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Case Reference: EA/2023/0345 & EA/2023/0346

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by CVP on 19 January 2023

Decision given on: 25 February 2024
Promulgated on: 26 February 2024

Before

TRIBUNAL JUDGE Stephen Cragg KC
TRIBUNAL MEMBER Dr Phebe Mann
TRIBUNAL MEMBER Raz Edwards

Between

JUSTICE

Appellant

And

INFORMATION COMMISSIONER

Respondent

Decision: The appeals are Dismissed.

Substituted Decision Notice: None

The Appellant was represented by Ms Dehon KC and Mr Fitzsimons
The Commissioner was represented by Mr Reichhold

REASONS

MODE OF HEARING

1. The proceedings were held via the Cloud Video Platform. All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

2. The Tribunal considered an agreed open bundle of evidence for both appeals comprising 2060 pages, a closed bundle, written submissions from both parties and a bundle of authorities.

BACKGROUND

3. The Appellant is a cross-party law reform and human rights charity which works for a UK justice system that is fair, accessible, and respects the rights of all. An overview of the Appellant's work is provided in the witness statement of its CEO, Fiona Rutherford, prepared for this appeal:-

> JUSTICE is a cross-party law reform and human rights charity, with a broad membership, which strives for a UK justice system that is fair, accessible, and respects the rights of all. JUSTICE works across the spheres of administrative, civil, family and criminal justice in the United Kingdom. JUSTICE aims to identify areas that are ripe for reform and make recommendations for practical, realistic and timely changes to generate meaningful reform of the justice system. JUSTICE's recommendations are based on high quality, evidence-based research reflecting the professional and lay experience of the justice system. JUSTICE also submits third-party interventions, including in the UK Supreme Court and the European Court of Human Rights in cases that engage critical points of law pertaining to JUSTICE's areas of expertise.

4. These appeals concern requests for information by the Appellant for statistical ethnicity, age and gender information held by Merseyside Police and West Midlands Police (collectively referred to in this decision as 'the Police Forces') in respect of referrals made by the Police Forces to the Prevent programme. The information was withheld by those forces under ss24(1) and 31(1)(a) and (b) Freedom of Information Act 2000 (FOIA).

5. The Information Commissioner (the Commissioner) upheld those decisions, by decision notices IC-238174-K3Z5 and IC-236219-M4B3 relying solely on the

exemption in s24(1) FOIA. The Appellant now challenges the application of s24(1) and s31(1) FOIA to its requests.

6. The Appellant had ascertained from the Home Office (in respect to previous requests for information about Prevent) that ethnicity data concerning referrals to the Prevent programme may be held by the Counter Terrorism Policing Head Quarters. The Appellant made further FOIA requests to Merseyside Police and West Midlands Police which were expressed as follows:

> For each of the years 2017 to 2022, please could you provide a breakdown of
> all those referred by Merseyside Police to Prevent by:
> a. Ethnicity and gender;
> b. Ethnicity and age; and
> c. Ethnicity and type of concern giving rise to the referral.
> Please could this data be provided in such a way that it is possible to analyse it intersectionally, particularly as between the three data categories of age, ethnicity and gender. We would like to be able to see, in particular, the ethnicity of females in each age group.
> Please could you provide this information electronically as a dataset in Excel.

7. On 6 January 2023, Merseyside Police responded. Their response confirmed that at least some of the information sought was held but they refused to provide the data in question citing s24(1) and s31(1)(a) and (b) FOIA. In particular, in setting out the harms associated with disclosure, Merseyside Police observed:-

> Publication of specific Prevent data would provide information to those who seek to challenge the process, which would not be in the public interest. Allegations of 'spying in the community' and 'targeting Muslims' misrepresent and undermine the intention of Prevent programme, which seeks to support those individuals vulnerable to being drawn into violent extremism. Figures on the ethnicity or age of participants may fuel perceived grievances such as the view that young Muslims are being targeted, or that the issue of political extremists (i.e. the far right) are not being tackled.

8. On 20 January 2023, West Midlands Police responded in near identical terms to Merseyside Police.[1] The exact same wording was used to set out the overall harm and the public interest tests relating to the exemptions.

9. On 9 February 2023, the Appellant sought an internal review of both responses explaining in detail its concerns with the applications of both exemptions.

10. On 24 February 2023, Merseyside Police provided their internal review response and refused to provide the information on the basis of ss24 and 31 FOIA stating: -

> Prevent aims to draw vulnerable individuals away from violent extremism before they become involved in criminal activity. Disclosure of this information would highlight individuals who are more susceptible to radicalisation. This could put individuals at risk along with that of National Security. The security of the country is of paramount importance and Merseyside Police will not divulge any information which would undermine national security or compromise law enforcement tactics.

11. On 3 March 2023, West Midlands Police responded to the request for an internal review. They maintained the exemptions too. They also claimed that their position was supported by a recent ICO Decision Notice IC-159785-M8Z8.

12. In May 2023, and pursuant to s50 FOIA, the Appellant applied to the Commissioner for decisions as to whether the Police Forces had dealt with the requests in accordance with the requirements of Part 1 of FOIA.

13. On 26 June 2023, the Commissioner dismissed the Merseyside Police complaint appeal in decision notice IC-239174-K3Z5. The Commissioner considered that Merseyside Police was correct to rely on s24(1) FOIA and as a result considered it unnecessary to go on to consider their reliance on s31(1) FOIA. In setting out his reasoning, the Commissioner referred to other cases in which he had considered complaints in respect of Prevent data held by the MPS and Essex Police. The Commissioner adopted his analysis of the section 24 FOIA exemption at

[1] The same wording was also used in response to the Appellant's FOIA requests made to other Police Forces.

paragraphs 15-21 of the Essex Police decision and went on to consider that, in the circumstances of this appeal, it was engaged.

14. In the Merseyside Police decision notice the Commissioner said at paragraph 17, in relation to the application of s24(1) FOIA that:-

> The Commissioner is satisfied that there is a risk that disclosing the requested figures could provide insight into Prevent referrals which may be of use to those seeking to radicalise vulnerable individuals. For example, if the figures were sufficiently low for a specific gender and ethnicity, it could potentially identify a perceived weakness in the system in the region which individuals could seek to exploit if they so wished. They could accomplish this by either targeting a particular category of individuals which appears to not be being consistently identified and referred to the programme, or equally by identifying those who have in fact already been referred to the programme and seeking to disrupt their engagement with the programme and counteract the work of the agencies supporting them.[2]

15. On 27 June 2023, the Commissioner dismissed the West Midlands Police appeal in similar terms in Decision Notice IC-236219-M4B3.

STATUTORY FRAMEWORK

16. The right of access provided by FOIA is set out in section 1(1) and is separated into two parts. Section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information if it is held. Both rights can be the subject to the application of exemptions.

17. Section 24(1) FOIA reads, relevantly, as follows:-

> (1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.

[2] Similar reasoning was contained in paragraph 18 of the West Midlands Police decision notice.

18. Section 24(1) FOIA, then, will only apply to such information that does not fall within the scope of s23(1) FOIA (which is about information relating to the security services) but is information required for the purpose of safeguarding national security.

19. By virtue of s2(2)(b) FOIA, s24(1) is a qualified exemption. Even if information falls within the description of the exemption, it is then necessary to consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

20. The expression 'national security' is not defined in FOIA. However, the decision in *Secretary of State for the Home Department v Rehman* [2001] UKHL 47 set out that 'national security' means the 'security of the United Kingdom and its people' (paragraphs 50 and 64); the interests of national security are not limited to action by an individual which can be said to be 'targeted at' the United Kingdom, its system of government or its people (paragraph15); the protection of democracy and the legal and constitutional systems of the state is a part of national security as well as military defence; action against a foreign state may be capable indirectly of affecting the security of the United Kingdom; and reciprocal co-operation between the United Kingdom and other states in combatting international terrorism is capable of promoting the United Kingdom's national security (paragraphs 16-17).

21. Despite the wide application of the term 'national security' as set out above, at paragraph 54 of *Rehman*, Lord Hoffmann explained that, in an appeal before a tribunal, there must be a factual basis for the executive's opinion that 'national security' matters are engaged.

22. The consideration of the engagement of the exemption under s24(1) thus involves a consideration of the engagement of section 24(1) FOIA to all the withheld information; and the harm element requiring non-disclosure to 'safeguard' national security.

23. General principles applicable to s24 FOIA are set out by the Upper Tribunal in *FCDO v IC, Williams, Wickham-Jones & Lownie* [2022] 1 WLR 1132 at paragraph 31:

(1) The term 'national security' has been interpreted broadly and encompasses the security of the United Kingdom and its people, the protection of democracy and the legal and constitutional systems of the state: *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 ('*Rehman*'), paras 15-16 per Lord Steyn, para 50 per Lord Hoffmann and para 64 per Lord Hutton.

(2) A threat to national security may be direct (the threat of action against the United Kingdom) or indirect (arising from the threat of action directed against other states): *Rehman*, paras 16 and 64.

(3) Section 24 is not engaged, unlike the majority of the qualified exemptions, by a consideration of prejudice. Its engagement is deliberately differently worded.

(4) The term 'required' means 'reasonably necessary': *Kalman v Information Comr* [2011] 1 Info LR 664, para 33.

(5) National security is a matter of vital national importance in which the tribunal should pause and reflect very carefully before overriding the sincerely held views of relevant public authorities: *All Party Parliamentary Group on Extraordinary Rendition v Information Comr* [2011] 2 Info LR 75, para 56 (citing *Rehman*).

(6) Even where the chance of a particular harm occurring is relatively low, the seriousness of the consequences (the nature of the risk) can nonetheless mean that the public interest in avoiding that risk is very strong: Kalman, para 47.

24. In *Keane v Information Commissioner* [2016] UKUT 461 (AAC), paragraph 58 (approving *Kalman*), the Upper Tribunal said that 'the reality is that the public interest in maintaining the qualified national security exemption in section 24(1) is likely to be substantial and to require a compelling competing public interest to equal or outweigh it'. That does not mean that the section 24 FOIA exemption carries 'inherent weight', but is rather a reflection of what is likely to be a fair recognition of the public interests involved in the particular circumstances of a case in which section 24 is properly engaged.

25. Section 31(1) FOIA provides, relevantly, that:-

(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'

…

26. Section 31(1)(a) FOIA is a 'prejudice based' exemption. A party relying upon it must establish that the disclosure of the relevant information 'would' or 'would be likely to' prejudice the interest in question. Section 31 FOIA is also a qualified exemption to which the public interest test applies.

THE APPEAL AND RESPONSE

27. By Notice and Grounds of Appeal dated 24 July 2023, the Appellant appealed against the DNs asking that both appeals be heard together. The Appellant relied on identical grounds of appeal in each case. By case management directions dated 20 September 2023 the appeals were listed together.

28. On 18 October 2023 the Commissioner filed open responses in both appeals. On 1 November 2023 the Appellant filed a joint reply to both open responses. The Police Forces have not participated in the appeal and have not filed or served any open evidence.

29. The Appellant seeks to argue that the section 24(1) FOIA exemption is not applicable in this case or, if the Tribunal finds that it does apply, then the public interest favours disclosure of the information in any event.

30. In relation to applicability the Appellant argues that the Tribunal must analyse both the extent of the engagement of s24(1) FOIA and the harm element requiring non-disclosure to 'safeguard' national security.

31. As to extent, the Appellant says that itis not in a position to determine the extent of the engagement of s24(1) FOIA having not had sight of the requested information and that the Tribunal would need to interrogate in closed session, including by considering whether any of the information could be disaggregated.

32. As to harm, the Appellant argues that the decision notices significantly overstate the potential harm to national security that would result from the disclosure of the data in question, without any cogent basis for the findings of potential harm and without addressing the key factual matter of disclosures by the Home Office.

33. Specifically, the Appellant argues that:-

(a) the Commissioner's conclusions are not based on any rationale set out by the police forces for withholding the information (the police forces are not parties to the appeal and have not filed evidence);

(b) the police forces have relied on 'cookie-cutter' rote assessments as to harm which might arise as a result of disclosure of information relating to Prevent rather than seeking to assess whether disclosure of the particular Requested Information gives rise to a risk of harm (essentially the police forces have used the same wording to justify the application of s24(1) FOIA) and the public interest test, and this has also been adopted by other police forces);

(c) These responses do not provide adequate evidence of harm, and the Tribunal should therefore exercise caution in deferring to the police forces' assessment of national security risk especially when they have not taken part in the appeal;

(d) The Commissioner's reasoning does not add up to circumstances in which non-disclosure is *required* for the purposes of safeguarding national security. Rather there are 'speculative and unspecified concerns about the risk of nefarious actors potentially gaining "insight" that "may be of use" and information that "could then be exploited" as a result of the publication of this data' (paragraph 60 of the Appellant's skeleton argument);

(e) The Commissioner has failed to consider the different categories of information sought as part of the requests individually. No analysis is brought to bear on whether publication of the individual categories of the information (i.e. ethnicity and age, or ethnicity and gender, or ethnicity and

type of concern) would be likely to cause a greater or lesser purported harm in relation to the safeguarding of national security.

(f) The Home Office publishes annually a regional breakdown of Prevent referrals broken down by age, gender, type of concern and region, including intersectional breakdowns by, for example, gender and region and age and region. The Home Office's response to the Appellant's FOIA requests provided arguably far more specific and far-reaching ethnicity data than the requested information in this appeal because it was data broken down by specific regions of the UK and concerned solely the ethnicity of those who were 'discussed as a channel case' and 'adopted as a channel case' in each region between 2016/17 and 2020/21. The Appellant argues:-

> This represents highly specific and sensitive data bearing in mind that cases are only progressed to Channel Panel when they are assessed as a "radicalisation risk" and according to the Contest Strategy 2023, only 13% of Prevent referrals actually became Channel Panel cases in the year ending March 2022... In 2017-18, the figure was only 5% ...
>
> By contrast, the dataset sought in the Requests is likely to concern a far larger and less specific spread of data, particularly as JUSTICE understands the catchment areas of Merseyside Police and West Midlands Police to be approximately 1.5m and 3m people respectively and the number of Prevent referrals will inevitably be greater than the number discussed or adopted as Channel Panel cases.
>
> The Home Office also publishes a list of "Prevent Priority Areas" where the risk of radicalisation is deemed to be particularly high. Both of the Police Forces' respective catchment areas are bigger than these Prevent Priority Areas, plainly undermining any arguments about disclosure of information leading to a perceived weakness or gap in the system for a particular region..

(g) As a result the Appellant says that the Home Office is publishing detailed and granular ethnicity, age and gender data on a regional level concerning Prevent and pertaining to more sensitive cases than Prevent referrals; the UK Government has expressed support for greater publication of ethnicity data across the criminal justice system; ethnicity data is held concerning Prevent by the Police Forces; but those Police Forces and the Commissioner believe that they are better placed than the Home Office to assess the risks to national security in publishing ethnicity data associated with Prevent.

(h) It is not enough for the Commissioner to assert that comparison with 'other public authorities' is not '…necessarily a helpful comparator…'. This ignores both the Home Office's general role in setting and overseeing UK Counter-Terrorism Policy and its specific role in the Prevent programme.

(i) The Essex decision concerned a request for much more granular ethnicity data broken down by numbers of referrals by specific towns like Rochford (circa 80,000 population) and Southend (circa 161,000 population) within the Essex Police's catchment. The Requested Information is much less specific bearing in mind, that the catchment areas for Merseyside Police and West Midlands Police are approximately 1.5 million and 3 million people respectively.

34. The Commissioner's response on the applicability of s24(1) FOIA confirms that the Commissioner's assessment was based on the Police Forces' responses to the requests, including that:-

> PREVENT only operates in specific locations. Revealing detailed statistics may increase interest in cases which could ultimately lead to the identity of individuals and the organisations we work with, which may assist others intending to counter such work. Identification of those working locally to deliver the aims and objectives of PREVENT could enable those wishing to counter such work to engage in activity to disrupt and jeopardise the successful delivery of ongoing work. This could threaten the successful delivery of PREVENT and the government's counter terrorism strategy and lead to the public being at increased risk from terrorism. […] Disclosure of the information would enable those intent on engaging in terrorist activities to determine on a national level which areas within the UK may be a vulnerable area to target.
>
> […]
> It is known that terrorist cells will try to radicalise [young] people and children, to indoctrinate them with their ideology in order to encourage them to commit acts of terror. Disclosure of the requested information would highlight which forces may have individuals who are more susceptible to radicalisation and how each force tackles this within their communities.

35. In relation to the 'cookie-cutter' arguments raised by the Appellant the Commissioner's skeleton argument (paragraph 56) states that the Commissioner:-

> …is not persuaded that by adopting a common position in response to identical requests for information the views expressed by MP and WMP (or any other public authority) should carry less weight. No evidence was presented to the Commissioner, and there is none before the Tribunal, to suggest that the concerns expressed by MP and WMP are not sincerely held, or that MP and WMP failed to deploy to their institutional expertise on matters of national security.

36. The Commissioner argues that as in many s.24(1) FOIA cases, the Police Forces have applied the exemption on the basis of a predictive assessment as to how the requested information might be used by a hostile actor or motivated intruder, and the harm which might arise as a result. The Commissioner 'considers that this is an exercise which [the Police Forces] are particularly well-placed to carry out'. The Commissioner relies on the acceptance by the Court of Appeal case *R (Campaign Against Arms Trade) v Secretary of State for International Trade* [2017] EWHC 1754 (Admin) at paragraph 29, that the nature of the assessment is indeed predictive. The Upper Tribunal has emphasised that it is important to consider the gravity of the harm should it occur, and that even if the likelihood of its occurrence is small, a precautionary approach is generally required when dealing with potential threats to national security and public safety (*All Party Parliamentary Group on Extraordinary Rendition v IC & FCO* [2015] UKUT 377 (AAC) at paragraphs 101 & 103).

37. The Commissioner does not accept the Appellant's points made about the nature of the information disclosed by the Home Office about Prevent or the effect of a comparison with the information sought in this case. The Commissioner's view is that the requested information in this case provides a more granular level of detail, from which additional insights can readily be extrapolated. It is argued that much of the Home Office data has been supressed (where numbers are less than 10, or could reveal numbers that are less than 10). The Home Office data by 'ethnicity', 'age', 'gender', 'type of concern' and 'sector of referral' are national figures, as opposed to figures relating to one particular police area. The Home Office data broken down region encompasses a larger area than the figures requested from the Police Forces. MP is one of six police forces in the 'North West' region and WMP is one of four police forces in the 'West Midlands' region.

38. In relation to the public interest balance the Appellant points out that the requests are made against a backdrop in which Prevent has become the subject of serious political debate and criticism as set out above and in which the Government has indicated its full support for the recommendations in the Lammy Review, including the publication of ethnicity data in the criminal justice system.

39. The Appellant relies on the public interest in (a) transparency and accountability; (b) good data governance and evidence-based policymaking; (c) ensuring justice and fair treatment for all; and (d) public confidence in the integrity of policing. Much of the really helpful witness and other evidence filed by the Appellant address these issues, and the witness evidence is discussed further below.

40. The Appellant's case is that the key and overarching public interest factor weighing heavily in favour of disclosure is transparency and accountability. The publication of relevant data would allow the public to assess the efficacy of Prevent, both in meeting its stated goals, as well as in terms of its consequences, unintended or otherwise. The Appellant prays in aid the Shawcross Review which stated that:-

> Prevent should encourage public trust by improving transparency and establishing better oversight of how the strategy is implemented. Where members of the public or practitioners have grounds for believing Prevent may have fallen short of its own standards, they must have a place to formally take their complaints. Demonstrating that Prevent has nothing to hide by upholding complaints when they are justified while also putting on public record when allegations are unfounded, can only enhance public trust in the scheme.

41. The public interest in good data governance and evidence-based policymaking is described as one of the other public interest factors that flow from the public interest in transparency and accountability. Publication of ethnicity data on Prevent would represent good data governance so as to understand the programme better and take steps to ameliorate it. This is linked to proper evidence-based policy making.

42. The public interest in ensuring justice and fair treatment for all, is placed in the context of real concern as to whether ethnic disparities exist as a consequence of the exercise of police powers, particularly in the context of Prevent. The Appellant argues that it is important that measures are in place to mitigate, if not fully address,

those concerns. The importance of accessing reliable data on ethnicity in this respect is indispensable, as recognised both in the Lammy Review and the UK Government's response to it. The terms of reference for the Independent Review by Sir William Shawcross also emphasised the goal of assessing 'how effectively and efficiently is Prevent being delivered at both the local and national levels'. Publication of datasets, including in relation to ethnicity, will enable that assessment to take place. The witness evidence also addressed this aspect of the public interest. It is also important that the wider public are made aware of whether the data bears out these experiences of targeting and discrimination. As the Joint Committee on Human Rights has noted '…the only way for [myths about Prevent] to be dispelled is for there to be rigorous and transparent reporting about the operation of the Prevent duty'.

43. There is a public interest in all sectors of the public having confidence that policing is being conducted fairly so that the police can continue to police by consent. Although the police forces suggest that publication of the requested information may fuel perceived grievances such as the view that young Muslims are being targeted, the Appellant argues that this fails to appreciate that those grievances are fuelled by not publishing this data, as the reticence by the police forces gives rise to an inference that there is information within the datasets that the police forces are uncomfortable with revealing.

44. The police forces are also under a duty under s149 of the Equality Act 2010 to have 'due regard' to the statutory equality objectives, including the need to eliminate discrimination. The Appellant argues that the publication of the requested information would enable the police forces to demonstrate compliance with that public sector equality duty.

45. In relation to the public interest test, the Commissioner points out that the Police Forces refer to potentially enabling 'those wishing to counter' Prevent and engaging 'in activity to disrupt and jeopardise the successful delivery of ongoing work'. It is stated that this 'could threaten the successful delivery of Prevent and the government's counter terrorism strategy and lead to the public being at increased risk of terrorism'. It is further stated that disclosure 'would enable those intent on

engaging in terrorist activities to determine on a national level which areas within the UK may be a vulnerable area to target'.

46. The Commissioner remains satisfied that the public interest factors against disclosure in these appeals are very strong. The Commissioner argues that even if the risk of harm is relatively low, the nature of the risk (i.e. the seriousness of the consequences) is such that there is a 'very strong' public interest in avoiding that risk: *FCDO v IC, Williams, Wickham-Jones & Lownie* [2022] 1 WLR 1132 at paragraph 31(6) (set out above). The Commissioner says that:-

> 74. For reasons which can only be elaborated in CLOSED submissions, while the Commissioner recognises the importance of transparency and accountability, he does not consider that publication of the requested information will "allow the public to assess the efficacy of Prevent, both in meeting its stated goals, as well as in terms of its consequences, unintended or otherwise"

47. Further, the Commissioner's skeleton argument states that:-

> 75. The Commissioner does not dispute that there is a public interest in information as to whether "ethnic disparities exist as a consequence of the exercise of police powers" …and "public confidence in the integrity of policing" … The Commissioner has carefully considered the witness evidence advanced by the Appellant and acknowledges the considerable strength of feeling with regard to Prevent. The Commissioner reiterates that it is not his role or function to 'take sides' or to express his own views. The Commissioner – and now the Tribunal – must weigh up the competing arguments in order to determine where the balance lies.
>
> 76. … The Commissioner maintains that the public interest in disclosure of the
> requested information does not outweigh the public interest in ensuring the successful delivery of the Prevent programme, in particular by not enabling those intent on engaging in terrorist activities, and avoiding prejudice to the prevention or detection of crime and the apprehension or prosecution of offenders. The Commissioner is also not persuaded that the application of s.24(1)… has impeded or prevented MP and WMP from complying with the public sector equality duty, set out in s.149 of the Equality Act 2010.

THE EVIDENCE AND HEARING

48. The Appellant filed and served the witness statements of Fiona Rutherford (CEO of JUSTICE), Dr Layla Aitlhadj (Director of Prevent Watch) and Zara Mohammed (Secretary General of the Muslim Council of Britain (MCB)). All three of these witnesses gave brief supplementary oral evidence at the hearing, but the contents of their witness statements were essentially uncontested.

49. Fiona Rutherford's statement (already referred to at the start of this decision) emphasises that '[e]quality and non-discrimination are cornerstone principles of a society that respects the rule of law' (para 17) and that 'if criminal justice system agencies (and by extension police forces) cannot provide an evidence-based explanation for apparent disparities between ethnic groups then reforms should be introduced to address those disparities' and that the provision of better data is an important part of this process. Ms Rutherford refers to a number of reports produced by the Appellant which address apparent disparities, and notes 'the real dearth of publicly available equality and ethnicity data across the criminal justice system' (para 21) and 'the striking lack of Prevent ethnicity data published by the Government or other public bodies' which led to the current (and other requests) (para 24).

50. Ms Rutherford states that (paras 31-37) implementing good data governance and working with the most complete data possible is critical for good policymaking. She observed (para 35) that:-

> …in the context of understanding issues of racialisation and racial or other biases within the Prevent programme, we need specific insights into the demographics and ethnicities of those who are referred to and/or otherwise have contact with the programme in order to be able to ascertain why the programme is operating as it is.

51. Ms Rutherford's evidence also discussed the positive example of the Crown Prosecution Service harnessing detailed data to investigate the extent to which there are demographic disparities in the outcomes of its decision-making and to formulate actions to increase transparency and fairness in its ongoing examination of its charging decisions: (paras 51-52). Publication of ethnicity data on Prevent would thus represent good data governance so as to understand the programme better and

take steps to ameliorate it. This is linked to proper evidence-based policy making. Ms Rutherford explained that '…without sufficient evidence and data, which allows you to identify where the biggest problems are, it is not possible to work out what the correct or most effective intervention is likely to be': (para 41). She continued by observing that:-

> It is …critical for good policymaking that as much quantitative and qualitative evidence as possible is thoroughly examined and that strong processes are in place to eliminate biases (both unconscious and explicit) in the examination of the evidence.

52. Publication of ethnicity data on Prevent would thus shine an important light on whether or not there is a problem with how Prevent is working. It follows that there is a clear public interest in publication of the requested information to ensure that policy can be improved in light of such evidence.

53. Ms Rutherford noted that the importance of transparent and thorough police data governance was recognised and highlighted by an inspection report published on 5 August 2023 by HM Inspectorate of Constabulary and Fire & Rescue Services ('HMICFRS') on race disparity in police criminal justice decision-making (included in our bundle) which observed that there 'was a lack of published data on disparity, both at force level and throughout England and Wales' and explained that it is '… very important that all forces gather and publish good quality data. This also helps Government and other organisations be aware of any potential disparity and the potential impact on community confidence'.

54. In relation to the public interest in the public confidence in the integrity of policing Ms Rutherford states (para 47) that:-

> If policing is 'by consent', then it follows that police powers must be exercised proportionately, fairly, and consistently with the public interest. It is in the public interest for data pertaining to police powers to be accurately and thoroughly recorded and shared as transparently as possible. It is important for members of the public from all walks of life, not just policymakers and legislators, to have access to data that allows them to assess how police powers and functions are being exercised and what effects

> they are having both on the communities being policed and society as a whole.

55. In relation to the public interest in ensuring public authorities comply with the public sector equality duty, Ms Rutherford explains at para 44:-

> As a first step to examining and addressing whether they are meeting their duties under the Equality Act, including the public sector equality duty under section 149 of the Act, public bodies need to be curious about disproportionalities and the effect of the particular legislation on those affected by it. Without recourse to both qualitative and quantitative evidence, it is impossible to demonstrate this curiosity and examine the impact of the legislation.

56. On this point Dr Aitlhadj's statement also expresses concerns about how the guidance issued to those subject to the Prevent referral duty fails to address the interaction between that duty and other public sector duties such as those under the Equality Act 2010 (para 47). Publishing the withheld information would thus further the public interest in ensuring the public can understand the equalities impacts of Prevent and address concerns about such issues.

57. Dr Aitlhadj's evidence sets out the important work that Prevent Watch carries out for those who feel they are adversely affected by the Prevent programme, and associated research and report writing. She notes (para 22) in particular how Prevent operates in schools and how for some children and young people 'the relationship between teacher and pupil has become one of securitisation as a result of the Prevent referral duty'.

58. She notes that '…there is generally a real lack of transparency surrounding the operation of Prevent' and there '…is a tendency of the Home Office and other public bodies like the police to cite national security as a reason not to disclose information relating to Prevent': (paras 50-51). She noted that in this regard, Amnesty International has recommended that the Government collect and publish data relating to Prevent's operation, disaggregated by ethnicity and religion. Its

research observed that the lack of transparency around Prevent compounds all of the impacts of a referral (paras 52-53).

59. Dr Aitlhadj explained her view that the Prevent system is 'inherently discriminatory' and 'what is perceived to be a 'risk' to those subject to the Prevent duty [teachers, social workers, police etc] is obviously influenced by what they see and hear in the media and in general discourse'. Prevent is highly intrusive within British Muslim communities and among children and young people in particular. Those subject to the Prevent referral duty are tasked with identifying 'vulnerable' young people and adults at risk of 'radicalisation' and being drawn into criminal offences, as defined in the legislation concerning terrorism offences.

60. Her statement (para 36) also explains the fear, stigma and social isolation caused by Prevent to members of the Muslim community:-

> If someone from the Muslim community is referred to Prevent, this often leads to stigma within the local community, and distancing of people who no longer want to be associated with the person referred.

61. Dr Aitlhadj notes (paras 45-46) the financial burden caused by referrals: §44; and the impact a referral can have in later life. Dr Aitlhadj also notes that the lack of transparency is all the more frustrating when organisations, including the Police Forces in the current matter, describe Muslims and others as having 'perceived grievances' when it comes to Prevent. She explains (para 54) that '…if this was really the case, I would expect the Home Office and other public bodies to be as transparent as possible with how Prevent works, as that would be the obvious way to counter the 'perceived grievances' that the Muslim community is said to have'.

62. Zara Mohammed, in her statement, explains that the MCB is the UK's largest and most diverse national representative Muslim umbrella body. It has over 500 members with national, regional and local remits, including mosques, charities, schools, businesses and other networks. The MCB's aims are, in summary, to advocate for the rights and interests of Muslims, to build and strengthen communities and to work towards a successful and cohesive future British society

that works for everybody. The job of the MCB is not just to serve Muslim communities, but also British society more generally.

63. Ms Mohammed notes (para 32) that:-

> The lack of transparency surrounding Prevent feeds the narrative that Muslims are being targeted and demonized. There's a general sense that the Prevent scheme does not operate effectively. Without clarity on the rationale, effectiveness and utility of Prevent, the feeling that it is unjust, biased and creating/relying on stereotypes within the Muslim community will only continue to increase.

64. Ms Mohammed also explains the MCB's perspective on the challenges faced by British Muslims in connection with security and counterterrorism which form the context for Prevent, in particular providing some examples of the detrimental impact of Prevent on the everyday life of British Muslims. Her evidence (para 28) further describes her view that the main problem with Prevent is that it:-

> …fundamentally lacks a basis in evidence: there is no evidence showing that the current Prevent approach is justified or effective. Further, it has become apparent that, because of the use of terminology like 'extremism' that is not well defined or understood, those subject to the Prevent duty (i.e. those making referrals) are not clear about what they should be looking for in identifying potential signs of that 'extremism'.

65. As well as hearing and considering witness evidence and also submissions in OPEN, the Tribunal also considered the withheld material and submissions from the Commissioner in closed and a gist was provided as follows:-

> In closed session, the Tribunal carefully reviewed the requested information held by both police forces contained the closed bundle ("the requested information"). In particular, the Tribunal considered the different categories of information, including in terms of volume, content and the way the information is presented. Counsel for the Commissioner addressed the Tribunal on assumptions made by the Appellant about the requested information.
>
> The Tribunal put questions to counsel for the Commissioner about the requested information, including whether disclosure of the requested information (in whole or in part) would engage s.24(1) and if so specifically how.

Finally, the Tribunal considered all the questions/issues advanced by the Appellant in open session (and followed up by email), in particular:

- The extent of engagement of s.24(1) and whether the requested information can be disaggregated, including by reference to the specific categories of information sought.
- The Commissioner confirmed that the Tribunal has been provided with all of the communications and information received from the police forces.
- The Tribunal and counsel for the Commissioner considered that arguments about the "required" standard for s.24(1) should be made in open closing submissions.
- The Tribunal carefully compared the requested information to the Home Office data contained in the OPEN bundle (starting at page G1608).
- On the applicability of s.31(1) and the required causal link, the Commissioner invited the Tribunal to consider the police forces' responses.
- The Tribunal considered the public interest arguments specifically in light of the requested information.

DISCUSSION

Applicability of s24(1) FOIA

66. Having seen the withheld information, the Tribunal is satisfied (and can confirm) that it does provide a more granular level of detail than does the Home Office statistics disclosed about Prevent. The assessment of the Commissioner, with which we agree, is that the requested information provides a further level of particularity to that provided by the Home Office, and we consider the application of s24(1) FOIA on that basis.

67. As the Commissioner states (and as can be seen from the relevant documents in the bundle) much of the Home Office data has been supressed (where numbers are less than 10, or could reveal numbers that are less than 10). The Home Office data by 'ethnicity', 'age', 'gender', 'type of concern' and 'sector of referral' are indeed national figures, as opposed to figures relating to one particular police area.

68. As the Commissioner points out the Home Office data is broken down by regions which encompass larger areas than the figures requested from the Police Forces.

For example, and relevantly, there are six police forces in the 'North West' region in the Home Office figures and four police forces in the 'West Midlands' region.

69. The Tribunal also accepts that the assessment that has to take place in deciding whether s24(1) FOIA exemption applies is necessarily a predictive one. The information has not been disclosed, and the Commissioner and Tribunal are entitled to (and must) give weight to the views of the Police Forces as to whether the test is met. To this end, it is a fact that the Police Forces have not been joined in this appeal. The Commissioner has accepted in terms that he has relied upon the information provided by the Police Forces when responding to the requests (as set out above) in deciding whether the exemption in s24(1) FOIA applies.

70. The points made by the Police Forces and supported by the Commissioner are that:-

    (a) PREVENT only operates in specific locations. Revealing detailed statistics may increase interest in cases which could ultimately lead to the identity of individuals and the organisations we work with, which may assist others intending to counter such work.
    (b) Identification of those working locally to deliver the aims and objectives of PREVENT could enable those wishing to counter such work to engage in activity to disrupt and jeopardise the successful delivery of ongoing work.
    (c) This could threaten the successful delivery of PREVENT and the government's counter terrorism strategy and lead to the public being at increased risk from terrorism. […]
    (d) Disclosure of the information would enable those intent on engaging in terrorist activities to determine on a national level which areas within the UK may be vulnerable areas to target.
    (e) It is known that terrorist cells will try to radicalise [young] people and children, to indoctrinate them with their ideology in order to encourage them to commit acts of terror.
    (f) Disclosure of the requested information would highlight which forces may have individuals who are more susceptible to radicalisation and how each force tackles this within their communities.

71. Although the Appellant is right to bring the 'cookie-cutter' approach to providing reasons for withholding information to the Tribunal's attention, in fact the Tribunal agrees with the Commissioner that this should not necessarily affect the weight the Tribunal should give to the reasons. It is likely that police forces consult and liaise about responses to FOIA requests. We do not know if that happened here but neither do we have any evidence to suggest that this approach does not reflect a serious consideration of the requests and the applicability of s24(1) FOIA, and the responses made to such requests. We accept that the views of the Police Forces are genuinely held. As set out in the case law above, national security is a matter of vital national importance in which the Tribunal should pause and reflect very carefully before overriding the sincerely held views of relevant public authorities.

72. In our view the particularity of the information we have seen does lead to the conclusion that the s24(1) FOIA does apply to all the information sought, whether it is disaggregated or not. The exemption applies because, in our view, it is reasonably necessary for the purposes of safe-guarding national security.

73. We agree that revealing detailed statistics about the operation of Prevent in specific locations could increase interest in cases and increase the prospect of the identify of individuals and organisations being identified. The disclosure of the information could assist those who oppose Prevent from disrupting and jeopardising ongoing work, which could increase the risk to the public from terrorism, and increasing the risk that vulnerable areas with increased numbers of individuals susceptible to radicalisation will be identified.

74. We have taken into account a combination of these factors advanced by the Police Forces when considering the information withheld and reaching our conclusion on the applicability of s24(1) FOIA. We support the reasoning of the Commissioner in paragraph 17 of the Merseyside police decision notice as set out above at paragraph 14.

75. It is hard to predict exactly how likely it is that the harm will occur. We do accept that there is a context where it is known that terrorist supporting elements will try to radicalise young people and children, to indoctrinate them with their ideology in

order to encourage them to commit acts of terror. As set out above the Upper Tribunal has emphasised in the *APPG* case that it is important to consider the gravity of the harm should it occur (and it is grave in the present case, in our view), and that even if the likelihood of its occurrence is small, a precautionary approach is generally required when dealing with potential threats to national security and public safety.

The balance of the public interest

76. The Appellant's case is that even if it is established that the exemption in s24(1) FOIA applies, and exemption is required for the purposes of safeguarding national security, this does not outweigh the public interest in disclosure of the information.

77. As stated above the Appellant relies on the public interest in (a) transparency and accountability; (b) good data governance and evidence-based policymaking; (c) ensuring justice and fair treatment for all; and (d) public confidence in the integrity of policing. We have considered all the written and oral evidence in support of these factors, and set some of this above to illustrate the points made in argument.

78. In our view there is weight to be given to all these factors. The publication of relevant data would allow the public to assess the efficacy of Prevent, both in meeting its stated goals, as well as in terms of its consequences, unintended or otherwise. As demonstrated by the Appellant's evidence, Prevent is a controversial policy where there is real concern as to whether ethnic disparities exist as a consequence of the exercise of police powers in the context of Prevent. In such circumstances there is clearly a public interest in good data governance and evidence-based policymaking, and publication of ethnicity data on Prevent would represent good data governance so as to understand the programme better and take steps to ameliorate it. This is linked to proper evidence-based policy making. It is important that the wider public are made aware of whether the data bears out these experiences of targeting and discrimination.

79. We also accept that there is a public interest in all sectors of the public having confidence that policing is being conducted fairly so that the police can continue to police by consent. The police forces are also under a duty under s149 of the Equality

Act 2010 (the public sector equality duty) to have 'due regard' to the statutory equality objectives, including the need to eliminate discrimination, and we accept that the publication of the requested information would assist scrutiny of compliance with that public sector equality duty.

80. Having found that the s24(1) FOIA exemption applies, however, the fact that withholding the information is required for the purposes of safeguarding national security is a factor which must be given weight when considering the balance of the public interest. We accept that that there is a public interest, as the Commissioner says in not enabling 'those wishing to counter' Prevent and those engaging 'in activity to disrupt and jeopardise the successful delivery of ongoing work'. It is important not to undermine the government's counter terrorism strategy and lead to the public being at increased risk of terrorism. We accept that disclosure 'would enable those intent on engaging in terrorist activities to determine on a national level which areas within the UK may be a vulnerable area to target', and that there is a strong public interest in ensuring this does not happen.

81. We accept the Commissioner's argument that even if the risk of harm is relatively low, the nature of the risk (i.e. the seriousness of the consequences) is such that there is a 'very strong' public interest in avoiding that risk and this is supported by the case of *FCDO v IC, Williams, Wickham-Jones & Lownie* [2022] 1 WLR 1132 at §31(6)), cited above.

82. Having seen the withheld material and explored the contents in the CLOSED session the Tribunal also concurs with the Commissioner that, although transparency and accountability are important public interest factors in favour of disclosure (including in relation to the public sector equality duty), in fact this information would not have the impact sought by the Appellant and would not, to any great degree 'allow the public to assess the efficacy of Prevent, both in meeting its stated goals, as well as in terms of its consequences, unintended or otherwise'.

83. It is not the case that once the s24(1) FOIA exemption is engaged it is necessarily the case that the public interest balance will favour non-disclosure of the information. But we do remind ourselves of the guidance in the *Keane* case (set out above), that 'the reality is that the public interest in maintaining the qualified

national security exemption in section 24(1) is likely to be substantial and to require a compelling competing public interest to equal or outweigh it'.

84. Bearing that in mind we note the importance of the successful delivery of the Prevent programme and the need not to enable those intent on engaging in or supporting terrorist activities by providing information which could promote those aims. We also bear in mind our view that the withheld information will not be as of much assistance to the Appellant as it is hoped, and that there is an amount of information available about Prevent in the public domain already.

85. We also have considered the argument that some of the requested information could be disclosed while other parts could be withheld.

86. Thus, although we accept the public interest arguments put forward by the Appellant and the witness evidence proffered, the public interest in disclosure in relation to all the information sought is outweighed by the national security reasons which favour non-disclosure.

87. Having reached those conclusions, we take the same approach as the Commissioner and we have not considered the reliance on s31 FOIA.

88. For these reasons, these appeals are dismissed.

Signed Recorder Stephen Cragg KC sitting as a Tribunal Judge

Date: 25 February 2024

Corrected pursuant to rule 40 on 1 August 2024.