



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

**Appeal Reference: EA/2021/0016**

**Decided without a hearing on 8 October 2021**

**Before**

**JUDGE SOPHIE BUCKLEY  
NAOMI MATTHEWS**

**Between**

**JON AUSTIN**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

First Respondent

**METROPOLITAN POLICE SERVICE**

Second Respondent

**DECISION**

1. For the reasons set out below the appeal is allowed. The Metropolitan Police Service ('the MPS') was not entitled to rely on s 31(3) of the Freedom of Information Act 2000 (FOIA) to neither confirm or deny that it held the requested information.
2. The tribunal will issue a further decision and if appropriate a substitute decision notice once it has made a determination in relation to any substantive exemptions relied on by the Second Respondent.
3. A separate case management order has been issued as follows:

1. By **17 December 2021**:
  - i. the second respondent shall write to the tribunal and the other parties confirming that it has disclosed the requested information, or,
  - ii. if the second respondent claims it is not obliged to comply with the request for information (other than under s 31(3) or s 30(3)), it shall provide a notice to the appellant, copied to the tribunal and the first respondent, that complies with s 17 FOIA.
  - iii. If the second respondent relies upon further exemptions in that notice it must also provide any evidence (not already in the bundle) or submissions relevant to those exemptions upon which it will rely before the tribunal.
2. If the second respondent relies upon further exemptions, the appellant and the first respondent must provide to the tribunal and the other parties by **21 January 2022** any evidence (not already in the bundle) or submissions relevant to those exemptions upon which they will rely before the tribunal.
3. The first respondent is responsible for preparing and providing an updated bundle.
4. By **4 February 2022** the parties will inform the tribunal whether or not they consent to:
  - i. The matter being heard on the papers;
  - ii. The appeal being finally determined by two panel members in the absence of one of the panel members originally chosen to decide the matter.
4. The tribunal will then make further orders and/or list for a hearing/paper determination as appropriate.

**CONSENT OF PARTIES TO PROCEEDING IN THE ABSENCE OF ONE  
MEMBER**  
**Schedule 4 para 15(6) Tribunal, Courts and Enforcement Act 2007 (TCEA)**

5. All parties provided their consent for the matter to be decided in the absence of one of the members chosen to decide the matter.

**REASONS**

**Introduction**

1. This is an appeal against the Commissioner's decision notice IC-40052-X4Y7 of 30 November 2020 which held that the Commissioner of the Metropolitan Police Service ('the MPS') was entitled to refuse to confirm whether the recorded information is held in accordance with s 30(3) of Freedom of Information Act 2000 (FOIA).
2. In an interim decision promulgated on 4 August 2021 the tribunal determined that the MPS was not entitled to rely on s 30(3) of the Freedom of Information Act 2000 (FOIA) to neither confirm or deny that it held the requested information.
3. In accordance with case management orders from the tribunal, further submissions were provided on s 31(3) by the MPS and Mr. Austin. The Commissioner did not provide any further submissions.
4. The substantive submissions of MPS are dated 24 August 2021. Mr. Austin's substantive submissions are dated 24 August and 10 September 2021.
5. The tribunal also took account of a number of replies/further submissions contained in emails from the parties dated 10, 13, 14 and 17 September 2021.
6. Mr. Austin included additional documents with his submissions and the MPS objected to this. By order dated 20 September 2021 the tribunal allowed the additional documents to be relied upon.

#### **Factual background to the request**

7. The request is for details relating to a police dog search. The importance of the request, according to Mr. Austin, is that there is evidence that the police dog search may not have taken place and that the CPS and the Court may have been misled by the MPS.

#### **Request, response and decision notice**

8. The request, the MPS' response and the decision notice are set out in the interim decision and will not be repeated here. The parties should note that the date of the Decision Notice is 2 April 2020 not 30 November 2020 as stated in para 1 of the interim decision.

#### **The grounds of appeal, the responses of the respondents and Mr. Austin's reply**

9. These are summarised in the interim decision and will not be repeated here.

#### **Further submissions on s 31(3)**

##### *Submissions of the MPS*

10. The MPS relies on the same matters as set out in its response in relation to s 30(3). The existence of ongoing criminal proceedings in the Court of Appeal in relation to Mr. Wright's conviction should be a weighty public interest factor against disclosure in the context of s 31(3).
11. Any decision notice should require MPS to provide Mr. Austin with a confirmation or denial rather than order disclosure of the requested information.
12. The MPS seeks, if necessary, a direction that the time to seek permission to appeal runs from the date of the final decision notice.
13. In its submissions of 10 September the MPS submits that the fact that the Court of Appeal considered all relevant matters and dismissed the criminal appeal and thus found the conviction sound is a weighty factor favouring the MPS' position on s 31.
14. In its submissions of 14 September the MPS submits that the wide ranging points about the criminal investigation in general are not relevant to the question of whether confirmation or denial that the requested information is held should be required under s 31 FOIA.

*Submissions of Mr. Austin*

15. Mr. Austin submits that the public interest favours disclosure. In essence Mr. Austin argues that, in the light of the findings in the interim decision, the matters relied on by MPS and the arguments made are now redundant and carry no weight. The tribunal found in respect of s 30(3) that the public interest test favoured confirming or denying if the information was held after considering all the factors relevant to the s 31(3) exemption.
16. A confirmation or denial would not prejudice the prevention or detection of crime or the apprehension or prosecution of offenders. The MPS has not been able to show any real or significant risk or even a potential risk of prejudice. There is no evidence of a causative link between confirmation and denial and any alleged prejudice that is real, actual or of any substance.
17. In relation to the ongoing criminal appeal, the tribunal will base its decision on the situation at the time the original FOI request was made. At that time, the appeal was some 17 months away from a first court hearing. The criminal appeal is not concerning warrants or dog searches but concerns non-disclosures of evidence during the trial. In any event the tribunal addresses this at para 132 and 133 of the interim decision.
18. In his submissions of 10 September 2021 Mr. Austin states that the criminal proceedings (the appeal) concluded on 2 September 2021 and therefore the MPS

submission that the ongoing proceedings were a weighty factor against disclosure should not be taken into account as an argument against disclosure.

19. Mr. Austin states that the process of the appeal revealed further information which could suggest that the investigation was not conducted properly in relation to the non-disclosures of evidence during the trial.
20. Mr. Austin also highlights further evidence that he says suggests that the investigation was not conducted properly.
21. In his submissions of 13 September Mr. Austin argues that the fact that Court of Appeal dismissed the appeal does not mean that the issues that he raises are not matters of public interest worthy of further investigation by a third party outside the appeal process. The Court of Appeal decision was focused solely on the alleged missing text messages.
22. In his submissions of 17 September Mr. Austin argues that the other issues raised by him are relevant to the request. The tribunal took account of independent evidence about the conduct of the investigation and it follow that any further evidence on the conduct of the investigation would be relevant to the public interest balancing exercise.

### **Evidence**

23. The evidence before the tribunal is set out in the interim decision. The tribunal allowed Mr. Austin to submit some additional documents and they were added to the bundle.

### **Legal framework**

24. The legal framework is set out in the interim decision.

### **Issues**

*Section 31(3)*

25. The issues that arise under s 31(3) are:
  1. What information derives from a 'yes' or 'no' answer?
  2. Would a 'yes' or 'no' answer prejudice or be likely to prejudice the prevention or detection of crime or the apprehension of prosecution of offenders?
  3. If so, in all the circumstances of the case, does the public interest in maintaining the exclusion of the duty to confirm or deny outweigh the public interest in disclosing whether the public authority holds the information?

### The role of the tribunal

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

### **Discussion and conclusions**

#### *The relevant date*

27. As stated in the interim decision, the relevant date for determining whether or not confirmation or denial would prejudice the relevant interests and for determining the public interest balance is, at or around the time when the request was refused including any internal review. The outcome of the appeal to the Court of Appeal is therefore not relevant.

#### *What information derives from a 'yes' or 'no' answer?*

28. Our conclusions on this are set out in the interim decision at para 115-118. We set them out here for convenience:
  115. When deciding what information derives from a 'yes' or 'no' answer, we think that it is legitimate to consider both any information expressly communicated by the public authority and any reasonable inferences the public would draw from the information.
  116. The request asks for the names and/or identification numbers of four MPS sniffer dogs sent to a particular location on 11 August 2014. It also asks for details of where the dogs were sent from and details of the time the search was carried out. If the MPS confirmed that it held information within the scope of the request, the information revealed by this answer would be official confirmation of the fact that a search using at least one sniffer dog was carried out at the specified location on that date. The information revealed by a 'no' answer is more ambiguous: either the search was not carried out or, for some reason, no written records have been kept. Given the nature of the information requested and the usual practices of the MPS we take the view that the public would reasonably infer, on the basis of officially provided information, that no search with dogs was carried out.
  117. We accept on the basis of the evidence in the bundle that the CRIS produced by Mr. Austin is the CRIS relating to this investigation and that it was disclosed by the MPS during the criminal proceedings. This does not mean that the information contained in the CRIS was in the public domain at the time, (i.e. that it was referred to in court). Further there is no evidence before us that it remains in the public domain. Similarly there is no evidence that the reference by the prosecution barrister in her opening and closing speeches

to a dog being involved in the search has remained in the public domain. There is no evidence in the bundle, for example, that shows that the reference to the use of a dog or dogs was reported by the press and is still available online.

118. We do not accept that either confirmation or denial would reveal the fact that an investigation had taken place, because this was already officially confirmed. We find that 'if asked' lines, once issued, amount to official and public confirmation of the facts contained therein. Accordingly we find that it was already officially confirmed that 'in December 2014 officers from the Criminal Finance Team investigated an offence of cultivation of cannabis at an address in [location removed]. One person, a man in his 40s, was convicted of possession of cannabis and subsequently a confiscation order made. Enquiries into this matter are now complete. There are no outstanding suspects'.

*Would a 'yes' or 'no' answer prejudice or be likely to prejudice the prevention or detection of crime or the apprehension of prosecution of offenders?*

29. Where the specified activity or interest which would be likely to be prejudiced is a public interest, like the prevention or detection of crime, or the apprehension of prosecution of offenders, there is an obvious overlap between whether or not the section is engaged and any subsequent application of the public interest test. We bear in mind that although the relevant factors may overlap, the questions that we have to answer are different.
30. The applicable interests in this case are the prevention or detection of crime or the apprehension of prosecution of offenders. It is important to note that s 31(3) is engaged where there would be likely to be prejudice to those interests. It does not require the respondent to show that disclosure *will* lead to an increase in crime.
31. The MPS has not explicitly set out the nature of the prejudice or harm to the s 31(1) interests, but instead relies on its arguments under s 30(3).
32. The tribunal has attempted, from the submissions on the public interest under s 30(1) and from the witness statements provided by MPS to identify the nature of the prejudice which the MPS submits is likely to occur to the s 31(1) interests.
33. In essence, the tribunal understands the nature of the prejudice being claimed by MPS :
1. Requiring MPS to confirm or deny would hinder its ability to take a consistent NCND line on requests for this kind of information. This would potentially allow for a 'mosaic effect' approach to be taken by anyone who wishes to gain information about specific investigations. It would permit information about the use of Police dogs both in general, and the use of specific police dogs to be accumulate. This information would be useful to those involved in organised criminality particularly, but not confined to, drugs offences.

2. The form of the request (a very specific request and relating to an assertion made by the requestor) means that providing confirmation/denial is likely to convey substantial information about the accuracy of that assertion. This would potentially jeopardise the conduct of criminal investigations. There is a realistic possibility of investigations being reopened in order to investigate new lines of enquiry, review existing evidence, the scope of an investigation being broadened or narrowed to even new investigations being carried out that relate to or overlap with earlier enquiries. There would be an expectation that information previously collated as part of related investigation(s) would be kept confidential. The fact that there is an ongoing appeal against a criminal conviction illustrates how even after an investigation is completed information relating to it may have ongoing relevance.
34. We accept that, in general, the articulation of harm in the context of an NCND response is inevitably going to be less precise and specific than when setting out the reasons for refusal to provide the information sought.
35. In relation to the consistency of approach, we accept that the MPS is entitled to take a consistent approach to NCND, in the sense that the use of NCND should not depend on whether or not it holds the requested information, otherwise the changing response would reveal if information was held. Further, the MPS is entitled to take a consistent approach if the inconsistent use of NCND reveals something else: for example a policy of only using NCND where the information requested is particularly sensitive would, over time, reveal information about the sensitivity of particular investigations.
36. However the threshold of prejudice must be reached in order for the exemption to be engaged. The MPS must consider, in each case, whether the information revealed by NCND response would, or would be likely to prejudice the relevant interests. The Upper Tribunal in Savic held that there is a need in each case to identify what information derives from a 'yes' or 'no' answer and to consider whether a 'yes' or 'no' answer has the impact specified in the relevant provision.
37. We dealt in the interim decision with the MPS' argument that because the request relates to an assertion made by the requestor, confirmation or denial would convey substantial information about the accuracy or otherwise of that assertion. On this basis it argued that an NCND response must be given consistently to this type of request, otherwise the pattern of responses would make clear that the use of NCND means that the information is held but its disclosure is not in the public interest.
38. We do not accept that this means that an NCND response must be given consistently to this 'type' of request, irrespective of whether or not confirming or denying would be likely prejudice the applicable interests. We do not accept that the pattern of responses would make clear that the use of NCND means that the



information is held but its disclosure is not in the public interest (or that its disclosure would prejudice the relevant interests in s 31(1)) The pattern of using NCND would give no indication as to whether the requested information was held. The prejudice caused by providing a 'yes' or 'no' answer (or not) does not depend on whether or not the requested information is held.

39. Further we do not accept, as set out in the interim decision, that this decision will bind the MPS as to the approach it takes to other requests. A decision to confirm or deny on one occasion because there is no real or significant risk of prejudice to the relevant interests does not mean that the MPS has to take the same approach in relation to future requests. Each request must be considered by the MPS on its own merits.
40. In the interim decision we rejected the MPS' submission that confirming or denying that it holds the information would disclose whether or not the MPS had conducted the investigation in question. We concluded that this information had already been officially publicly confirmed.
41. We accepted that the information which would be revealed by a confirmation or denial in this case does amount to substantive information about the investigation i.e. whether or not there was a search with dogs.
42. We have found that the revealed information (i.e. whether or not there was a dog search) could contribute, to a limited extent, to a 'mosaic effect' accumulation of information about the use of police dogs. However, as we are considering the revealed information rather than the requested information, we find that such contribution would be minimal.
43. When deciding if the section is engaged, we must decide if the MPS has satisfied the evidential burden of showing that some causal relationship exists between the prejudice being claimed and the potential disclosure; if the prejudice is real, actual or substantial; and whether the chance of prejudice is more than a hypothetical or remote possibility i.e. is there a real and significant risk of prejudice?
44. We are not satisfied, on the basis of the evidence and submissions before us, that the chance of prejudice to the prevention or detection of crime or the apprehension of prosecution of offenders from this minimal contribution to the accumulation of information relating to the use of police dogs is more than a hypothetical or remote possibility. We are not persuaded that there is a real and significant risk of prejudice to those interests.
45. We accepted in the interim decision that the revealed information, taken together with other publicly available information, could provide an 'intelligence picture' and insight regarding the conduct of this specific investigation. We concluded that the fact that an appeal had been lodged meant that there must be some possibility that the case could be reopened. The MPS have not explained to us

how any reopened investigation would be likely to be prejudiced by this information. The fact that there would be an expectation that information previously collated as part of related investigation(s) would be kept confidential does not amount to an explanation. In the absence of such an explanation we do not accept that the MPS have satisfied the evidential burden of showing that some causal relationship exists between the prejudice being claimed and the potential disclosure, nor of showing that there is a real and significant risk of the harm.

46. On this basis we conclude that the exemption is not engaged.

#### *Public interest balance*

47. We do not need to go on to consider the public interest balance. However we have gone on to consider what our conclusions would have been if we had determined that the exemption was engaged.
48. For the reasons set out in the interim decision, taken together with the matters set out above, we would have concluded that the public interest in maintaining the exclusion of the duty to confirm or deny was outweighed by the extremely strong public interest in confirmation or denial because of the importance of maintaining public confidence in the MPS, as a public authority tasked with upholding the law, and the importance of scrutiny of the actions of the police where there is a suggestion, supported by independent evidence, that the investigation may not have been properly carried out.
49. In reaching this conclusion we would not have found it necessary to consider any of the additional evidence put forward by Mr. Austin in support of his argument that the investigation might not have been properly carried out.

#### *Next steps*

50. The tribunal has decided, in the light of the Upper Tribunal judgments in **Information Commissioner v E Malnick and The Advisory Committee on Business Appointments** [2018] UKUT 72 (AAC) and **NHS England V Information Commissioner and Dean** [2019] UKUT 145 (AAC), that the consideration of substantive exemptions should be dealt with by this tribunal through further submissions and deliberations rather than, in effect, by remitting the matter to the public authority and, as a necessary consequence, the Information Commissioner.
51. The tribunal was unsure as to whether or not **Malnick** was intended to apply in a 'gateway' appeal such as this one, i.e. when the public authority has given a NCND response. However we concluded that the general tenor of **Malnick** and subsequent Upper Tribunal decisions is that the first tier tribunal, once seized, should determine the issue. Pragmatically, the matter is likely to be resolved

more quickly if we determine the issue on the basis of further submissions rather than sending it back to the public authority. We have therefore issued appropriate case management directions.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 4 November 2021

Promulgated: 4 November 2021