



Neutral citation number: [2024] UKFTT 881 (GRC)

Case Reference: EA/2023/0115

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

Heard at: the Royal Courts of Justice, Belfast

Heard on 4 to 6 December 2023
(with further Panel deliberations 11 January 2024)

Decision given on: 10 October 2024

Before

**JUDGE GRIFFIN
TRIBUNAL MEMBER MS CHAFFER
TRIBUNAL MEMBER MS SAUNDERS**

Between

CIARAN MACAIRT

Appellant

And

THE INFORMATION COMMISSIONER

&

**THE CHIEF CONSTABLE OF THE POLICE SERVICE OF
NORTHERN IRELAND**

Respondents

Representation:

For the appellant: Ms Jennifer Carter-Manning KC and Ms Kate Temple-Mabe, counsel (instructed by KRW LAW)

For the first respondent: Mr Will Perry, counsel

For the second respondent: Mr Phillip Aldworth KC and Mr Phillip McAteer, counsel

Decision: The appeal is allowed

Substituted Decision Notice:

- (1) Within 35 days of the promulgation of the open decision in this case the Police Service of Northern Ireland will
 - a. Provide a fresh response to Mr MacAirt arising from the request in accordance with part 1 of the Freedom of Information Act 2000.
 - b. Provide to Mr MacAirt a copy of the material to be disclosed in accordance with our decision redacted as set out below
- (2) Failure to comply with this substituted decision notice may amount to a contempt of court

Preliminaries

Structure of the decision

1. This decision has been constructed as a continuous document combining our open and closed reasons. The closed reasons are written in red with a grey highlight for ease of reference.
2. It is intended that an open decision will be created from this decision that shows only the open reasons and redacts all closed sections.

Abbreviations used in this decision

- ATO - Ammunition Technical Officer
- CHIS - Covert human intelligence source
- Legacy case - case arising from the Troubles
- RIPA - Regulation of Investigatory Practices Act
- Commissioner - Information Commissioner
- FOIA - Freedom of Information Act 2000
- HET report - Historical Enquiries Team Report. HET is an independent operational unit of PSNI. The report was published 20th May 2014. Quashed in

its entirety by JR [Irvine OB F335], because found that there was no investigative bias - and this conclusion was infected by irrationality

- ICO - Information Commissioner's Office
 - Legacy Act - Northern Ireland Troubles (Legacy and Reconciliation) Act 2023
 - PSNI - Police Service of Northern Ireland
 - PONI report - The Office of the Police Ombudsmen of Northern Ireland, published February 2011
3. In this decision we refer to the pagination of the documents in the bundles before us so the parties can be in no doubt about the documents to which we are referring. Those in the open bundle are referred to using the prefix OB and those within the closed bundle with the prefix CB.

Introduction

4. On Saturday 4th December 1971 at about 8.45 in the evening a bomb exploded causing McGurk's Bar in Belfast to collapse, killing fifteen people aged between 13 years old and 73 years old, and injuring many others. This was one of the worst atrocities in Northern Ireland during the period known as The Troubles. Mr MacAirt's grandmother, Kathleen "Kitty" Irvine was killed by the bomb at McGurk's Bar, his grandfather John was among those injured. In this decision we shall refer to this incident as "the bombing".
5. In the aftermath of the bombing, suggestions were made about who had been responsible for the bombing. These suggestions included that the bombing had been an "own goal", in other words that an IRA bomb destined for elsewhere had detonated prematurely. However, only one man has been convicted of the murders and attempted murders of those in McGurk's Bar on 4th December 1971 and he was a member of the Ulster Defence Force. In 2008 Paul Goggins MP, then Minister of State for Northern Ireland told the House of Commons that both he and the Foreign Secretary were deeply sorry, not only for the suffering and loss of life caused by the bombing, but also for the "extraordinary additional pain" caused to the families of the victims and the wider community by the erroneous suggestions made in the immediate aftermath of the bombing.
6. Mr MacAirt is the Appellant in this case. He is not alone in his belief that the erroneous suggestion that the bombing was an "own goal" was "disinformation", or in other words a purposeful misdirection or untruth as opposed to an honest error, circulated by law enforcement or security

services as part of a campaign to undermine the IRA in the minds of the public.

7. The Appellant reached this conclusion having discovered a document [OB F183] which he believes sets out an agreement between an army commander and the RUC. That entry in a log is timed at 01.00 on 5 December 1971 and reads as follows

"RUC have a line that the bomb in the pub was a bomb designed to be used elsewhere, left in the pub to be picked up by Provisional IRA. Bomb went off and was a mistake. RUC press office have a line on it - NI should deal with them."

8. A Briefing document addressed to 10 Downing Street dated 15th October 1971 shows the approval by the Prime Minister of a Press Liaison Officer [OB F231]. A document setting out the role of the Press Liaison Officer included reference to an objective of the information agencies in Northern Ireland being to "blacken the reputation of the IRA by highlighting their brutality...the cowardly nature of their tactics and their callous disregard for the lives of innocent bystanders." [OB F272].
9. The Appellant has also obtained a letter dated 10th November 1971 stating that the Information Research Department, of the British Army had been tasked with helping to "blacken the IRA" through the use of material which would be discreditable to IRA personalities. [OB F233] This aim is consistent with other documents provided by the Appellant which illustrate a policy to use propaganda in support of government policy objectives in Northern Ireland, including to discredit the IRA [OB F233, 257, 270].
10. The RUC duty officer's report for 08.00 on 5th December 1971 states at paragraph 8, [OB F185]

"...Just before the explosion a man entered the licensed premises and left down a suitcase presumably to be picked up by a known member of the Provisional IRA. The bomb was intended for use on other premises. Before the "pick-up" was made the bomb exploded..."

The request

11. On 16 December 1971 a Meeting of the Joint Security Committee was convened at Stormont Castle. It was attended by the Prime Minister of Northern Ireland and others including the "Security Liaison Officer" who the Appellant told us was a member of the Security Service (MI5) and the "Assistant Chief Constable Crime Special Branch" - the minutes of this

Meeting are in the Appellant's documents in the open bundle [OB F176]. We will refer to this as "the Meeting". Apparently in preparation for the Meeting, Special Branch wrote an assessment for the period ending 15th December 1971, we shall refer to this document [OB F180] as "the Briefing".

12. The Briefing dealt specifically with the bombing at paragraph 5 which reads as follows

"The most disastrous explosion of the period occurred on 4th December. McGurk's bar in Belfast was totally demolished killing 15 people and wounding a further 13. Circumstantial evidence indicates that this was a premature detonation and two of those killed were known I.R.A members at least one of whom had been associated with bombing activities. Intelligence indicates that the bomb was destined for use elsewhere in the City. It is also relevant that three other members of the I.R.A arrested on 11th December, while conducting final reconnaissance of their target admitted they had left their bomb in a bar for collection when their survey was complete."

13. On 3rd December 2020 the Appellant made a request under the Freedom of Information Act 2000 drawn from what he had read in the Briefing. His request stated as follows

"May I request the provenance, dates and source (with any names redacted, of course) of the intelligence contained within the "Special Branch Assessment for the Period Ended 15th December 1971" which was used as a Briefing at a Joint Security Committee Meeting on 16th December 1971 (1971/Joint Sec/50), please."

14. The Appellant went on to explain that he had the minutes of the Meeting and the Briefing but he was "seeking proof" of the assessment at paragraph 5 of the Briefing and asked to be emailed

"proof that this was intelligence in police stores along with provenance, dates and source etc. For example

-Which circumstantial evidence indicated premature detonation (we know it was not)

- Which two of those killed were alleged to be IRA, which was an alleged bomber and where that information came from if it existed (we know that police alleged one was IRA but not two)

- What was the intelligence that alleged it was destined for other premises and where did it come from or did that ever exist."

15. The Appellant explained that he was trying to find the origin of the false information and had "proof" that some arose from a secret agreement between the military and the police, this belief arising from the document from the army commander, see above. The Appellant set out in his request that he believes that the intelligence was created by the police at the time and so PSNI would not be able to provide any provenance or origin of the false intelligence but he hoped he would be proved wrong.
16. In effect the Appellant appears to have been hoping for a response to his request stating that the information he requested was not held. He received a prompt automated response on 3rd December 2020 but did not receive a substantive reply until 20th April 2021. In that response PSNI stated that it could neither confirm nor deny that it held the information that the Appellant requested with reference to sections 23(5), 24(2), 30(3), 31(3) and 40(5) FOIA.
17. The Appellant requested an internal review the same day. He received the outcome of the review on 24th June 2021. In the internal review PSNI maintained its stance of neither confirming nor denying that it held information within the scope of the request.
18. The Appellant remained dissatisfied with the response from PSNI and made a complaint to the Commissioner on 9th July 2021. He made it clear in his complaint that he wanted *"PSNI to provenance the police lies or admit that the police made them up in collusion"*.
19. The Commissioner acknowledged the complaint on 7th August 2021 and contacted PSNI the same day. On 5th May 2022 PSNI wrote to the Commissioner to inform him that its response to the request had changed. PSNI now acknowledged that it held material within the scope of the request but was relying on the exemptions contained in sections 24, 30, 38 and 40 FOIA.
20. The Commissioner raised the issue of reliance on section 23 FOIA with PSNI given the Commissioner's previous decisions and with reference to previous decisions of this Tribunal. Having considered what was said by the Commissioner, PSNI withdrew reliance on section 24. In a letter dated 17 January 2023 PSNI stated that it now relied on section 23.
21. The Commissioner issued a decision notice on 2 February 2023 (reference IC-116673-G6M2) concluding that the information requested was exempt from disclosure on the basis of section 23 FOIA. It was the Commissioner's view that the description of the requested information clearly indicated the

involvement of Special Branch and thus related to one of the security bodies named in section 23 "even if it was not directly or indirectly supplied by them, as the nature of the work of this type of police unit involves very close working with security bodies and regular sharing of information and intelligence".

22. Having inspected the withheld information the Commissioner decided that in the light of what was said in previous decisions of this tribunal (reference numbers EA/2010/0008 and EA/2010/0117) the information asked for in the Appellant's request was exempt from disclosure as section 23 FOIA was engaged.
23. The Appellant filed his notice of appeal on 1 March 2023 with detailed grounds drafted by counsel. There were 6 grounds of appeal upon which it was submitted that the decision notice was in error of law:
 - a. Failure to disaggregate the information;
 - b. Illegal treatment of Special Branch as a body falling within section 23(3) FOIA;
 - c. Failure to have regard to the nature of Special Branch at the date of the information sought;
 - d. Erroneous conclusion that section 23 applies to the information requested;
 - e. No other exemption claimed by PSNI is engaged;
 - f. The public interest falls in favour of disclosure
24. In the response to the appeal the Commissioner maintained his reliance on section 23 FOIA and drew attention to the case of Commissioner of Police for the Metropolis v Information Commissioner and Rosenbaum [2021] UKUT 5 (AAC). In a further response the Commissioner made clear that whilst there was no evidence regarding the relationship between RUC Special Branch and any security body the Commissioner considered on the balance of probabilities that Special Branch was "in the orbit" of relevant security bodies as demonstrated by those who attended the Meeting, the context in which the information was created and the date of the Meeting coming shortly after the bombing. The Commissioner accepted that PSNI was correct to rely on the alternative sections were the Tribunal not to accept the primary submission under s23.
25. In their response to the appeal PSNI supported the Commissioner's reliance on section 23 FOIA and relied in the alternative upon sections 24, 30(1), 38(1)

and 40(3)(a)(i) FOIA. However, the position changed and by the time of the hearing PSNI did not rely on section 23 FOIA and did not put forward positive evidence in that regard, albeit PSNI acknowledged the position of the Commissioner in continuing to invite the Tribunal to uphold the decision notice on that basis.

The issues

26. In the decision notice under appeal the Commissioner had decided that section 23 FOIA was engaged in relation to all the withheld material and thus it was exempt from release under FOIA.
27. By the time of the hearing the issues had been set out in detailed written arguments and within the witness statements provided.
28. The essence of the Appellant's request was for the provenance, dates and source of the information underpinning paragraph 5 of the Briefing. He does not ask for the name of individuals. All parties agreed that personal data should be protected by redaction and that this disposed of any risk that may engage section 38 FOIA.
29. The Appellant's case was that as the information that the bombing was an own goal has been demonstrated to be untrue and that his request sought information about how that untruth came about and was disseminated. In particular he sought information about whether:
 - a. the bombing was a premature detonation;
 - b. two of the deceased were IRA members;
 - c. the bomb was destined for elsewhere in the City.
30. If any such information was held by PSNI the Appellant sought information about when it was received and whether it was provided by an intelligence source or another organisation. We have interpreted the request in the light of its clarification by the Appellant and focussed on paragraph 5 of the Briefing.
31. The Commissioner relied on section 23 FOIA in relation to all the withheld material. He maintained this reliance notwithstanding that PSNI took the position that there was insufficient evidence to support the contention that the material "related to" any of the security bodies.

32. PSNI rely on section 24 FOIA as regards some of the material. The copy of the withheld material provided to us had been highlighted in pink where this exemption was claimed. It was submitted that the parts of the information highlighted in pink were required for the purpose of safeguarding national security which would be adversely impacted by the release of information concerning the methodologies, techniques and operational capabilities utilised at the time of the bombing.
33. The Commissioner and PSNI submitted that section 30 FOIA applied to the material as a whole. The focus was on whether the balance of the public interests fell in favour of maintaining the exemption under section 30.
34. Having considered the evidence given during the hearing the Commissioner altered his position on section 30 and came to the view that the exemption did not operate to exempt the material from disclosure because there was little if any likelihood that the investigation into the bombing would be reopened. PSNI maintained reliance on this exemption.
35. The public interests in issue were said to include the interest in the families of the victims of the bombings being able to achieve closure and the identification of the provenance of the disinformation "the RUC manufactured and disseminated to belie the truth" behind the bombing of the bar.
36. We were urged by the Appellant to disaggregate the information where possible.

The withheld material

37. There were 11 documents in the withheld bundle and we were provided with a closed witness statement from Detective Superintendent Marshall.
38. Prior to the hearing an application under rule 14 of the Tribunal rules had been made as regards the withheld material. However large sections of the copy provided was not legible and Judge Griffin requested a further copy of the documents and an explanation of some of the markings on the documents. It transpired that the copies were not made from original documents but from copies, hence the degradation in quality.
39. A further copy was provided which was more legible and an order under rule 14(6) was made.

40. At the hearing a third copy was provided to us, this copy was of far better quality and all but a few words were legible. In addition we were provided with a further witness statement from Detective Superintendent Marshall arising from her ability to now read the passages.
41. The 11 documents in the withheld material were paginated [redacted].

Hearing

42. At the start of the hearing an issue arose as to the scope of the request and the possible implications of parts of the material being in the public domain.
43. Mr Aldworth KC for PSNI suggested that as some of the documents post-dated the dates of the information sought by the request, particularly the date of the Briefing (15 December 1971) they were not caught by its scope. The submission was that document 4 and three other documents would be outside the scope of the request.
44. Ms Carter-Manning KC submitted that whether a document is in scope would depend on when the information was received and not on the date of creation of the document. Moreover some documents may have more than one date on them. We were urged to focus on information not documents, and three pieces of information that the Appellant was seeking in particular:
 - a. Information about whether the device had been detonated prematurely;
 - b. About the two members of the IRA said to have left the bomb in the bar;
 - c. About whether the bomb was destined for other premises.
45. Ms Carter-Manning also requested that if documents were already in the public domain that the Appellant be told which they were.
46. We heard submissions in closed session. A gist of the closed session was provided to the Appellant having been approved by the Tribunal. That gist read

Submissions were made on 2 issues in closed session

(1) Whether certain documents fell within or outside the scope of the request. Counsel for the PSNI submitted certain documents clearly fell outside the scope of the request. Counsel for the IC agreed with that position, save in respect of document 4 where it was suggested determination as to whether it fell inside or outside the scope of the request was best left to the end of the hearing.

(2) The parties made submissions on the Appellant's request that, where information was already in the public domain, he be told that is the case or the relevant information be gisted. Counsel for the IC submitted that this issue is best considered after the Tribunal determines whether the section 23 exemption applies. Counsel for the PSNI agreed with that submission.

47. It was submitted in closed session that [redacted paragraphs 47 - 51].
52. The Tribunal announced its decision and said reasons would be given later. The decision was that documents 1 to 5 inclusive were at least capable of being within scope of the request. Documents 6 and 7 were outside the scope of the request as was the last page of document 11 (CB20).
53. Furthermore, the Tribunal stated that the inaccurate description of document 2 in the withheld material should be corrected and that the Tribunal would consider the impact, if any, of information being in the public domain having heard further open evidence.
54. The reasons are [redacted].
55. The Appellant had asked for any further description or dates of the documents in the withheld material. We decided that as much information as possible had been provided at this stage of the proceedings but in accordance with our duty in Browning we would keep the question of further disclosure under review.
56. We noted the request by the appellant to be told which, if any, of the documents in the withheld material were already in his possession however, we did not do so because, even if they were in his possession as a result of a previous FOIA request made to another public authority different considerations might have applied to that request, the terms or date of which were not before us. The public interest considerations in particular may have been different. Just because a document is in the public domain, or in possession of a requestor from another source, this is not determinative of the proper response to a further FOIA request to a different public authority, albeit those facts may be of relevance to the balance of the public interests when considering any qualified exemption that is engaged.

The legal framework

57. Section 1 FOIA creates a duty to disclose information held by public authorities. That duty exists whether that information is accurate or not; if it is held it is subject to the regime set out in FOIA albeit the accuracy of the information may be relevant to any balance of the public interests.
58. The duty to disclose information held by public authorities is subject to exemptions. There are two types of exemption; absolute and qualified. An exemption will be 'qualified' where, if the exemption is engaged, the relevant public interests must be balanced to determine whether the public interest in maintaining the exemption outweighs the public interest in disclosure pursuant to section 2 FOIA. An absolute exemption will not require the balancing of the public interests.
59. Following the cases of R (Evans) v Attorney General [2015] UKSC 21 and Montague v The Information Commissioner and Department for International Trade [2022] UKUT 104 (AAC) and [2023] EWCA Civ 1378 it is clear that the Tribunal should apply the public interest balance at the date of refusal, not at the date of an internal review, and thus not at any later date such as where there is a later reliance on additional or different exemptions. In this case the initial refusal dated 20th April 2021 was in the form of a response neither confirming nor denying that the information was held. The dates of the amendments to that response are irrelevant under the principle in Montague. However, in case we are in error on that point, we have considered whether the public interests would have differed if the balance was applied at the later dates and we have concluded that they would not have differed and would remain as they were in April 2021. We also note the ability to aggregate the public interest considerations in applying the public interest balancing test however, we have not done so in this case.
60. Section 23 provides an absolute exemption to the duty to disclose information under FOIA. Section 23 provides that
- "Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)".*
61. It is common ground in this case that Special Branch, being a division of the police service, is not a body specified in section 23(3).
62. As to APPGER v The Information Commissioner [2015] UKUT 377 (AAC), we note that it would be an overly generous approach to exempt information from disclosure simply because it has been copied to a section 23 body. The fact that a document has been copied to that section 23 body will be exempt

but not necessarily the substance of the document. Whether that substance is exempt will depend on whether the substance itself 'relates to' the section 23 body.

63. Corderoy v The Information Commissioner [2017] UKUT 495, is relied upon by the Commissioner for the passage that states that information supplied to one of the section 23 security bodies for the purpose of the discharge of their statutory functions is "highly likely" to be information which relates to an intelligence or security body and thus would be exempt information under section 23.
64. The point at which connection between the withheld material and a section 23 body is too remote to engage section 23 is a matter of evidence on the facts of each case Lownie v The Information Commissioner and others [2020] UKUT 32 (AAC).
65. In Commissioner of Police for the Metropolis v The Information Commissioner and Rosenbaum [2021] UKUT 5 (AAC) Judge Markus approved 14 principles drawn from earlier cases including APPGER and Lownie above, that while not providing an answer in every case will provide practical guidance in applying the provisions.
66. The 14 principles can be summarised as follows
 - i. Section 23 FOIA affords the widest protection of any exemption
 - ii. The purpose of the exemption in section 23 is to preserve the operational secrecy of the bodies named in s23(3)
 - iii. Parliament's clear intention was to prevent any disclosure of information from or about the activities of those bodies
 - iv. Parliament had chosen that even the most anodyne disclosure touching on the security bodies could only be obtained with the consent of the body concerned
 - v. That is because identification of information as being anodyne is not possible without a detailed understanding of the context in which the security bodies work
 - vi. The phrase "relates to" in s23(1) and 23(5) is used in the widest sense
 - vii. Statutory language should be interpreted without judicial gloss
 - viii. However it may be useful to consider synonyms but the test of "relates to" is not subject to a test of focus or directness

- ix. The scope of the "relates to" limb is not unlimited and will be limited by remoteness the assessment of which is a question of judgment on the evidence
- x. The degree of remoteness may be informed by the context of the information
- xi. Section 23's scope should not be construed by reference to other exemptions
- xii. Information should be disaggregated if possible in order to provide that which is not exempt under s23 [or indeed otherwise] in intelligible form
- xiii. Section 23(5) requires a consideration of whether indicating whether or not information is held engages any limb of section 23
- xiv. The purpose of section 23(5) is a protective concept to stop inferences being drawn on the existence of types of information and enables an equivalent position to be taken on other occasions.

67. Section 24 FOIA states that

"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."

68. The Upper Tribunal made clear in The Foreign Commonwealth and Development Office v The Information Commissioner and Williams & others [2021] UKUT 248 (AAC), that the term 'national security' is to be interpreted broadly. The engagement of section 24 does not depend on consideration of prejudice and the Tribunal should be cautious before overriding the sincerely held views of relevant public authorities. Even where the chance of a particular harm occurring is relatively low the seriousness of the consequences were it to happen can mean that the public interest in avoiding that risk is strong or very strong. The public interest in maintaining the exemption in section 24 where engaged is likely to be substantial but that does not mean it carries inherent weight. A compelling competing public interest will be required to equal or outweigh it.

69. Section 30(1) FOIA is concerned with investigations and states as relevant:

"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-

(i) whether a person should be charged with an offence, or

(ii) 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."

70. Section 63(1) FOIA provides that information will not be exempt under section 30(1) if it is contained in an historical record. Section 62(1) sets out that a record becomes an historic record *"at the end of the period of twenty years¹ beginning with the year following that in which it was created"*.
71. Section 62(2) states that
- "Where records created at different dates are for administrative purposes kept together in one file or other assembly, all the records in that file or other assembly are to be treated for the purposes of this part as having been created when the latest of those records was created."*
72. The application of sections 38 and 40 to the personal data contained in the withheld information is not in issue and thus there is no need to set out these sections within this decision.
73. The Tribunal's powers in this appeal are circumscribed in section 57 and 58 FOIA. If we are satisfied that the Information Commissioner's decision notice is in error of law or involves an inappropriate exercise of discretion then we will allow the appeal and may substitute a decision notice for that of the Information Commissioner.
74. If information is to be communicated to a requestor section 11 FOIA governs the means by which such communications are to be made. Section 11(4) provides that a public authority may comply with a request by communicating information "by any means which are reasonable in the circumstances". Thus the method of communication is a matter for the discretion of the public authority subject to dealing with any preferences expressed by the requestor at the time of making the request. In this case the Appellant did not express any preference at the time of making his request.
75. FOIA is concerned with information and not documents, the provisions of section 11 means that information contained in documents may be

¹ We note that prior to 1 January 2013 the period provided was thirty years, however this has no practical effect in this case.

communicated other than by providing a copy of the document that holds it, for example by extracting the text of the information to be communicated.

The evidence

76. We heard from Professor Mark McGovern who gave evidence to us via video link. We are grateful for the context he was able to place upon the circumstances of this case and for his considered thoughts on aspects of the public interests currently important within the communities in Northern Ireland.
77. We received evidence from the Appellant by way of witness statement in which he set out the background to his request, his links to the Bombing and his concerns.
78. We then heard from Detective Superintendent Marshall in open session and she was asked questions by the other parties and the tribunal. It is not necessary to rehearse that evidence at any length except to refer to it in our findings and analysis as part of this decision.

Closed evidence

79. We heard evidence in closed session from Detective Superintendent Marshall. It is necessary to set this out in detail as it underpins our conclusions on the engagement of the exemptions in issue and the public interest balance.
80. In closed session Detective Superintendent Marshall gave evidence as follows [redacted].
81. In cross examination by Mr Perry in the closed session Detective Superintendent Marshall stated [redacted].
82. An email sent on behalf of the Appellant was received while in closed session.
83. Mr Perry asked questions based on that email, [redacted],
84. A gist of that evidence was supplied to the Appellant having been approved by the Tribunal. That gist read as follows

Evidence

NM confirmed the truth and accuracy of her closed statement.

PA took NM through that statement, and NM elaborated on some matters relating to the importance of intelligence gathering, and various other matters addressed in her statement.

WP cross examined NM, asking questions relating to:

- *Section 30;*
- *Section 24, testing the specific redactions proposed*
- *Section 23, in that WP asked questions about the involvement (in 1971) of the intelligence agencies.*

Judge Griffin highlighted para 13-16 and 22 of the Appellant's skeleton argument, and asked questions relating to those paragraphs. Judge Griffin also asked questions about how documents came to be selected by PSNI as falling in scope, and in what form they were held.

Judge Griffin then handed to the parties an email sent by the Appellant's counsel. WP asked further questions in relation to s24 arising from that email, including questions relating to the terrorist threat level in April 2021.

PA asked various questions in re-examination regarding s.24, in particular with reference to the matters raised in the Appellant's email.

Withheld information

Judge Griffin asked that the Appellant be informed that 'Document 2' (ATO incident report), comprising 2 pages, is made up of 2 separate documents: the ATO Incident Report and an extract from the Duty Officer's report

Closed Closing Submissions

85. We received closed submissions from both respondents.
86. Mr Aldridge KC on behalf of PSNI asked the Tribunal to have regard to the submissions made in closed at the start of the hearing and further submitted that: [redacted].
87. On behalf of the Commissioner points were made by Mr Perry in support of the Commissioner's case but he also, very fairly, drew attention to those points that could be made against his submissions by the Appellant. Mr Perry

submitted in closed session that
[redacted].

88. The Appellant was provided with a gist of this part of the hearing. The gist of this part read as follows

CLOSED Closings

PA made submissions in relation to the s.24 exemption. PA indicated he would make s.30 submissions in open. Judge Griffin raised the issue of disaggregation and the gisting of the withheld information.

WP made submissions on behalf of the IC and the Appellant (as per Browning²):

- Section 23: WP argued that Ms Marshall's evidence supported the IC position. On behalf of the Appellant, WP said Ms Marshall had no direct experience or knowledge of interaction between RUC to intelligence agencies in 1971.*
- Section 24: WP confirmed the IC's position remained that s.24 applies and that PSNI had conscientiously turned its mind to the granular detail, in a specific way, and was not proposing wholesale redactions. WP made submissions on behalf of the Appellant, going to the robustness of Ms Marshall's evidence; the interaction with other exemptions; the relationships between PSNI and other bodies; and the public interest balance.*
- Section 30: WP indicated that the Commissioner had changed his approach and concluded that the public interest balance under s30 favoured disclosure, provided redactions were made under ss.24, 30 and 40. This was based on two factors: the likelihood of further investigations and matters already in the public domain. WP made further points with reference to the withheld information.*

Open Closing submissions

89. All three parties made helpful and comprehensive submissions building on their skeleton arguments which may be summarised as below.
90. Ms Carter-Manning KC outlined the genesis of the request being made, the Appellant's motivation and submitted that:

² This is a reference to the case of Browning [2014] EWCA Civ 1050

- a. The request was for information and not documents and so there may need to be an imaginative way of providing the substance of the information in particular where information can be disaggregated.
- b. Some of the documents may already be in the hands of the Appellant/in the public domain. There can be no justification for not informing the Appellant about this.
- c. If the Appellant cannot be told what the intelligence says he would like to be told the reason why, for example because it was provided by a security body.
- d. There is no need to address section 38 and 40 FOIA.
- e. The concern as to section 23 is a remote one and this cannot be made more proximate by repetition. The burden is on those who seek the application of the exemption. In order to find that s23 is engaged the tribunal would need well informed detailed evidence about the way the RUC and the security bodies operated in 1971. It is of note that PSNI do not seek to assert such a connection and the Commissioner raises it as a cautious approach. There is insufficient evidence to engage section 23.
- f. As to section 24, it is not necessary to withhold information under this section where it is already in the public domain. An enormous amount is already known about the events some of which is set out in the witness evidence and in the PONI and HET reports. The passage of time will diminish any risk to national security of revealing methodologies in place in the seventies. In any event any concern is likely to relate to possible prejudice to the investigation and not to national security.
- g. If section 24 is engaged the principle of disaggregation will apply and the tribunal may feel there is a way of providing the information requested without imperilling the capabilities of the police.
- h. Section 30 was the exemption with which most of the open evidence from PSNI was concerned. If the tribunal concluded that the material was not investigatory in nature then it cannot apply.
- i. If section 30 is engaged the public interest will be stronger the more current the information. This information is in the region of 52 years old. It is unlikely to be used in any future investigation. The last investigation was ten years ago and DSupt Marshall agreed that there was little likelihood of the case being re-opened. It is understandable that DSupt Marshall has concerns about releasing any material of this type but she candidly accepted that she had not read the whole file. Any living suspect would likely be in their seventies. Most of the information is in the public domain. There is some public interest in maintaining the exemption but it is slight.

j. The public interest in disclosure includes ameliorating the damage caused by a vacuum of information which leads to conclusions being drawn to fill the gaps. As recognised by Professor McGovern it is critical for there to be understanding from all sides to correct information or myths and to right wrongs previously done. The relatives of those who died continue to be adversely affected by the incomplete information about the bombing. There is a public interest in the truth being known whatever that is.

k. There is a public interest in transparency of decision making surrounding the investigation of the bombing and in the release of information about the period of The Troubles.

l. If the material is also held in a file which was not added to within the last 20 years then the document becomes historic and should be released.

91. On behalf of PSNI, Mr Aldworth KC made an open submission containing the following points,

- a. There is no evidence of a secret agreement between the police and the army. The conclusions drawn by the Appellant based on the log entry are not a reasonable inference from the document. This position has shaped the Appellant's approach to the request and the tribunal should bear in mind that misinterpretation in deciding whether to take a flexible approach.
- b. Sections 38 and 40 are not in dispute.
- c. PSNI make no substantive submission on the application of section 23 but do not take issue with the Commissioner's position. PSNI is not in a position to provide direct evidence of the relationship with the security bodies in 1971.
- d. PSNI have already considered disaggregation as regards section 24 indicated by the fact that not all the text is in pink. The tribunal may consider further disaggregation is possible.
- e. The disputed aspect in relation to section 30 is the public interest balance. DSupt Marshall explained her position on the harm that could be caused on the flow of information from the public generally and her concern was wider than the specific harm that may be caused to any future investigation into the bombing. Information from the public is vital to criminal investigation and the flow of information is predicated on the trust that the police will protect those who provide it.
- f. The records have been added to over the years and have not been dormant for 20 years. The age of a document cannot be used as a blunt instrument to assess the balance of the public interests.

92. Mr Perry made three points on behalf of the Information Commissioner:
- a. Ideally there would be evidence of a relationship between the RUC special branch and the security bodies listed in section 23. However, on a balance of probabilities the Commissioner suggests section 23 is engaged in relation to all the material because
 - i. The meeting on 16 December 1971 was attended by high ranking intelligence figures including a security liaison officer
 - ii. The committee that met on 16 December 1971 was heavily focussed on the use of explosive devices by extremist groups, particularly republican groups
 - iii. The appellant's evidence describes that MI5 was in situ at the material time
 - iv. Some weight, albeit limited, can be placed on the conclusions in Rosenbaum as to the status of Special Branch in 1971
 - v. The political ramifications of the bombing were considerable as recognised in the open documentation. Thus the bombing, its aftermath and the investigations would have been of intense interest to the security bodies including MI5 and so information was bound to have been fed up the chain to those bodies.
 - b. The tribunal is bound by Montague as decided in the Upper Tribunal as to the date of the assessment of the public interest.
 - c. Section 11 FOIA gives a requestor a chance to request the form of any disclosure at the point of making his request. Release under FOIA is almost always done by release of the document containing the information.
93. The Commissioner supported the Appellant's arguments on section 30 except in relation to the Legacy Act.
94. When brought into force the Legacy Act would prevent further criminal investigation of Troubles related offences, see section 38 of that act. The Appellant submits that this goes to the public interest because of the reduction in likelihood of re-opening the case even though the Act was still a Bill at the relevant date of assessment of the public interest in April 2022. The Appellant submits that one of its aims is to limit criminal investigations and that this is properly to be taken into account notwithstanding a challenge to the act³, and the fact that the Appellant himself does not agree with the

³ Judgment was delivered in respect of this challenge on 28 February 2024

possible restriction on those future proceedings. Both respondents submit that the Legacy Act is not relevant. The Commissioner submitted that the Appellant does not need this argument to make good his case.

95. In reply Ms Carter Manning KC took issue with Mr Perry's analysis of the foundation upon which he had submitted section 23 was engaged and invited us to take a forensic approach to those submissions.

Analysis and conclusions

The search for information by PSNI

96. We were told and accept for these purposes that PSNI hold 11 archive boxes of material relating to the investigation of the Bombing. On receipt of the request DSupt Marshall's predecessor conducted a search. That search was limited to the part of the material relating to intelligence in order to respond to this request. The other material was not searched.
97. The closed bundle contains [redacted].
98. In considering this appeal we must consider whether the public authority has complied with its duty under part 1 of FOIA. On PSNI's evidence they have not searched all of the places where the requested information may be held. It is incumbent on a public authority to do so or to explain to a requestor why they have not, in reliance on what are sometimes known as the gateway provisions in FOIA, such as section 12 or 14. PSNI have not conducted a search of all the places it may hold the information requested nor explained to the requestor, Mr MacAirt why it has not done so. Thus PSNI has not complied with part 1 of FOIA in this regard. The Commissioner should have noted this and taken action to remedy the position before moving to consider the arguments about section 23, as to which see below.
99. The decision notice is in error of law in this regard however, a gateway provision may apply and thus we do not direct PSNI to search beyond that which it has already but direct them to either do so or to explain why they will not with reference to the provisions of FOIA; see substituted decision notice.

Sections 40 and 38

100. The parties agree that in the event of any disclosure being ordered by the Tribunal that any personal data contained therein should be redacted pursuant to section 40 FOIA. The parties also agree that the redaction of any

personal data would be sufficient to remove any risk of endangering those person's (or any other individual's) physical or mental health or their safety. We agree and have proceeded on that basis and reflected that position in our substituted decision notice.

Disaggregation and form of any disclosure

101. The form of disclosure under FOIA is generally made by providing copies of documents held by the public authority but this is not the only way. In the absence of a preference expressed by a requestor, pursuant to section 11 FOIA a public authority may comply with a request by communicating information "by any means which are reasonable in the circumstances".
102. The information requested may be contained in documents within the withheld material (Closed Bundle) but we remind ourselves that it is important to remember that
- a. The request is for information and not for documents and the request may be answered in a way other than providing whole or redacted documents that record the information,
 - b. The information may be provided by extracting it from the documents held by PSNI,
 - c. If requested information that is not exempt from disclosure can be disaggregated from that which is exempt then this should be done.

Section 23

103. The Commissioner submits that section 23 applies to the withheld material in its entirety because Special Branch was 'in the orbit' of relevant security bodies at the time, as recognised in Rosenbaum, and the withheld information 'relates to' those bodies. In support of this proposition the Commissioner draws attention to
- a. The evidence of the Appellant that the Meeting was attended by a representative from MI5, the Security Service and that the British Army had already commenced military intelligence operations in Northern Ireland.
 - b. The evidence of Professor McGovern that the Meeting was of the highest ranking figures from politics, the military and intelligence communities.
 - c. The provision of the Briefing to the Meeting shortly after the bombing.
 - d. The evidence received in closed session from Detective Superintendent Marshall including that [redacted].

- e. The nature of the request can be distinguished from those in Corderoy as the request in this case is not as broadly framed and is restricted to provenance, dates and source of the intelligence about the matters contained in paragraph 5 of the Briefing.

104. Having considered and applied the guidance in Rosenbaum, we do not accept that the material is exempt pursuant to section 23 FOIA. This is because

- a. The withheld information is not from or about the activities of the security bodies at all. It does not relate to any security body; it has no connection to any security body.

- b. All parties accept for these purposes that there was representation from the security bodies at the Meeting as reflected in the minutes that are already in the public domain. To that extent we accept that a security body or bodies were "in the orbit" of the events subsequent to the Bombing; this is unsurprising but we note has not been officially confirmed. However this is not to conclude that a security body was "in the orbit" of Special Branch in 1971.

- c. PSNI did not rely on section 23 and the evidence of DSupt Marshall was that she had no direct experience or knowledge of the interaction between the RUC, its Special Branch and security bodies in 1971.

- d. Special Branch is not a security body within the scope of section 23. We are asked to infer that [redacted].., however this inference is not supported by evidence.

- e. We are not satisfied, on the evidence before us, that the withheld material was supplied to a security body.

- f. Even if we are wrong about that matter the only inference that may be drawn is that [redacted].

- g. [redacted].

- h. The Commissioner refers us to the case of Corderoy in support of the contention that the material will have been passed to MI5 for the purpose of the discharge of their statutory functions and thus it is highly likely to be information which relates to the security body.

- i. In our judgment the connection in this case is too remote to engage section 23 on the substance of the withheld information.

- j. [redacted].

105. We conclude that section 23 is not engaged in relation to any of the withheld material.

Section 24

106. PSNI relies on the exemption in section 24 in relation to all text highlighted pink in the closed bundle, [redacted].
107. The reason that PSNI submit that section 24 is engaged is that the protection of methodologies, techniques and operational capabilities is required for the purposes of safeguarding national security. We accept the evidence of DSupt Marshall in this regard and find that [redacted]
108. Exemption from s1(1)(b) FOIA of the information highlighted pink in the closed bundle is required for the purpose of safeguarding national security, [redacted].
109. [Redacted]
110. It is necessary to protect those matters in order that PSNI can continue to protect the public, prevent and detect crime [redacted]. In the context of this case this is required to safeguard national security as much in the present day as it was at the time of the Bombing. Section 24 is engaged as regards the pink highlighted material.
111. As we have decided that section 24 is engaged we turn to consider whether the public interest in maintaining the exemption is outweighed by the public interest in disclosure of those parts highlighted in pink.
112. There would need to be a strong countervailing public interest to outweigh the public interest in maintaining an exemption that is engaged as regards information required for the purposes of safeguarding national security. However, section 24 is not an absolute exemption.
113. We have assessed the public interest as it was at the time of the response to the request.
114. [redacted].
115. We have concluded that there is a distinction to be drawn between that which is in the public domain by reason of inclusion in the PONI and HET reports and material that has not yet been released
116. We have concluded that the public interest balance will fall in favour of disclosure of material that is already in the public domain. This is because the

maintenance of the exemption cannot be said to be required for the purpose of protecting national security unless the disclosure of the fact that it is held by the public authority could be said to hold risk, such as to tip the balance in favour of maintaining the exemption. That is not the position in this case.

117. As to the information not in the public domain, as well as the public interest in transparency and accountability, we recognise the strong public interest on the facts of this case of working towards achieving a measure of reconciliation within the different communities in Northern Ireland and Belfast in particular. We are urged on behalf of the Appellant to conclude that the passage of time has reduced the risk to national security whereby it is outweighed by the public interest in disclosure.

118. However, in our judgment the public interest in maintaining the exemption regarding the information highlighted pink that is not in the public domain is stronger, given the risk to national security posed by disclosure, which is not diminished notwithstanding the passage of time.

119. We have decided that this material can be disaggregated and considered how this should best be achieved in relation to each document in turn.

Section 30

120. As we noted earlier in this judgment the position of the Commissioner on section 30 changed in the light of considering the evidence. PSNI maintains its reliance on the exemption in section 30.

121. The documents in the closed bundle form part of the RUC material generated as a result of the investigation into the Bombing. There is no dispute that it was held by PSNI for the purposes of an investigation within the parameters of section 30(1)(a) FOIA.

122. We accept the evidence of DSupt Marshall that the case has been reviewed on more than one occasion since 1971. The case was re-opened in 2013-2014. This is within 20 years of the response to the request. Just because the review in 2014 produced no outcome does not mean that the information is to be regarded as an historic record as defined within section 63(1) FOIA.

123. We accept DSupt Marshall's evidence that records created at different dates including 2014 will have been added to the file and thus treat the contents of the file as having been created at the latest date on the records. We know that includes 2014 and so s63(1) does not apply.

124. Section 30 is engaged as regards all the information but it is a qualified exemption so we must consider the balance of the public interest at the time of the response to the request. We indicate that we accept the points made in open and closed session by Mr Perry on behalf of the Commissioner in this regard.
125. In considering whether the public interest in disclosing the information outweighs the public interest in maintaining the exemption we have considered the likelihood of there being a re-opening of the criminal investigation. DSupt Marshall told us that although the case is not closed, in her view a further investigation is unlikely. We note that one man has been convicted of the Bombing.
126. We have concluded that there is only a slim chance of the case being re-opened. This is due to the passage of time making it unlikely that new information or witnesses would be found in order to progress the case. It is not out of the question entirely but in our view DSupt Marshall's evidence on this point was fair and realistic.
127. As to the Legacy Act, Mr Perry's point that the Appellant does not need to refer to this legislation to make a successful argument is correct. Clearly if that act had been in force at the time of the response to the request a public authority would be bound to consider its impact on the balance of the public interests but it was not and in any event we have concluded without reference to that legislation that there is but a slim chance that the case would be re-opened. In other words it is more likely than not that there will be no re-opening of the police investigation into the Bombing.
128. We accept that the section 30 exemption exists to protect investigative material where the premature release of the information would damage any subsequent inquiry. That is important to the maintenance of public confidence in the law enforcement process and effective policing. However, where information is already in the public domain those considerations do not apply.
129. Thus once again a distinction must be drawn between that which is in the public domain and that which is not. The PONI and HET reports include significant quantities of information that was analysed in the reporting process.

Mr MacAirt has also obtained disclosure from public authorities of other information under FOIA.

130. It is our conclusion that if the information is in the public domain the public interest in disclosure will outweigh that in maintaining the exemption in circumstances where another police investigation is highly unlikely such as this case. There can be no risk to the investigation by the repeated release of information that is already public. However we were asked to consider the potential damage to the trust placed in the police by release of any material received from members of the public who bring them information. It was submitted that damage would be caused to that trust even if the material was already in the public domain.

131. We have concluded that to maintain the exemption as regards material already in the public domain would have a greater impact on public confidence in the police than any potential damage caused by the re-release of material that is already known to be held by the investigative authorities by reason of publication in the PONI or HET reports for example.

132. Therefore we have concluded that the public interest in maintaining the exemption in s30 is outweighed by the public interest in disclosure of those matters which were already in the public domain at the time of the response to the request.

Application of our decisions to the withheld material

133. In order to give effect to our decisions and to the principle of disaggregation we have considered each document in turn. The following table sets out how each document should be dealt with to give effect to our decision

No.	Page		
1	CB1-5	Disclose text of this document subject to redaction under section 30 & 38/40 and for that which is out of scope of the request	[redacted].
2a	CB6	Exempt under s24 - do not disclose	[redacted].
2b	CB7	Disclose subject to redaction under section 38/40	
3	CB8	Disclose text of this document subject to redaction under sections 24 & 38/40	[redacted].
4	CB9	Disclose text of this document subject to redaction under sections 24 & 38/40	[redacted].

No.	Page		
5	CB10	Disclose text of this document subject to redaction under sections 24/30 & 38/40	[redacted].
6	CB11	Out of scope of request – do not disclose	
7	CB12	Out of scope of request – do not disclose	
8	CB13	Disclose text of this document subject to redaction under sections 24 & 38/40 and for that which is out of scope of the request	[redacted].
9	CB14	Out of scope of request – do not disclose	
10	CB15-17	Disclose text of this document subject to redaction under sections 38/40 and for that which is out of scope of the request	[redacted].
11a	CB18	Disclose text of this document subject to redaction under sections 38/40 and for that which is out of scope of the request	[redacted].
11b	CB19	Disclose text of this document subject to redaction under sections 38/40 and for that which is out of scope of the request	[redacted].
11c	CB20	Out of scope of request – do not disclose	

Conclusion

134. The decision notice IC-116673-G6M2 is in error of law and thus the appeal is allowed. We have substituted a decision notice which is to be found at the start of this judgment.

Signed

Date

Judge Griffin

28 February 2024

CODA - Further to the usual processes of this tribunal a draft of this OPEN decision was provided to the respondents to check that it did not inadvertently reveal any matters subject to the rule 14 order of the tribunal. The Respondents have confirmed that in their view it does not do so. Unfortunately that process has delayed the promulgation of this decision and the tribunal is grateful to the parties for their patience in that regard.