IN THE UPPER TRIBUNAL **Appeal No. GIA/2230/2019**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (General Regulatory Chamber) (Information Rights)

Between:

The Commissioner of the Police of the Metropolis

Appellant

- v –

1. The Information Commissioner

2. Mr Martin Rosenbaum

Respondents

Before: Upper Tribunal Judge Markus QC

Hearing date: 15 October 2020
Decision date: 7 January 2021

Representation:
Appellant: Mr Robert Talalay, instructed by Directorate of Legal Services, Metropolitan Police Commissioner.
1st Respondent: Mr Christopher Knight, instructed by Nicholas Martin, solicitor, Information Commissioner's Office
2nd Respondent: In person.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 4 July 2019 under number EA/2018/0246 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remake it as follows:

The Information Commissioner's decision dated 14 November 2018 is confirmed. The Commissioner of the Police of the Metropolis was entitled to rely on section 23(5) of the Freedom of Information Act 2000

REASONS FOR DECISION

1. This appeal concerns a request made to the Commissioner of the Police of the Metropolis ('the MPS') by Mr Rosenbaum for all information held by what was then called Special Branch relating to the National Front in 1974, 1975 and 1983. The MPS refused to confirm or deny that it held the requested information, citing

sections 23(5), 24(2), 27(4), 31(3) and 40(g) of the Freedom of Information Act 2000 ('FOIA').

2. The Information Commissioner ('IC') upheld the MPS's decision, relying only on section 23(5). The IC did not go on to consider the other exemptions on which the MPS had relied.

3. Mr Rosenbaum appealed to the First-tier Tribunal ('FTT'). In an interim decision dated 4 July 2019 the FTT decided that the MPS were not entitled to refuse to confirm or deny whether they held the requested information. The FTT found that the exemptions in sections 23(5), 24(2), 27, 31(3) and 40(5B) were not engaged. It found that the exemptions in sections 30(1) and (2) were engaged but the public interest in maintaining the exclusion of the duty to confirm or deny did not outweigh the public interest in confirming or denying that the information was held.

4. The FTT gave the Appellant permission to appeal to the Upper Tribunal.

Factual background

5. The factual background was set out in the FTT's decision as follows:

> "3. The National Front is defined by the Police in their letter of 15 October 2018 as follows:
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> '*The National Front is a far-right and fascist political party. The party espouses the ethnic nationalist view that only white people should be citizens of the United Kingdom. The party calls for an end to non-white migration into the UK and settled non-white Britons to be stripped of citizenship and deported from the country. A white supremacist group, it promotes biological racism, calling for global racial separatism and condemning interracial relationships and miscegenation. Https://en.wikipedia.org/wiki/National_Front_(UK) and http://www.nationalfront.info/*'
>
> 4. In 2006 the functions of Special Branch were merged with the Anti-Terrorist Branch into a unit called the Counter Terrorism Command ('CTC'), also known as S015. The tribunal read a statement from Detective Chief Superintendent Kevin Southworth, in charge of the CTC. The CTC's remit includes countering terrorism but also to combat threats to national security and to protect democracy from, for example, espionage, subversion, political extremism etc. This national security remit is shared with a number of s 23 bodies. The CTC's most significant intelligence partner is the Security Service, and there is significant liaison between the CTC and the Security Service on a daily basis. Section 23 bodies are routinely involved in most aspects of CTC work and any information gathered by CTC may be exchanged with or originate from s 23 bodies.
>
> 5. The Police currently has a policy of neither confirming or denying the existence of material which would inform the public whether or not Special Branch have had an interest in a particular individual or organisation. While the witness statement makes reference to information in relation to any terrorist or extremist group or individual, the Tribunal understands that the policy applies to requests for information concerning any groups or people who may or may not have been of

interest to Special Branch, where confirming or denying would reveal the investigative ambit of Special Branch. Historically, when the FOIA was first implemented, the Police released some information from Special Branch files in response to FOI requests. The Appellant identifies, for example, the release of information held in relation to certain groups in 2005 and 2006.

6. The BBC Documentary, 'True Spies', contained interviews from ex-Special Branch officers in which they state, for example, that Special Branch used an MI5 agent to infiltrate the National Front. The Police have not confirmed or denied anything that was said by the ex-officers. The Police issued the following press release about 'True Spies':

"We assisted the BBC with its research on the subject, which is closely linked with the operational history of Special Branch. A number of ex-officers approached the Met asking for advice as to whether or not they should contribute, which we gave them. It is incumbent on them not to do anything that could compromise national security. However, ex-officers are private individuals and the final decision as to whether to give interviews is up to them."

7. The Undercover Policing Enquiry has published a list identifying 78 organisations to enable members of the public to identify whether they may have known officers who were deployed undercover. The list is stated not to be a comprehensive list of groups with which the officer may have interacted and not to constitute a factual finding by the Chairman that any group was or was not targeted. The Police have not confirmed the accuracy of this list."

Legislative Framework

6. The general right of access to information held by public authorities is set out in section 1 of FOIA:

> "1(1) Any person making a request for information to a public authority is entitled—
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> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
>
> (b) if that is the case, to have that information communicated to him.
>
> …
>
> (6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny".

7. Section 2 provides that the duties in section 1 are subject to the exemptions contained in Part II of FOIA:

> "2 (1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—
>
> (a) the provision confers absolute exemption, or
>
> (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,

section 1(1)(a) does not apply.

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—

…(b) section 23,…"

8. Section 23, which creates an absolute exemption, provides as follows:

"23 (1) 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).

(2) A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.

(3) The bodies referred to in subsections (1) and (2) are—

(a) the Security Service,

(b) the Secret Intelligence Service,

(c) the Government Communications Headquarters,

(d) the special forces,

(e) the Tribunal established under section 65 of the Regulation of M1Investigatory Powers Act 2000,

(f) the Tribunal established under section 7 of the M2Interception of Communications Act 1985,

(g) the Tribunal established under section 5 of the M3Security Service Act 1989,

(h) the Tribunal established under section 9 of the M4Intelligence Services Act 1994,

(i) the Security Vetting Appeals Panel,

(j) the Security Commission,

(k)the National Criminal Intelligence Service, F1. . .

(l) the Service Authority for the National Criminal Intelligence Service.

(m) the Serious Organised Crime Agency.

(n) the National Crime Agency.

(o) the Intelligence and Security Committee of Parliament.

> ...
>
> (5) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)."

9. I do not set out sections providing for the qualified exemptions which were in issue in the FTT proceedings. It is sufficient to say that each exemption would be engaged if exemption was required for a specified purpose, or if disclosure of the information would or would be likely to prejudice specified interests. If an exemption was engaged, then the exemption would apply only if the public interest test in section 2(2)(b) was satisfied.

The FTT's decision

10. In the FTT proceedings the position of the MPS and the IC in respect of section 23(5) was, in summary, that confirming or denying whether the MPS held the requested information would disclose whether or not Special Branch had an interest in the National Front and, given the close working relationship between Special Branch and the Security Service, would disclose whether or not there had been any involvement of the Security Service. Therefore, confirming or denying whether the information was held would involve disclosure of information relating to the Security Service. Accordingly, section 23(5) applied so that the duty to confirm or deny did not arise. The MPS and the IC also relied on the qualified exemptions which I have already referred to.

11. I now set out the principal relevant aspects of the FTT's decision.

12. The FTT identified that the information in issue under section 23(5) was not the information covered by the request but was the information that would be disclosed by a confirmation or denial that the requested information was held: the 'revealed information' (paragraph 41). The question was whether the revealed information fell within section 23(5). In accordance with the Upper Tribunal's decision in *Corderoy v Information Commissioner* [2017] UKUT 495 (AAC), [2018] AACR 19, in determining whether the revealed information related to a security body, it had to decide whether Parliament intended which exemption from the duty to confirm or deny should apply; the absolute exemption in section 23(5) or a qualified exemption (paragraph 48). In a case of neither confirming nor denying whether the information was held (an 'NCND' case) it was necessary to ask what information derived from a 'yes' or 'no' answer and whether it had the impact specified in the relevant provision (paragraph 50.2). In that regard, it was legitimate to consider both any information expressly communicated by the public authority and any inferences the public would draw from the information (paragraph 51).

13. The FTT identified the following issues arising under section 23(5):

> "75.1 What is the revealed information? This can be made up of:
>
> 75.1.1 Any information that is expressly communicated to the public by a 'yes' or 'no' answer, and

> 75.1.2 Any other information which would effectively be communicated to the public by a 'yes' or 'no' answer because of the inferences the public would draw from the expressly communicated information.
>
> 75.2 Is this information already in the public domain?
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> 75.3 If so, what is the relevance of that to s 23(5)?
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> 75.4 Does the revealed information 'relate to' a s 23(3) body as a matter of ordinary language?
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> 75.5 If so, did Parliament not intend such information to be covered by the absolute section 23 exemption?"

14. The FTT identified the information which was already in the public domain:

> "84. We have been provided with a transcript of the BBC programme 'True Spies'. In it ex-Special Branch Officers provide details of Special Branch and MI5 surveillance of the National Front. It does not identify the specific years in which this took place but refers to 'the mid-70s' and that it continued for 'many years'. This is not based on a 'leak' from Special Branch. The press statement states that Special Branch assisted the BBC with their research on this programme. The Police or the Security Services have not issued any statements confirming or denying any information in the programme.
>
> 85. Having read the transcripts we find that, despite the lack of official confirmation or denial, any viewer, in the light of the statement that Special Branch had assisted the BBC with their research, would reasonably infer that Special Branch and MI5 had carried out surveillance of the National Front in 1974 and 1975 and probably in 1983. We find, therefore that is already known that Special Branch and MI5 were involved with the National Front throughout that period."

15. At paragraphs 90 to 85 the FTT identified the information that would be revealed by a confirmation or denial. If the MPS confirmed that they held the information, that would reveal that Special Branch held information relating to the National Front. Given the publicly known nature of the work of Special Branch and of the National Front, a member of the public would probably infer from that fact that the Security Service was also probably involved with a Special Branch investigation into the National Front in those years. If the MPS denied that they held the information, that would probably lead a member of the public to infer that Special Branch had not been investigating the National Front during those years, and that there had been no Security Service involvement in a Special Branch investigation into the National Front in those years.

16. At paragraphs 96 to 100 the FTT decided that section 23(5) could not apply to information which was already in the public domain. Any member of the public who saw the "True Spies" programme would already have drawn the inference that the Security Service was involved with an investigation into the National Front. Although it had not been officially confirmed, neither would it be officially confirmed by a confirmation or denial which would only give rise to an inference. A confirmation or denial would not disclose any further information about the involvement of the Security Service save as to their involvement in the specific

years to which the request related. Therefore, confirmation or denial would disclose (albeit to a limited extent) information about the involvement of the Security Services with the National Front.

17. Next the FTT held (paragraphs 101-102) that, as a matter of ordinary language the revealed information related to a section 23(3) body. However, applying the approach in *Corderoy*, the FTT concluded that Parliament did not intend such information to be covered by the absolute exemption in section 23. The FTT's reasoning was as follows:

> "103.1. The basis on which the information 'relates to' a s 23(3) body is because of the conclusions that can be drawn on the basis of the nature of the relationship between Special Branch and the Security Services. It therefore applies to all Special Branch activities. The Commissioner confirms in its response that it takes the position that s 23 is engaged in relation to any information relating to the work of Special Branch.
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> 103.2. Parliament can be taken to have known about the nature of Special Branch activities and its close relationship with the Security Services.
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> 103.3. It did not include Special Branch in the list of s 23(3) bodies.
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> It cannot therefore have intended that *all* its activities would fall within s 23.
>
> 103.4. 'Relates to' should therefore not be interpreted so widely that it would have this effect.
>
> 103.5. The revealed information falls obviously within the qualified exclusion in s 30(3) (investigation and proceedings conducted by public authorities).
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> 104. We have considered whether what we have decided is consistent with para 59 of *Corderoy* in which the Upper Tribunal stated:
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> "59….We reiterate that Parliament clearly did not intend information to be obtained from or about security bodies through the back door and we acknowledge that there can be difficulty:
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> (i) in an outsider identifying what the revelatory nature of information, if any, which is said to be subject to the absolute section 23 exemption might be, and so
>
> (ii) in the application of an approach that asks whether the information is or might be revelatory of the Security Services' activities, their intelligence or intelligence sources, and that
>
> These points support a wide approach to the reach of section 23."
>
> 105. We find that it is consistent. In our view, were a request made to the Police for information held by Special Branch on MI5 involvement in a specific case, they would be entitled to refuse to confirm or deny whether they held that information. They could do this consistently in every request which asked whether or not they held information on MI5 involvement. This is because Parliament did not intend information to be obtained from or about Security bodies through the back door. This is different in our view from consistently refusing to confirm or deny any

> information which reveals anything about Special Branch activity on the basis that it works closely with the Security Services. If Parliament had intended all Special Branch activities to be covered by s 23 it would have included them in the list.
>
> 106. The above example also illustrates the point that the Commissioner is correct to observe that the Upper Tribunal in *Corderoy* did not purport to set down a general rule that the s 23 exemption could only be used if no other (qualified) exemptions were applicable. The existence of other applicable qualified exemptions is relevant to a consideration of Parliament's intentions but it is not the only relevant factor and is not determinative of the issue."

18. Accordingly, the FTT concluded that section 23(5) was not engaged.

19. The FTT's conclusions in relation to sections 24(2), 27, 30 and 31(3) were substantially based on its finding that it was already in the public domain that the National Front were of interest to Special Branch and the Security Service. Accordingly disclosure of the information would either not give rise to the prejudice specified in the exemptions or meant that the public interest favoured confirming or denying that the information was held.

Discussion and conclusions

20. The grounds of appeal are as follows:

> Ground 1: Having found that the facts fell within the statutory words of section 23(5), the FTT erred in seeking to put a gloss on the statutory wording.
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> Ground 2: The FTT erred in finding that the information in question was in the public domain and the effect of that finding on section 23 and the other sections relied on by the MPS.
>
> Ground 3: In carrying out the public interest balancing exercise, the FTT placed too much weight on what it found to be in the public domain and failed to take proper account of the evidence of a senior police officer.

Ground 1: "relates to".

21. For the MPS, Mr Talalay submitted that the FTT's principal error was that, having found that the information "related to" a section 23(3) body, it then put an unlawful gloss on the test by asking itself whether Parliament intended that the exemption should apply in this case. This was contrary to the decision of the three-judge panel of the Upper Tribunal in *APPGER v Information Commissioner and Foreign and Commonwealth Office* [2015] UKUT 377 (AAC), [2016] AACR 5, and *Corderoy* (reference at paragraph 12 above) should not be understood as permitting a departure from the clear statutory language. In addition, he submitted that the FTT incorrectly asked whether some other exemption should apply. Mr Knight for the IC agreed with those submissions. In one respect he went further in that he submitted that I should find that the Upper Tribunal in *Corderoy* was wrong in law in allowing a departure from the statutory language.

Mr Rosenbaum submitted that the FTT had interpreted section 23(5) correctly in the light of case law including *Corderoy.*

The meaning and application of "relates to".

22. *APPGER* is the leading case on the meaning of "relates to" in section 23(2). There the Upper Tribunal rejected a submission that information "relates to" a section 23 body only if the information has that body as "its focus, or main focus" or an equivalent connection to that body. The Upper Tribunal said that that submission was inconsistent with the ordinary meaning of the language and was inconsistent with

> "Parliament's clear intention that, because of what they do, there should be no question of using FOIA to obtain information from or about the activities of section 23 bodies at all…Parliament had shut the front door by deliberately omitting the section 23 bodies from the list of public authorities in the Schedule to the Act. Section 23 was a means of shutting the back door to ensure that this exclusion was not circumvented." (*APPGER* paragraph 16)

23. In addition, at paragraph 17 the Upper Tribunal had observed that the broad approach to section 23(1) was not narrowed by the qualified exemption in section 24(1) which was a safety net provision "which recognises that national security issues may arise in respect of information that is not within the absolute section 23 exemption".

24. In *APPGER* the Upper Tribunal declined to offer a judicial steer or guidance in general terms as to the meaning of "relates to" other than to say that it is "used in a wide sense" (paragraphs 23 and 25).

25. In *Corderoy* the Upper Tribunal adopted the analysis in *APPGER*, saying:

> "53. ….for the reasons set out in paragraphs 23 to 25 of *APPGER v IC and FCO*, the judicial language in earlier cases should not be substituted for the statutory language and the correct approach is to give effect to that language in its context and so having regard to the relevant statutory purpose and other principles of statutory construction."

26. However, at paragraphs 55 and 56 of *Corderoy* the Upper Tribunal went on to say that it was necessary to ascertain which exemptions Parliament intended to apply to the particular information, and that the question to be asked was "Did Parliament intend that an absolute or qualified exemption would apply to the … Information?". At paragraph 57 the Upper Tribunal said that the approach to answering that question was

> "to address by reference to the content of the information in question …which of the exemptions Parliament intended to apply. In other words, is the … Information still 'caught' by section 23, or is it subject to the qualified exemptions in sections 35(1)(c) and/or 42?".

27. The Upper Tribunal decided that Parliament had not intended that the disputed information in that case should be caught by section 23(1) but that, instead, the qualified exemptions in sections 35 and 42 should apply (paragraph 62).

28. In *Lownie v Information Commissioner and others* [2020] UKUT 32 (AAC), [2020] 1 WLR 3319, I noted the inconsistency between paragraph 53 of *Corderoy* and its analysis at paragraphs 55 to 57. At paragraph 44 I said that the latter was "best understood as a tool used by the Upper Tribunal in applying the statutory language, and the conclusion in paragraph 62 is best understood as the application of the statutory language to the particular facts of the case." I continued:

> "45. I am reinforced in my view because, as a matter of general principle, the fact that information might come within the scope of a qualified exemption cannot of itself be an answer to the question whether it is within the scope of a different absolute exemption. Indeed such an approach would be contrary to the clear statement of the Upper Tribunal in *APPGER* (to which I make further reference below) that the scope of section 24 (a qualified exemption) cannot define the scope of section 23.
>
> …
>
> 47. Importantly, the Upper Tribunal in *Corderoy* did not qualify the following propositions or guidance that can be derived from *APPGER*:
>
> a. The phrase "relates to" should not be construed narrowly. In the light of the ordinary meaning of the language, parliamentary intention to "shut the backdoor" to ensure the exclusion of section 23 bodies from the reach of FOIA, and previous authority, the phrase is used in a wide sense (*APPGER* paragraphs 15-19 and 25; *Corderoy* paragraph 59).
>
> b. There should be no judicial gloss to the statutory test (*APPGER* paragraphs 23 to 25; *Corderoy* paragraphs 51 and 53)."

29. At paragraphs 47 to 61 I rejected other submissions advancing a narrower approach to the scope of section 23(1). In particular I said that the policy underlying section 23 was to preserve the operational secrecy necessary for the section 23 bodies to operate (paragraph 50), and that it "would be wrong in principle to interpret section 23 by reference to the perceived role of section 24 rather than to give effect to the important public policy imperative which drives section 23" (paragraph 52). I said that section 23(1) enabled the withholding of entirely anodyne information (paragraph 54). Finally, I said that section 23 should not be limited to information which says something about the activities of a section 23 body nor to information which *directly* "relates to" a section 23 body (paragraphs 57 - 60).

30. Although I was clear in *Lownie* that the approach in *APPGER* was the correct one and that any departure from or narrowing of the clear statutory language was impermissible, I did not say that the Upper Tribunal in *Corderoy* had been wrong in law in its approach at paragraphs 55 to 57 and its conclusion based on that approach at paragraph 62. Instead, I limited that approach to the Upper Tribunal's decision on the facts of the particular case. Mr Knight now urges me to go further and state clearly that those passages in *Corderoy* are wrong in law.

31. In *Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (AAC) at paragraph 37 a three-judge panel of the Administrative Appeals Chamber (AAC)

of the Upper Tribunal set out the following guidelines as to the precedential authority to be given to various constitutions of the AAC including:

> "(iii) In so far as the AAC is concerned, on questions of legal principle, a single judge shall follow a decision of a Three-Judge Panel of the AAC or Tribunal of Commissioners unless there are compelling reasons why he should not, as, for instance, a decision of a superior court affecting the legal principles involved. A single judge in the interests of comity and to avoid confusion on questions of legal principle normally follows the decisions of other single judges. It is recognised however that a slavish adherence to this could lead to the perpetuation of error and he is not bound to do so."

32. *Corderoy* was a decision on an appeal to the FTT which had been transferred to the Upper Tribunal under rule 19(3) of the rules of procedure of the FTT (General Regulatory Chamber). It was decided by a panel comprising Charles J (the Chamber President of the AAC at that time), Mitting J and a non-legal member (Ms Chafer). In *Information Commissioner v (1) Poplar Housing and Regeneration Community Association (2) People's Information Centre* [2020] UKUT 182 (AAC) Farbey J, the current Chamber President of the AAC, said that *Dorset Healthcare* does not deal with the effect of a decision by such a panel and so a single judge of the AAC is not bound by the *Dorset Healthcare* guidelines to follow it in the same way as it would be expected to follow a decision of a three-judge panel. Accordingly I am not bound to follow the decision in *Corderoy*.

33. As I explained in *Lownie,* paragraphs 55 to 57 and 62 of *Corderoy* are inconsistent with the decision in *APPGER*. Despite my approach in *Lownie* at paragraph 44*,* on reflection I do not think those passages in *Corderoy* can properly be explained away as an attempt to apply the statutory language to the facts of the case. The Upper Tribunal's approach in *Corderoy* was expressed in general terms, not limited to the facts of that case and its effect was indeed to add a further gloss on the statutory words by applying a test of whether Parliament intended that section 23(1) should apply rather than a qualified exemption. In the light of *APPGER,* which was decided by a three-judge panel of the Upper Tribunal, it was an error of law to add that further gloss.

34. While the interests of comity would normally inhibit my expressing such a conclusion, particularly where the panel comprised two High Court Judges including a past Chamber President who had also presided on the three-judge panel in *APPGER*, I am satisfied that I should do so. I am told by Mr Knight (who appeared for the Information Commissioner in *Corderoy*) that the passages in question in that case had not been the subject of legal argument. More importantly, permitting the error in *Corderoy* to be perpetuated risks leading decision-makers and tribunals into error (as was the FTT in the instant case) and creating confusion as to the applicable legal principles.

35. Mr Knight put forward fifteen principles which he said were to be derived from *APPGER* and *Lownie,* those parts of *Corderoy* which are accepted as correct, and from two other decisions of the Upper Tribunal: *Home Office v Information Commissioner and Cobain* [2015] UKUT 27 (AAC), to which I also referred in *Lownie,* and *Savic v Information Commissioner, Attorney General's Office and Cabinet Office* [2016] UKUT 535 (AAC), [2017] AACR 26. I list here principles 1 to 14 but, for reasons which I explain below, omit 15:

1. Section 23 affords the "widest protection" of any of the exemptions: *Cobain* at [19(b)] and [29].

2. The purpose of section 23 is to preserve the operational secrecy necessary for section 23(3) bodies to function: *Lownie* at [50].

3. It is "Parliament's clear intention that, because of what they do, there should be no question of using FOIA to obtain information from or about the activities of section 23 bodies at all". The exclusion of the section 23(3) bodies from the scope of FOIA was shutting the front door, and section 23 was "a means of shutting the back door to ensure that this exclusion was not circumvented": *APPGER* at [16].

4. The legislative choice of Parliament was that "the exclusionary principle was so fundamental when considering information touching the specified bodies, that even perfectly harmless disclosure would only be made on the initiative or with the consent of the body concerned": *Cobain* at [28]; *Lownie* at [53].

5. Asking whether the information requested is anodyne or revelatory fails to respect the difficulty of identifying what the revelatory nature of the information might be without a detailed understanding of the security context: *Lownie* at [42]; *Corderoy* at [59].

6. When applying the 'relates to' limb of sections 23(1) and (5), that language is used in "a wide sense": *APPGER* at [25]; *Corderoy* at [59]*; Savic* at [40].

7. The first port of call should always be the statutory language without any judicial gloss: *APPGER* at [23]; *Corderoy* at [51]; *Savic* at [40].

8. With that warning in mind, in the context of 'relates to' in section 23, it may sometimes be helpful to consider the synonyms of "some connection", or "that it touches or stands in some relation to" (*APPGER* at [13], [25]) or to consider whether the request is for "information, in a record supplied to one or more of the section 23 bodies, which was for the purpose of the discharge of their statutory functions" (*APPGER* at [21], [26]; *Lownie* at [57]). But the 'relates to' limb must not be read as subject to a test of focus (*APPGER* at [14) or directness (*Lownie* at [59]-[60]).

9. The scope of the 'relates to' limb is not unlimited and there will come a point when any connection between the information and the section 23(3) body is too remote. Assessing this is a question of judgment on the evidence: *Lownie* at [62].

10. The assessment of the degree of relationship may be informed by the context of the information: *Lownie* at [4] and [67].

11. The scope of the section 23 exemption is not to be construed or applied by reference to other exemptions, including section 24: *APPGER* at [17]; *Lownie* at [45] and [52].

12. In a section 23(1) case, regard should be had as to whether or not information can be disaggregated from the exempt information so as to

render it non-exempt and still be provided in an intelligible form: *Corderoy* at [43].

13. Section 23(5) requires consideration of whether answering 'yes' or 'no' to whether the information requested is held engages any of the limbs of section 23: *Savic* at [43], [82] and [92].

14. The purpose of section 23(5) is a protective concept, to stop inferences being drawn on the existence or types of information and enables an equivalent position to be taken on other occasions: *Savic* at [60].

36. Mr Talalay agreed with these principles. He suggested adding to principle 12 that that position does not pertain to section 23(5). He said there could be no question of disaggregating information because at that stage the decision-maker was concerned with what confirmation or denial would reveal and not with the content of the requested information. I see the merit of this position but I did not hear detailed argument on this issue, it does not arise for consideration in this case, and it is not appropriate to say more about it here. I prefer to leave principle 12 as it is, which makes it clear that it applies only to section 23(1).

37. Mr Rosenbaum agreed with Mr Knight's principles save for number 11. He accepted that in *APPGER* at paragraph 17 and *Lownie* at paragraphs 45 and 52 the Upper Tribunal said that the scope of section 23 was not to be construed or applied by reference to section 24 but he did not accept that this extended to other exemptions. He submitted that section 24 stands in a completely different relationship to section 23 than does any other exemption. Section 24(1) is expressed to apply to "Information which does not fall within section 23(1)", which means that section 24 cannot be considered without first considering section 23 and that sections 23 and 24 are mutually exclusive. He pointed out that section 24(1) was the only qualified exemption considered in *APPGER* and *Lownie*, and the reasoning in those cases was dependent on the way that section 24 functions. In respect of my comment in *Lownie* at paragraph 45 that "The fact that information might come within the scope of a qualified exemption cannot of itself be an answer to the question wither it is within the scope of a different absolute exemption", Mr Rosenbaum said that the key words were "of itself". While coming within another exemption would not be determinative it could be one factor to take into account along with others and that would be consistent with the reasoning at paragraph 43 of *Corderoy*.

38. The difficulty with Mr Rosenbaum's position is that it involves adding a gloss to the statutory language of section 23(1), and it is clear from *APPGER* and *Lownie* that that is not permissible. The last sentence of paragraph 43 of *Corderoy* ("in determining the scope that Parliament intended section 23 to have, it will be necessary to consider whether a qualified exemption would nevertheless apply to the information concerned") was a reference to the analysis at paragraphs 55 to 57 which I have rejected as erroneous in law.

39. Moreover, while it is true that section 24 was the only qualified exemption in issue in *APPGER* and *Lownie*, I do not agree with Mr Rosenbaum that the reasoning should be limited to the relationship between sections 23 and 24. The reasoning in *Corderoy* which I rejected as a matter of principle was applied (paragraph 62) on the basis that the information fell within qualified exemptions other than section 24.

40. Indeed, an argument that an applicable qualified exemption was relevant would have been at its strongest in relation to section 24 given its relationship with section 23, and yet that argument was rejected in *APPGER*. Exemptions in FOIA frequently overlap, and more than one can apply. The functions of and information relating to a number of section 23 bodies will engage qualified exemptions. For example, information relating the special forces (section 23(3)(d)) may well engage the qualified exemption in section 26, and information relating to the bodies listed in section 23(3)(k), (m) and (n) is likely to engage sections 30 or 31.

41. The telling point at the end of paragraph 17 of *APPGER* is that section 24 "reinforces the view that Parliament's intention was to put section 23 bodies outside the ambit of the right to information conferred by FOIA." That applies with equal force regardless of which other qualified exemption might apply to the information in question.

42. Mr Knight's principle 15 was as follows: "In a section 23(5) case, reliance should not ordinarily be placed on the content of the information in issue, but it may be necessary to examine closed material in order to determine whether the exemption is engaged: *Savic* at [47]-[48]." I have omitted it from those cited above because it is the only one of Mr Knight's principles which, it seems to me, calls for further exploration. As expressed, it could be misleading. It was not discussed in the hearing of this appeal, it is not necessary to consider it for the purpose of this appeal and I say nothing further about it one way or the other.

43. Each of Mr Knight's principles 1 to 14 is correct as a matter of law. They synthesise the analysis and principles in the case law which I have applied in deciding this appeal. In the light of the complexity of some of the case law as to the scope and application of section 23 and the risk of confusion arising from the error in *Corderoy*, these principles provide a helpful summary of the correct approach in law to section 23(1) and (5) and should provide practical guidance to those seeking to apply the provisions. I acknowledge that they may not provide the full answer in every case and so they should not be treated as comprising an exhaustive list of all relevant considerations.

The FTT's errors

44. I turn then to the FTT's decision. It considered the case law as to the meaning of "relates to", identifying the width of its scope in accordance with *APPGER*. It found that confirmation or denial by the MPS of whether it held the requested information would reveal that the Security Service had or had not been involved with some manner of Special Branch investigation into the National Front during those specific years. This reasoning has not been challenged and I note that the FTT drew sound inferences based on the context and evidence. As the information concerned the activities of the Security Service, the FTT correctly concluded that it related to a section 23(3) body. The FTT did not expressly address the question of remoteness, but there was no need to do so: the information was clearly connected with the Security Service. This was supported by the witness statement of a Detective Chief Superintendent Southworth as summarised at paragraph 4 of the FTT's reasons which I have set out above. On that basis, the FTT should have concluded that section 23(5) applied.

45. The FTT's error was that it did not conclude its decision at that point but went on to adopt the approach in *Corderoy* by asking whether Parliament had

intended the information to be covered by the absolute section 23 exemption and, in that context, to ask whether it had intended to exclude all information relating to the work of Special Branch. In the light of my analysis of the meaning and application of "relates to", that was plainly an error of law. The further questions that the FTT asked were irrelevant.

46. The FTT then proceeded to make further errors in identifying Parliament's intention. First, the suggestion that Parliament would have listed Special Branch in section 23(3) if it had intended all of its activities to be included was misconceived. If Special Branch were listed in section 23(3), the effect would be to expand the scope of the exemption by excluding all information related to Special Branch itself, not just its work, and by exempting information held by any other public authority which related to Special Branch activities. As Mr Knight said, "Special Branch is in MI5's orbit; if were a listed NSB [national security body], it would have its own, much larger orbit, significantly expanding the scope of the exemption"; and, I would add, expanding it beyond what is necessary to protect information relating to security bodies.

47. Second, as the case law clearly shows, Parliament had cast the net of section 23 widely so as to avoid the possibility of sensitive information being improperly disclosed and to ensure that the security bodies are not inhibited from collaborating with other bodies which are not listed in section 23(3). To exclude from the scope of section 23 information which relates to a section 23(3) body by reason of its collaboration with a non-section 23(3) body would undermine the purpose and effect of the provision.

48. Third, the FTT's reasons at paragraph 105 involved adding a further hurdle that the section 23(3) body be named in a request. This would mean that any bodies that worked closely as a matter of course with a security body could not rely on section 23(5) unless the security body was named, thus depriving the security body of the protection against information being revealed by the back door.

49. Finally, the FTT's view at paragraph 106 that the existence of other applicable qualified exemptions could be relevant to whether section 23 applies (even if not determinative) was wrong – see paragraph 45 of *Lownie* and Mr Knight's principle 11.

50. Ground 1 succeeds.

Ground 2: Information in the public domain

51. Mr Talalay and Mr Knight submitted that the FTT was wrong in law to find that there could be no "disclosure" within section 23(5) of information which was already in the public domain. The fact that information had been placed in the public domain was irrelevant to section 23(5) unless that information had been officially confirmed. However, as both of them acknowledged, the FTT's approach to "disclosure" did not impinge on its decision in relation to section 23(5) because it did find that a confirmation or denial would disclose information not in the public domain as to the specific years with which the request was concerned. Nonetheless, as I am allowing the appeal, the issue as to whether

"disclosure" means "new disclosure" arises in remaking the decision (whether by the Upper Tribunal or on remittal to the FTT) and so I address it.

52. Mr Talalay and Mr Knight also submitted that the FTT erred in both law and fact in deciding what information was in the public domain and what additional information would or would not be revealed by a confirmation or denial. This was relevant not only to the FTT's approach to section 23(5) but also to its approach to the qualified exemptions. Thus, the FTT found that section 24(2) was not engaged because official confirmation of a known fact could not compromise national security – "the cat is already out of the bag", it said. Moreover, the public interest in maintaining the exemption was significantly diminished by the fact that the public was already aware of Special Branch and MI5 interest in the National Front. Similarly, the FTT found that most of the other qualified exemptions relied on by the MPS were either not engaged or, if they were, that the public interest favoured confirmation or denial – in each instance, because the information was already in the public domain.

53. Mr Rosenbaum submitted that there would be no "disclosure" of information already in the public domain because NCND is a protective concept which is intended to be used where complying with the duty to confirm or deny would disclose sensitive or potentially damaging information that falls under an exemption. He said that it could not have been the intention of Parliament that NCND could be relied on where there was no potential for harm because the information was effectively already a matter of public record. In any event, he submitted that there had in fact been official confirmation of the information in "True Spies".

54. I reject Mr Rosnbaum's submission that section 23(5) cannot apply where there is no potential for harm because the information is already in the public domain. To invite consideration of the extent to which information is already known, or whether revelation of such information would be harmful, flies in the face of the purpose of section 23 as identified in *APPGER* and as summarised by Mr Knight's principle 5. The position is different if there is official confirmation of the revealed information, because there is then no need for the decision-maker to get involved in such considerations.

55. Official confirmation adds something to other information in the public domain, even if that is credible information provided by third parties who are well-placed to provide that information. In the context of section 23(5), this follows from the fundamentally important exclusionary principle referred to in *Cobain* and *Lownie* (see Mr Knight's principle 4). Mr Talalay referred to the FTT decision in *Commissioner of the Police of the Metropolis v Information Commissioner* (EA/2010/0008) which upheld the MPS's reliance on section 23(5) on the basis that confirmation or denial would reveal the involvement or non-involvement of the security services in the operation in issue, even though the then President of the USA had made a public announcement revealing that information. As a decision of the FTT, it is not binding but I mention it because it provides a clear example of the importance and effect of the principle, which is not eroded by information provided by a credible source (the US President) but which has not been officially confirmed. This is reinforced by the Upper Tribunal's suggestion in *Corderoy* at paragraph 60 that a NCND approach would be inappropriate where there was "expected *and confirmed* involvement of the security bodies" (my emphasis).

56. The point applies more generally, however, and is illustrated by the decision in *DIL and others v Commissioner of Police of the Metropolis* [2014] EWHC 2184 (QB), albeit in a non-FOIA context. There the High Court considered a NCND policy, relied on by the police in order to avoid pleading a defence to a civil claim, in order to protect the identities of undercover officers. The officers had all been named in the media and some had also self-disclosed. At paragraph 44 the Court said that self-disclosure, while relevant, did not have the same significance as official confirmation. Nor did naming in the media. Two of the officers who had not self-disclosed had been named publicly in a variety of media (and with a photograph of each in one national newspaper). However, there had been no official confirmation that they were undercover officers. The Court held (paragraph 47) that the police were entitled to rely on NCND in relation to those officers.

57. As these cases show, there is a qualitative difference between credible third party information and official confirmation of that information. The FTT attempted to address this by stating "Although the involvement of MI5 has not been officially confirmed neither will it be officially confirmed by a 'yes' or 'no' answer: it is purely an inference that the public is expected to draw from the information expressly communicated. This misses the point. The provision of official confirmation by means of a 'yes' or 'no' answer that that information was held would provide a qualitatively different foundation for the drawing of inferences from that provided by the unconfirmed information contained in the TV programme.

58. Mr Rosenbaum contended that the MPS's involvement in and support for the "True Spies" programme did amount to, or was tantamount to, official confirmation. He relied on the fact that the MPS had provided assistance to the BBC as explained in the MPS press release (see paragraph 6 of the FTT's factual summary, set out at paragraph 5 above). In addition, with the permission of UTJ Wikeley, Mr Rosenbaum adduced evidence which had not been before the FTT consisting of correspondence between the BBC and MPS regarding the "True Spies" series. This correspondence showed that the MPS helped the BBC to contact former officers, that the MPS agreed to support the project on the basis that it did not compromise operational and personal security and that the MPS Commander at the time, having seen the final script, was supportive of the overall message from the programme.

59. At first view I found it surprising that the MPS would have cooperated with the programme and commended its overall message if it had not considered that the information within it was correct. However, I am satisfied that these facts do not amount to official confirmation by the MPS of the information that would be revealed by giving a confirmation or denial in response to Mr Rosenbaum's information request. I am not in a position to judge why the MPS would have wanted to support or commend the programme. However, there are hints in the letter from the Commander. First, he said that that the MPS support was on the condition that operational and personal security would not be compromised. That would be consistent with the MPS taking a stance of avoiding such matters being compromised by providing an NCND response to information requests such as Mr Rosenbaum's. Second, the Commander said that "the overall message from the programme will be enormously to the credit of those who served in Special Branch". The reference to "overall message" is a distinct distancing from the

specific factual content within the programme. I do not know what it was of the "overall message" which the Commander thought would be of credit but the opinion that the series gave a good impression of the officers cannot be equated with confirmation of the accuracy of the factual content. In this context, it is important to note that the "True Spies" series covered the activities of various agencies of the state in respect of a wide spectrum of groups considered to be "subversive" (see the letter from the series producer to the MPS dated 9 January 2001). The activities of Special Branch in relation to the National Front formed only one element of this.

60. Consistently with this, the press release did not suggest that the MPS approved the content of the programme and, in particular, that relating to the involvement of Special Branch with the National Front during the years in question.

61. In his witness statement DCS Southworth explained why official confirmation of specific information would make a difference:

> "16. The mosaic effect can be such that confirmation or denial of particular information could undermine operational effectiveness. For example, the confirmation of particular information on a particular group may lead a terrorist to ascertain where or how the intelligence was gathered. This would have a seriously detrimental effect to the operational capabilities of information gathering units.
>
> 17. While there may be information in the public domain which purports to disclose information or covert tactics, persons of interest or organisations that are of interest to CTC, much of this is speculative and has not been confirmed by CTC/former Special Branch (or UK policing). Criminals and terrorists must be kept guessing as to CTC/former Special Branch's areas of interest so that they do not change their behaviour and make it more difficult to counter their threat."

62. In support of his claim that the MPS had confirmed the content of the programme Mr Rosenbaum also relied on a letter of 16 May 2008 in which the MPS responded to a different request for information, being Special Branch files on various political organisations in the 1960s, by refusing to confirm or deny whether it held the information. Included within the letter was the following:

> "Furthermore information pertaining to the above organisations may also be available from the BBC series "True Spies". However, the Metropolitan Police Service can neither confirm nor deny that it holds any further information…"

63. Mr Rosenbaum said that the use of "further" in the second sentenec was an acknowledgment that the information in "True Spies" was valid. I do not read it in this way. The word "further" meant that the MPS held no information other than "True Spies". This was an acknowledgment that there was information about the organisations in question in "True Spies", but it was not an acknowledgment that all or any of that information was accurate and, specifically, the information in "True Spies" referred to in that letter was nothing to do with the interest of the MPS Special Branch in the National Front nor with the years in question.

64. Furthermore, the FTT's finding that "True Spies" revealed the involvement of the MPS Special Branch with the Security Service was based on a

misapprehension as to the content of the TV programme, the transcript of which was before the FTT. The relevant part comprised interviews with "Steve", said to have been recruited as a Special Branch agent between 1974 and 1991 to spy on the activities of the National Front in the West Midlands area, and with an officer from the West Midlands Special Branch who was said to have recruited Steve for the purpose of operations in that area and who gave information about having contacted MI5. There was no information about the MPS. The MPS and the West Midlands Police are separate police forces. What a West Midlands officer said about operations in that area did not directly reveal information about the activities of the MPS nor of the involvement of the Security Service with the MPS Special Branch.

65. Mr Rosenbaum sought to address this as follows. He said that it was public knowledge that Special Branch operated hand in glove with the Security Service. That included both the West Midlands Special Branch and the MPS Special Branch. It followed that the MPS Special Branch would have held information regarding the activities of the West Midlands Special Branch. The request was for information held by the MPS but that was not limited to information about MPS's activities; it also covered information held by MPS about other forces. Furthermore the three particular years (1974, 1975 and 1983) in respect of which he sought the information were within the overall period covered by "True Spies".

66. The difficulty with this position is that there was and is no evidence to support the underlying factual assertion that the MPS would have been involved in or held information regarding the activities of the West Midlands Special Branch, and Mr Rosenbaum did not appeal against the FTT's finding at paragraph 100 of its decision that the information in the public domain did not relate to the specific years which were the subject of the request. In any event, that finding was plainly correct as the coverage over a general period of time did reveal in which specific years any of the reported activities took place.

67. In addition to the above, there is a further error in the FTT's decision that the MPS's response would add nothing (save regarding the specific years) to the information revealed in "True Spies". That was only sustainable on the facts if it was assumed that the response would be confirmation that the information was held. As the FTT found at paragraphs 90-95, a confirmation or denial would reveal different information. Specifically, a denial would lead to the reasonable inference that "the Security Services were probably not involved in a Special Branch investigation into the National Front in those particular years". However, as the FTT found, the information revealed in "True Spies" was, by inference, that the Security Services probably were involved in such an investigation. The FTT could not properly assume a particular outcome to the MPS's response; the point of a NCND response is that it leaves the position entirely open.

68. The above errors also affected the FTT's conclusions in relation to the qualified exemptions in sections 24(2), 27, 30 and 31(3). The finding that information about the activities of the Security Service in relation to the National Front had been made public by the "True Spies" programme was of course relevant to an assessment of whether confirmation or denial would give rise to the harms against which the exemptions were designed to protect and to an assessment of the public interest balance in providing confirmation or denial or not doing so. The weight to be afforded to that fact was a matter for the FTT. However, the FTT's erroneous conclusion as to what was already in the public

domain and that official confirmation would add nothing to that information undermined its assessment of those matters.

69. Ground 2 succeeds.

Ground 3

70. In the light of my conclusion on ground 2, there is no need to address this ground and to do so would unnecessarily burden an already lengthy decision.

Disposal

71. Mr Talalay and Mr Knight invited me to remake the decision under section 23(5) rather than remit the appeal to the FTT for a fresh decision.

72. I have decided that, up to the point that the FTT went wrong by applying *Corderoy* and asking what Parliament intended, the FTT approached this case correctly. There has been no appeal against its decision up to that point. Mr Rosenbaum disagreed with the conclusion that the information in the public domain did not relate to the specific years with which the information request was concerned, but I have explained why that conclusion was correct.

73. In the light of this, I am satisfied that it is appropriate to remake the decision. No further findings of fact are required. I have already carried out the necessary analysis of the law and the application of the law to the facts. It would not be proportionate to remit the appeal to another FTT.

74. As the FTT found, confirmation or denial would in response to the request would disclose information regarding the involvement or non-involvement of the Security Service in a Special Branch investigation during the years in question, notwithstanding the "True Spies" programme and the MPS's position in relation to that programme. This clearly, as the FTT found, "relates to" the Security Service. It follows that section 23(5) is engaged and the duty to confirm or deny does not arise.

75. I remake the decision accordingly.

Kate Markus QC
Judge of the Upper Tribunal
Authorised for issue on 7 January 2021