



**NCN: [2024] UKFTT 168 (GRC)
Case Reference: EA/2023/0281**

**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-188311-T7D3 is not in accordance with the law. The public authority is not entitled to rely on 3.30(3) of the Freedom of Information Act 1000 ("FIOA") to confirm or deny whether the information is held.

Substituted Decision Notice

In response to the request dated 8 June 2022 from Ian Hudson the Sussex Police to disclose whether the Gatwick drone was sighted at any time between 07:00 am and 08:15am on 20 December 2018, 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 2 May 2023 ("the DN") with reference IC-188311-T7D3 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/2023/0272 and EA/2023/0273) 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 81 pages (A1 to D78) 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 8 June 2022, the Appellant made a FOIA request to the Sussex Police in the following terms:

"According to your records, you may want to refer to the timeline in the unredacted version of the Op Trebor SDB Report, for example, was the Gatwick drone specifically sighted at any time between 7:00am to 8:15am on 20/12/2018?"
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 24 August 2022, the Appellant lodged a complaint to the Commissioner concerning his request.

The Decision Notice

12. On 2 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 5 June 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 subsection (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.

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

Grounds of Appeal

20. The Appellant submits the following grounds of appeal:

- a) The Appellant wants to know when the sightings of the drone ended as the official sightings appear to have taken place between sunset and sunrise on 20 December 2018.
- b) The Commissioner failed to fully consider the public interest to counter the exemption in s. 30 due to a misunderstanding or downplaying of the significance of the evidence he has submitted.
- c) There is advice from a senior officer in the public domain suggesting a timeline should be made public with details in order to emphasise the credibility of events.
- d) He does not believe that an experienced police officer would advise Sussex Police to take actions that would open the force to prejudicing a criminal case.
- e) The request is relatively trivial in that he wished ‘morning’ to be more specifically defined.
- a) The requested information will clarify a statement within the Operation Trebor Structured Debrief Report (“Op Trebor SDB Report”).
- f) There is a previous example of Leicester Police revealing a claimed drone incursion to East Midlands Airport in 2022 involved mistaken sightings which demonstrates that transparency about a claimed drone incursion need not be a concern for Sussex Police.

- g) The reputation of the UK aviation has been damaged by the Sussex Police narrative, and also those who were affected and the airlines that lost money deserve transparency.
- h) In relation to public interest, the global drone community (professional and amateur) has been damaged by the incident at Gatwick Airport especially the UK industry. There is global reputational damage as the Gatwick incident is seen as a failed police operation where Sussex Police are burying mistakes.
- i) There is public interest from the thousands of passengers who had their flights cancelled.
- j) The official account of what happened at the Airport is untrue.
- k) The public interest in disclosure outweighs maintaining the exemption.

The Commissioner's Response

21. The Commissioner submits that following grounds:

- b) 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])
- c) 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.
- d) 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.
- e) 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.
- f) 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.
- g) The investigation into the events of 19-20 December 2018 involves inquiries relating to a serious unsolved crime.

- h) Disclosure would reveal much about the extent and capabilities of Sussex Police in detecting the interference with the Airport which led to the relevant criminal offence.
- i) The consideration for neither confirming nor denying that the requested information is held clearly outweighs the public interest in doing so which essentially derives from the benefit of transparency in the exercise of policing powers.
- j) The Appellant has misunderstood the statement within the Op Trebor SDB Report and the request is based on a misunderstanding and the clarification of the Op Trebor SDB Report does not support disclosure.
- k) The statements by the senior police officer about timelines were broad statements and he did not state that full details of sightings be disclosed to the public. He stated that a timeline could “potentially” be released.
- l) The relevant authorities have already taken steps to provide the public with an appropriate level of details concerning the relevant timeline without compromising the ongoing investigation.
- m) Disclosure will not clarify the Op Trebor SDB Report and would not change the response of the authorities or the record of what happened at the Airport.
- n) Reference to the drone coming down of its own accord is of no relevance to the request.
- o) On the Appellant’s own evidence there was a valid drone sighting at the Airport and it follows that it was appropriate for appropriate safety measures to be deployed. It is difficult to see how further disclosure of any specific time of any sighting could assist in remedying any asserted reputational damage.
- p) There is no credible evidence of any wrongdoing relating to authorities responding to the incident at the Airport. The requested information would not assist in uncovering or exposing any claimed wrong doing. The public interest in relation to this point is minimal.
- q) The appeal should be dismissed.

Conclusions

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

24. The request arose from the sightings of two drones at Gatwick 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 being investigated by Sussex Police was an offence of 'serious disruption to an aerodrome' contrary to s.1(2)(b) of the Aviation and Maritime Security Act 1990 which carries a maximum penalty of life imprisonment. Mr Brazier, Head of Information Management, Data Protection Officer, in an email dated 2 February 2023 stated that no charges had yet been brought as a result of the investigation and the investigation will continue as new evidence becomes available.
25. In reaching its decision the Tribunal has borne in mind that s.30(3) is a qualified exemption. This means that the public interest test contained in s.2 of FOIA must be considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in confirming or denying whether the requested information is held.
26. In accordance with this guidance when considering the public interest in maintaining exemptions it is necessary to be clear what they are designed to protect. In broad terms the s.30 exemptions exist to ensure the effective investigation and prosecution of offences and the protection of confidential sources. They recognise the need to prevent disclosures that would prejudice either a particular investigation or set of proceedings, or the investigatory and prosecution processes generally including any prejudice to future investigations and proceedings.
27. The Tribunal has taken into account that for the exemption under s.30(1) to apply an investigation does not have to be ongoing and that the case may be resumed if new information came to light. Taking this into account the Tribunal considered it not relevant that the Appellant asserts that the Sussex Police are on record as saying there are no future realistic lines of inquiry.
28. The Appellant seeks states that he is an expert on drones and counter drones. He has submitted statements from others in support of this assertion. 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.
29. The Tribunal found that disclosure of whether a drone was sighted at any time between 07:00 and 08:15 am on 20 December 2018 would not provide insight about how Sussex police and other agencies work together to safeguard the Airport.
30. The Tribunal found that disclosure would not shed light on the procedural approach adopted by Sussex Police in deploying various apparatus in conjunction with other agencies.
31. The Tribunal found that disclosure would not compromise the protection offered to members of the public.

32. The Tribunal found that disclosure would not prejudice both related and similar investigations because providing this information does not reveal the timeframe within which Sussex Police responded to the threat by deploying any apparatus.
33. The Tribunal found that disclosure of the information in the request 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 this very limited information 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 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 as relates only to times of possible sightings at a specific time on 20 December 2018.
37. 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.
38. In relation to the public Interest test the Tribunal found that the Sussex Police had a duty to enforce the law and investigate crime and the public release of this information would reinforce the commitment as an open and transparent service in respect of the information it holds.
39. 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 due to the limited and specific nature of the request.
40. 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.
41. 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.
42. 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 at the time of the request 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.

43. 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.
44. 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.
45. Accordingly, the appeal is allowed.

Signed: **Judge J Findlay**

Date: 25 January 2024