

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

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

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

2. whether a person charged with an offence is guilty of it,
 - (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
 - (c) any criminal proceedings which the authority has power to conduct.”
18. S.30(3) of FOIA provides that: “The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be exempt) information by virtue of subs. (1) or (2).”
19. The powers of the Tribunal in determining this appeal are set out in s.58 of the FOIA as follows:
 - (1) if on an appeal under s.57 the Tribunal considers-
 - (a) that the notice against which the appeal is brought is not in accordance with the law, or
 - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.
 - (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.
20. The Tribunal stands in the shoes of the Commissioner and takes a fresh decision on the evidence. The Tribunal does not undertake a review of the way in which the Commissioner’s decision was made.

Grounds of Appeal

21. The Appellant submits the following grounds of appeal:
 - a) The Commissioner failed to fully consider the public interest to counter the exemption in s.30 due to a lack of understanding of how a police force is embedded at an airport such as Gatwick, where the police are stationed on site and operate their own equipment for the benefit of the airport. Hence when an airport talks about their capability it can be that owned or operated by the Police.
 - b) The Commissioner failed to fully consider all the evidence submitted.
 - c) The Commissioner failed to consider the (publicly available) photograph submitted showing a Sussex Police Officer operating Aeroscope on the roof of the Airport on 20 December 2018. The technical information provided supports the public interest argument.

- d) The information the Appellant provided was technical but the Commissioner never sought any clarification.
- e) The Appellant's knowledge about the Aeroscope system would not give away the Police's ability to tackle any airport incursion in future because the RAF currently have the responsibility and capability called ORCUS which can be deployed nationally by helicopter.
- f) The UK's national counter drone capability is fully documented by the Ministry of Defence and RAF and so is not a secret.
- g) The Commissioner is saying that current or future policing would be compromised should knowledge of a four year old defunct, discontinued system which is not the UK's national infrastructure defence be revealed.
- h) The fact that the Sussex Police had a capability is in the public domain.
- i) In relation to public interest the global drone community has been damaged by the incident at the Airport especially the UK industry. There is global reputational damage as the Gatwick incident is seen as a failed police operation and, also, one where Sussex Police are burying mistakes.
- j) There is public interest from the thousands of passengers who had their flights cancelled.
- k) The Commissioner should not have considered the number of request to Sussex Police but should have considered the number of requests answered and whether those answers addressed the requests. The Sussex Police have provided very little information to requesters.
- l) Every refused FOIA request underlines an ongoing failure and lack of trust.

The Commissioner's Response

22. The Commissioner submits the following:

- a) The Commissioner is mindful of his role as an independent regulator and therefore the need to keep the merits of his decision under review (*Lubicz v IC and King's College London* [2015] UKUT 555 (AC) at [51])
- b) On 19-20 December 2018, following unannounced drone sightings close to its runways, the Airport was forced to suspend and/or cancel a number of domestic and international flights. This caused extensive disruption to a key national infrastructure resource whilst also raising a significant security threat generally.
- c) The Appellant does not appear to challenge Sussex Police's reliance on the exemption within s.30(3) FOIA. The exemption is engaged because the request concerns information potentially held by Sussex Police for the purposes of an

investigation into whether a person should be charge with an offence or whether a person charged with an offence is guilty of it.

- d) The information would, if held, relate to an ongoing and unsolved investigation arising from the interference with key aviation infrastructure represented by the drone presence at the Airport. This is a serious offence. The suspension and/or cancellation of services at the Airport arose due to genuine fears for the safety of members of the public as well as travellers.
- e) The public interest favours neither confirming nor denying that the information is held. There are significant factors in favour of maintaining that approach, largely relating to the ability of public authorities to safeguard the public by effectively investigating the incident at the Airport and by being able to decisively respond to similar threats relating to key UK infrastructure.
- f) The investigation into the events of 19-20 December 2018 involves inquiries relating to a serious unsolved crime.
- g) The effect of disclosure would reveal much about key dates/times at which the alleged apparatus was stationed at the Airport. This would amount to public disclosure of the detection capabilities of Sussex Police on the days of the relevant offences and could compromise the investigation and/or prevent the crime from ever being solved.
- h) The effect of disclosure would provide insight about how Sussex police and other agencies work together to safeguard the Airport. Even if the precise system used has now been updated, disclosure would shed light on the procedural approach adopted by Sussex Police in deploying various apparatus in conjunction with other agencies. Disclosure could compromise the protection offered to members of the public.
- i) The effect of the disclosure could also prejudice both related and similar investigations. It could reveal the timeframe within which Sussex Police responded to the threat by deploying the claimed apparatus.
- j) The above considerations are in favour of maintaining the relevant exemption clearly and conclusively outweigh the public interest in not doing so, which largely derives from the benefit of transparency in the exercise of policing powers.
- k) Revealing when, if at all, Sussex Police used the claimed apparatus would amount to a significant disclosure concerning their past and future ability to respond to threats concerning drones as well as in relation to their interaction with other law enforcement agencies. This is a significant and persuasive factor in favour of maintaining the exemption.
- l) The statement by Chris Woodroffe (COO of the airport) confirmed that the Airport used the DJI Aeroscope system and did not refer to the Sussex Police. The Commissioner was correct to state that the statement of Chris Woodroffe does not amount to the information being in the public domain because it does not refer to the Sussex Police's drone response apparatus and does not shed light on when, if at all, any such apparatus may have been acquired by Sussex Police.

- m) The photographs of Police Officers next to antennae apparatus at the Airport do not reveal the information requested in the request. The photographs do not disclose who owns or rents the photographed apparatus or when the photographed apparatus was rented or purchased by the user. The photographs offer no insight into how and how quickly Sussex Police responded to threats at the Airport.
- n) Identification of the type of apparatus in the photographs does not comprise the information in the request and hence the photographs do not indicate the requested information is already in the public domain.
- o) The information within the request is not within the public domain and the argument that it is in the public domain holds no weight against maintaining the exemption.
- p) Whether or not security measures at the Airport are now different the criminal investigation into what took place entails consideration of the security measure in place at the time. Revealing information about the apparatus at the Airport at that time has the ability to prejudice that investigation.
- q) Information concerning the speed with which Sussex Police provided the claimed apparatus goes to the ability of that law enforcement department to respond to threats at the Airport. Revealing the requested information has the possibility to assist those who wish to commit criminal offences and escape the repercussions by disclosing the speed with which Sussex Police obtain relevant apparatus in response.
- r) The requested information would shed light on how Sussex Police deploy measures concerning threats in conjunction with other law enforcement agencies and would be prejudicial to future responses to threats.
- s) Hypothetically if the Sussex Police wish to use the DJI Aeroscope for security purposes disclosure of the requested information would allow potential criminal insight into the procedural operation of that technology including response times by Sussex Police. Disclosure would prevent the technology being used in future which is to the detriment of the public at large and could undermine the safety at the Airport.
- t) The Appellant has not particularised how the drone community has been prejudiced by the disruption at Gatwick Airport and failed to explain how disclosure could alleviate any reputational damage.
- u) The reputational damage to a relatively small community does not outweigh the extremely weighty public interest in maintaining the safety of the Airport for members of the UK public and international visitors. The public interest would be significantly undermined by disclosure of the requested information.
- v) The evidence relied on by the Appellant appears to suggest that the Falcon Shield system did not detect a drone once it was active but cannot be used as confirmation that there was never a drone at the Airport.

- w) The requested information has no value in determining whether or not there actually was a drone on the dates in question and therefore there is no public interest in the disclosure of the information if that is the purpose for which it is sought.
- x) The Appellant suggests that Sussex Police have revealed very little if anything on Operation Trebor via FOIA and this should be taken into account. This argument is misconceived. The fact that the valid operation of the s.30(3) exemption in respect of matters relating to the Airport has been continually justified in the public interest is a factor in favour of continuing to maintain the exemption. It underscores how sensitive information relating to this incident is in respect of current and future policing operations. The Appellant's argument that because Sussex Police have released little information justifies the release of sensitive information completely undermines the purpose behind exemptions in the public interest.
- y) The Commissioner submitted that the decision in respect of the public interest balance was correct and that the balance fell in favour of maintaining the exemption.

Conclusions

- 23. In reaching its decision the Tribunal took into account all the evidence before it whether or not specifically referred to in this Decision. The Tribunal has not relied on any information in the Closed Bundle in reaching its decision. The Tribunal applied the legislation and case law as set out above.
- 24. The request arose from the sightings of two drones at the Airport on 19 and 20 December 2018. The Airport immediately closed its runway and suspended all flights resulting in disruption to many passengers and flights were re-routed. Sussex Police commenced an investigation into the incident in a multi-agency collaboration with other police forces and the security services. The incident attracted substantial national and international media coverage. The crime investigate by Sussex Police was an offence of 'serious disruption to an aerodrome' contrary to s.1(2)(b) of the Aviation and Maritime Security Act 1990 which carries a maximum penalty of life imprisonment. Mr Brazier, Head of Information Management, Data Protection Officer, in an email dated 2 February 2023 stated that no charges had yet been brought as a result of the investigation and the investigation will continue as new evidence becomes available.
- 25. The Tribunal has taken into account that for the exemption under s.30(1) to apply an investigation does not have to be ongoing and that the case may be resumed if new information came to light. Taking this into account the Tribunal considered it not relevant that the Appellant asserts that the Sussex Police are on record as saying there are no future realistic lines of inquiry.
- 26. The Appellant states that he is an expert on drones and counter drones and he has lodged evidence in support of this. He has relied on video evidence to identify which make and model of drone was being used by Sussex Police and he does not seek disclosure of this information.
- 27. The Tribunal found that disclosure of the dates when the UAV Detect and Warn Capability deployed on 20 December 2018 was purchased or if rented the dates of

the rental period would not provide insight about how Sussex police and other agencies work together to safeguard the Airport. This is because the disclosure is of very limited information even if the information relates to more than one piece of apparatus.

28. The Tribunal found that disclosure would not shed light on the procedural approach adopted by Sussex Police in deploying various pieces of apparatus in conjunction with other agencies. The disclosure relates only to dates and would not disclose details of any or all of the apparatus in use by the Sussex Police or other agencies.
29. The Tribunal found that disclosure would not compromise the protection offered to members of the public because the disclosure is specific to the apparatus used on 20 December 2018 and does not provide information about the apparatus used in other incidents in the past and future or about all the apparatus used on that date.
30. The Tribunal found that disclosure would not reveal much about key dates/times at which the alleged apparatus was stationed at the Airport. This would not amount to public disclosure of the detection capabilities of Sussex Police on the days of the relevant offences and could not compromise the investigation and/or prevent the crime from ever being solved. The information sought is too limited in nature and scope to do this.
31. The Tribunal found that disclosure would not prejudice both related and similar investigations because providing the dates does not reveal the timeframe within which Sussex Police responded to the threat by deploying any apparatus.
32. The Tribunal found that disclosure would not reveal much about key dates/times at which the alleged apparatus was stationed at the Airport.
33. The Tribunal found that disclosure of dates would not amount to public disclosure of the detection capabilities of Sussex Police on the days of the relevant offences and would not compromise the investigation and/or prevent the crime from ever being solved.
34. The Tribunal found that disclosure of the dates is not disclosure of the dates when, if at all, Sussex Police used the claimed apparatus. Accordingly, does not amount to a significant disclosure concerning the past and future ability of the Sussex Police to respond to threats concerning drones as well as in relation to their interaction with other law enforcement agencies.
35. The Tribunal found that the disclosure of the dates would not amount to disclosure of information concerning the speed with which Sussex Police did respond and would be able to respond in the future to threats at the Airport. The disclosure does not shed light on how Sussex Police deploy measures concerning threats in conjunction with other law enforcement agencies and would not be prejudicial to future responses to threats.
36. The Tribunal found that disclosure would not assist those who wish to commit criminal offences and escape the repercussions by disclosing the speed with which Sussex

Police obtain apparatus. The disclosure does not identify which apparatus was used and when.

37. The Tribunal found that the dates of purchase or rental of the Unmanned Aerial Vehicle Detect and Warn Capability deployed on 20 December 2018 would not provide information about how quickly the Sussex Police responded to the threats at the Airport.
38. The Tribunal was not persuaded that the dates of purchase or rental of the UAV detect and Warn capability was information held by the Sussex Police for the purposes of any investigation with a view to it being ascertained whether a person should be charged with an offence.
39. In relation to the public Interest test the Tribunal found that the Sussex Police had a duty to enforce the law and investigate crime on behalf of the public and that the public release of this information would reinforce its commitment as an open and transparent service in respect of the information it holds.
40. The Tribunal found that the information to be disclosed would not potentially compromise any investigation into this unsolved crime and would not compromise related or similar investigations.
41. The Tribunal found there had been damage to the drone community which is not a small community taking into account the number of professional and amateur drone users, the contribution of drones to the economy and the number of jobs involved in the industry.
42. The Tribunal found that disclosure would not prejudice the prevention of crime as would not disclose the detection capability and would not prejudice the detection of crime or undermine the partnership approach to law enforcement with other agencies and would be unlikely to affect the force's future law enforcement capabilities.
43. The Tribunal found that disclosure would not affect the force's ability to ascertain whether any person was responsible and would not assist offenders in commissioning similar crimes.
44. The Tribunal understands that the Police need to be allowed to carry out investigations effectively away from public scrutiny but were not persuaded that disclosure of this information would prevent accurate thorough and objective investigations to be carried out. The disclosure would not interfere with court proceedings or prevent an individual from being brought to justice.
45. The disclosure is only of the dates of purchase or rental and not the details of the specific make and model of the equipment. Details of the equipment might assist offenders to evade detection and commit crime and the exemption correctly applies to that information which the Appellant does not seek in any event.
46. The above considerations support the decision of the Tribunal that maintaining the relevant exemption clearly does not outweigh the public interest in disclosure, which largely derives from the benefit of transparency in the exercise of policing powers.

47. The exemption under s.30(3) of FOIA is subject to the public interest test set out in s.2(1)(b) of the FOIA. The Tribunal found that in all the circumstances the public interest in disclosing whether or not Sussex Police hold the relevant information outweighs the public interest in maintaining the exclusion of the duty to confirm or deny.
48. The Tribunal found an error in the Commissioner's reasoning within the DN and there was a flaw in the exercise of his discretion of the public interest test.
49. Accordingly, the appeal is allowed.

Signed: **Judge J Findlay**

Date: 25 January 2024