



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2015/0013

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50532586

Dated: 13 November 2014

Appellant: Mr. Barry Keane

Respondent: Information Commissioner

Additional Party: The Home Office

Additional Party: The Commissioner of Police of the Metropolis

Heard at: Field House, London

Date of hearing: 17 June 2015

Date of decision: 13 August 2015

Before

Angus Hamilton

Judge

and

Henry Fitzhugh

and

Paul Taylor

Subject matter: Freedom of Information Act 2000 s. 24(1) – national security – and s.38 – health and safety

Cases considered:

D V NSPCC [1978] AC 171

Chief Constable of Greater Manchester v McNally [2002] 2 Cr App R 37

Baker v ICO & Cabinet Office (EA/2006/0045)

Frank-Steiner v Data Controller of the Secret Intelligence Service IPT/06/81/CH (26 February 2008)

Metropolitan Police v ICO (EA/2008/0078)

Metropolitan Police Commissioner v ICO (EA/2010/0006)

Marriott v ICO and Metropolitan Police Commissioner (EA/2010/0183)

Kalman v ICO and Department for Transport (EA/2009/0111)

APG v ICO and MOD [2011] UKUT 153

Quayum on behalf of Camden Community Law Centre v ICO and FCO (EA/2011/0167)

DECISION OF THE FIRST-TIER TRIBUNAL

By a majority decision the Tribunal dismisses the appeal for the reasons given below.

REASONS FOR DECISION

Introduction

- 1 s.1(1) of the Freedom of Information Act provides that:
Any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request, and if that is the case, to have that information communicated to him.

- 2 s.24(1) of the Freedom of Information Act (FOIA) provides 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.

- 3 s.38(1) of the Freedom of Information Act (FOIA) provides that:
Information is exempt information if its disclosure under this Act would, or would be likely to -
(a) endanger the physical or mental health of any individual, or
(b) endanger the safety of any individual.

The Request from Mr Keane

- 4 On 2 September 2013 the appellant wrote to Home Office and requested information in the following terms:
Perhaps your office may be able to assist with this request which I initially sent to the National Archives. The National Archives reference is 'HO 317/78 – Activities

of named paid informants against Irish secret societies' and when I accessed the file a large number of pages have been removed before it was passed to the Archives as they explain in their reply to me (see below). While there may be good reason for doing so when the file was sent to the National Archives it does not appear to have any validity now. As the file ends in 1910 there seems to be no reason why any papers should be excluded 103 years later. Is it possible to access these papers or to receive a copy of these papers, or for the Home Office to release them to the National Archive so that they can be accessed there?

- 5 On 1 October 2013 the Home Office responded and refused to provide the requested information citing the s. 24(1) exemption and asserting that the balance of the public interest favoured maintaining the exemption. Following an internal review, the Home Office wrote to the complainant again on 5 November 2014 maintaining its refusal.
- 6 The complainant complained to the Commissioner on 26 February 2014. That complaint resulted in the Decision Notice of 13 November 2014. That Decision Notice stated that in the Commissioner's view the exemption provided by s. 24(1) of FOIA was engaged and that balance of the public interest was 'firmly in the direction of maintaining the exemption'. Mr Keane submitted an appeal (and a request for it to be accepted out of time) to the First Tier Tribunal (FTT) on 9 December 2014.

The Appeal to the Tribunal

- 7 The appeal hearing took place on 17 June 2015. Mr Keane, the appellant, was in attendance and was represented by Mr Leahy. The Home Office was represented by Ms Callaghan and the Metropolitan Police by Mr Knight. The Commissioner did not attend and was not represented but the Tribunal had the benefit of the Decision Notice and the Response to Appeal which set out the Commissioner's analysis in detail.

- 8 There was no disagreement between the parties that the issues for the Tribunal to consider were first whether the exemption under s.24(1) FOIA was engaged and, secondly, s. 24(1) being a qualified exemption whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Tribunal refer to this latter point as the 'public interest balancing test' (PIBT). The Home Office also sought to rely on a late claimed exemption under s38. Again the issues for the Tribunal to consider were first whether the exemption under s.38 FOIA was engaged and, again, s. 38 being a qualified exemption whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
- 9 The Tribunal first heard evidence from the appellant. Mr Keane had not prepared a formal statement in advance of the hearing and therefore only gave oral evidence. Mr Keane asserted that the national security exemption was not engaged due to the age of the information that he was asking to be disclosed. The information related to informants against Irish secret societies for the period (approximately) of 1892 to 1910. Mr Keane asserted that *'it's ridiculous to suggest that there would be retribution in 2015 for events in 1910'*. Mr Keane stated, based on his experience as an Irish historian: *'I have never encountered retribution in later generations. People tend to live and let live. I've never come across a grandchild or great grandchild being harmed.'* Under cross-examination Mr Keane accepted: *'that there are more recent events where informants should be carefully protected but not informants from over a 100 years ago. I would expect more recent informants to be revealed in 100 years' time.'* Mr Keane also accepted that it had been quite easy for him to identify the descendants of informants in the Republic of Ireland once the informants themselves had been identified but he insisted that such descendants did

not show any trepidation when he approached them rather a desire to *'get the truth out'*.

- 10 The Tribunal heard evidence from Officer A, whose anonymity had been sanctioned in advance of the hearing, an officer with the Metropolitan Police. He gave evidence in both open and closed sessions of the Tribunal. In open session Officer A gave evidence about the recruitment of Covert Human Intelligence Sources (CHIS) and stated that disclosure of the information requested by the appellant would *'have an immediate and significant effect in that it would undermine the trust in the whole CHIS system'*. Existing CHIS would be lost and many people would be deterred from becoming CHIS. In Officer A's experience *'each individual who has agreed to undertake the role of CHIS has done so with an expectation of complete confidentiality with regard to their identity and activities... the single most common reason given by people who refuse to become CHIS is a lack of confidence that their anonymity will be respected.... I am convinced that the release of specific information regarding CHIS activity, no matter how historical would have an immediate adverse effect upon CHIS retention and future CHIS recruitment'*

- 11 In relation to the age of the information being sought by Mr Keane Officer A stated: *It is my view that even if it were not possible to establish a definitive genealogical link between the names contained within these files and people living now that does not affect the perception of current and prospective CHIS that the Metropolitan Police Service may later release their names and their family may be identifiable at a later date, particularly given the ever increasing volume of data about individuals that is currently available through the internet and other similar sources of information... the taint which is associated with being an informant and the associated risks may be transferred to their family friends or other innocent parties.*

- 12 Officer A gave examples where close relatives of uncovered or suspected informants had been threatened or attacked.
- 13 Under cross examination Officer A accepted that part of the information sought by Mr Keane had been openly available in the National Archives since 2009 before being removed. In Officer A's opinion that information should never have been disclosed through the Archives. He agreed that he was not aware of any adverse consequences arising from this disclosure.
- 14 Officer A insisted that an informant or potential informant would not accept any qualification being placed on their confidentiality – even telling an informant that their identity might be disclosed in 100 years would be a discouragement. Conversely Officer A accepted that he had never had a discussion with an informant on this issue.
- 15 Officer A accepted that he had not been able to identify the descendants of the informants identified in the information sought by Mr Keane but he felt that someone with local knowledge would be able to. Officer A also accepted that he had no examples of more distant relatives or descendants of informants being threatened or attacked.
- 16 Officer A then gave evidence in closed session which cannot be reproduced here.
- 17 The Tribunal heard evidence from Ms. Janet Millar from the Home Office. The original proposal was that part of Ms. Millar's evidence be heard in open session and part in closed session. However, upon the Tribunal reviewing her evidence it was agreed that all her evidence could be heard in open session. This was with the exception of Ms. Millar's presentation to the Tribunal of the documents which were the subject of Mr. Keane's request. These were examined by the Tribunal in closed session

- 18 Ms. Millar's evidence dealt largely with the procedures for reviewing old, but in the Home Office's view, still sensitive information of the type sought by Mr Keane. Ms Millar also explained how part of the information came to be placed in the National Archives in 2009 but then removed when the Metropolitan Police (TMP) were provided with a copy of that information as part of the procedures surrounding Mr Keane's appeal. TMP objected to the placing of the information in the National Archives. It was removed and its disclosure was, at the time of the hearing, under review. Ms Millar agreed that part of the disclosed information did appear to identify an informant in relation to Irish secret societies from the period in question. Ms Millar thought that TMP would have been consulted when documents were placed in the National Archive in 2009 but could find no record of this.
- 19 The parties present all made helpful final submissions to the Tribunal. Mr Keane submitted that an 'age' line had to be drawn somewhere and that information of the type he sought could not be protected for all time. Mr Keane emphasised that there was no evidence of a descendant of an historical informant being caused any harm. The only evidence of threats to relatives was of threats roughly contemporaneous with the actual or suspected 'informing'. Officer A's evidence, he submitted, was speculation. Mr Keane also pointed to the inconsistency in policy in relation to historical informants and how information in relation to one potential informant from the period in question (approximately 1892-1910) had been placed in the National Archives before being removed. Mr Keane submitted that the national security exemption was not engaged at all. If it was engaged, then it was in the public interest that society should be able to engage in historic research and it was in the public interest for people to be able to have access to information about the activities of their ancestors given the interest in family history. These factors outweighed the public interest in continuing to conceal the identity of informants from over a hundred years ago.

- 20 The Commissioner's submissions were contained within the Decision Notice and the Response to Appeal. The Commissioner submitted that it was undeniable that informants played a vital role in safeguarding the UK's national security and that it was vital for informants to be assured that the information they provided and their identities would be treated with the utmost discretion. Any risk that such information would be disclosed would clearly make it more difficult to recruit and retain informants.
- 21 In relation to the age of the information sought the Commissioner submitted that informants would be far less likely to provide information '*if they feared that at some point in the future (even after their deaths), information they have provided, or their identities would be made public, causing potential harm to not only themselves but their families, friends, reputation and memory after their death. In other words, the disincentive effect of disclosure would still be felt even taking into account the age of the information in this case.*' Response paragraph 20.
- 22 In relation to the PIBT the Commissioner accepted that there was a general case for greater transparency and accountability favouring the disclosure of government information and there was a public interest in understanding the efforts of the government to counter terrorism and in providing insights into past strategies. The Commissioner also acknowledged the public interest in being able to read Mr Keane's proposed book about the history of Ireland at the start of the 20th century. However, the Commissioner felt that the public interest in avoiding prejudice to the safeguarding of national security was far more compelling and that the public interest in avoiding the risk of damage to the informant programme resulting from the type of disclosure sought by Mr Keane overwhelmed the public interest favouring disclosure.
- 23 The Home Office submitted that the tribunal should pause and reflect very seriously before rejecting the State's evidence on issues of national security. The policy in relation to informants was to protect their identity in perpetuity. If this policy were undermined, then there would be a two-fold risk of harm:

1. Disclosure could potentially effect the ability to retain current and recruit new informers.
 2. There was a risk to the safety of the descendants of informers. It would be easy to identify the descendants of informers especially in a small country such as the Republic of Ireland.
- 24 The Home Office contended that s.24 FOIA was clearly engaged and cited the authorities of:
- Metropolitan Police v ICO (EA/2008/0078)*
Metropolitan Police Commissioner v ICO (EA/2010/0006)
Marriott v ICO and Metropolitan Police Commissioner (EA/2010/0183)
- to support this submission.
- 25 In relation to the PIBT the Home Office submitted that although there was a public interest in disclosure – this would allow Mr Keane to write his book on the issue of informants against Irish secret societies - it was completely outweighed by the public interest in maintaining the anonymity of informants
- 26 The Home Office also sought to rely on the 'late claimed' exemption under s.38(1) of FOIA in the event that the Tribunal did not find that the exemption in s.24(1) was engaged or if the Tribunal found that the PIBT in relation to s.24(1) favoured disclosure. The Home Office contended that the persons likely to be 'endangered' (as referred to in s.38(1)) by disclosure of the information would be the descendants of informants. The Home Office accepted that the risk of such endangerment was small but submitted that the nature of the harm that might flow from disclosure was potentially very serious. In relation to the late claimed exemption under s.38(1) FOIA Mr Keane submitted that again this was not engaged as the risk of harm to descendants was speculative and unsupported by any evidence.
- 27 The MPS submitted that although tracing the descendants of historical informants might be small Mr Keane himself had accepted that he would be able

to do it in some cases. The MPS also submitted that informants are invariably operating under extreme stress and extreme danger. They don't necessarily think logically. The fact that their name might be disclosed in 120 years time might be enough to tip the balance against them participating.

- 28 The MPS also submitted that any previous limited or mistaken disclosures did not undermine the current arguments. The MPS also submitted that the FTT cases of:

Metropolitan Police v ICO (EA/2008/0078)

Metropolitan Police Commissioner v ICO (EA/2010/0006)

Marriott v ICO and Metropolitan Police Commissioner (EA/2010/0183)

taken together were authorities for the principle that informant's identities should be kept confidential in perpetuity. The MPS acknowledged that no FTT decision is binding upon another FTT.

The Majority Decision

- 29 The majority decision is that the appeal should be dismissed for the following reasons.

- 30 Ability to recruit and retain informants

In his skeleton argument the Appellant sets out three premises which he says are common themes amongst the respondents in relation to national security in the context of this appeal.

- a) The national security exemption in section 24 is broad enough to encompass the need to avoid direct or indirect threats to the UK's national security.
- b) Informants perform a vital role in protecting the UK from direct and indirect threats to its national security (as well as crime more generally). Any adverse impact on the ability to recruit and retain informants therefore

poses a threat to national security.

- c) It is the policy of all 3 respondents, to protect the identity of informants in perpetuity.¹

31 He goes on to say that "*In response to the above...the Appellant accepts that put forward in a and b but does not agree that the disclosure of informants from a period in history of some 120 years will have any bearing on the current policy.*"² He relies on a previous case of this Tribunal, *Marriot v Information Commissioner and The Commissioner of the Police for the Metropolis* (EA/2010/0183), ("the Marriot case"),³ which, at para.42, said:

'The difference arises from the significance to be given to the age of the information. All agree that there must come a time when the disclosure of the identity of an informant who operated in the distant past would not have an effect on the confidence of a current day informant. Or at least one whose inherent paranoia was not so great as to make him or her totally unsuitable to perform the role in any event. To take an extreme example, if a potential informant were to be discouraged from co-operating by the fear that his or her activities would be disclosed after, say, three hundred and fifty years (the equivalent of the disclosure today of those who may have acted as spies during the English Civil War), then one might conclude that his or her paranoia was so intense and irrational that it would not be safe for the police to pursue the recruitment process. Conversely, as the MI5 policy referred to above suggests (supported by the conclusions of the Investigatory Powers Tribunal in the Frank-Steiner case) it would certainly be premature to disclose today information about those acting as informants or agents during the Second World War. But, as one extends further back in time than that, those seeking to retain confidentiality must shoulder a greater burden of demonstrating that the risk of real danger, or of a rational perception of danger, has not diluted to such an extent that the public interest in maintaining secrecy loses much of its weight. In that context it is not just the seniority and experience of those giving evidence that must be considered. The

¹ Appellant's Skeleton Argument, para.6

² Ibid note 1, para.7

³ Ibid note 1, para.8

Tribunal must assess the reasoning of an expert witness, no matter how eminent, experienced and knowledgeable he or she may be.'

- 32 The critical point to be drawn from this is that even though the Appellant disputes the effect of the requested information, because of its age, he accepts that any adverse impact on the ability to recruit and retain informants poses a threat to national security.
- 33 The Tribunal heard sworn witness evidence from a serving police officer (Officer "A"). Through his service, which has included work on anti-terrorist duties,⁴ Officer "A" has experience of "*direct contact and dealings with individuals carrying out the roles and activities of being 'police informants'*".⁵ He goes on to describe his involvement in the management of informants (referred to currently as "covert human intelligence sources" or "CHIS") and explains that this includes "*...the making of reward payments and checking on welfare and security considerations.*"⁶ It is clear then from his evidence that Officer "A" can be regarded as an expert witness in such matters given his actual involvement and direct dealings with informants or CHIS.
- 34 The Home Office argue that the age of the documents in question is not decisive in relation to the question whether the national security exemption is engaged or the public interest balance. They say "*the willingness of individuals to provide information to the UK Government now or in the future would be undermined by the perception that their identities could be made public either during their lifetime or after their death.*"⁷ In his Decision Notice the Information Commissioner accepted this argument and found that avoiding this outcome is required for the purpose of safeguarding national security.⁸

⁴ As confirmed in answer to cross-examination by the Appellant's Counsel, Mr Leahy (open session)

⁵ Open witness statement of Officer "A", para.5

⁶ Ibid note 5, para.9

⁷ Open skeleton argument of the Home Office, para.11

⁸ Open bundle, p.4, para.16: Decision Notice

- 35 The Commissioner of the Police of the Metropolis ("MPS") say they have direct expertise in and understanding of the importance of informants to the protection of national security. They stress the vital function which they perform in enabling the neutralisation of direct and indirect threats to national security (as well as crime more generally). They leave no room for doubt that any potential impact on the likelihood of an individual providing crucial information to the law enforcement and security bodies increases the risk of a significant potential harm to national security through attacks.⁹ MPS also draw our attention to previous rulings which said that *"...the Tribunal should pause and reflect very carefully before overriding the sincerely held views of relevant public authorities..."*¹⁰ We accept that point, particularly in relation to sworn expert evidence.
- 36 At paragraph 13 of his witness statement, Officer "A" says: *"I strongly believe that disclosure of the information requested would have an immediate and significant effect in that it would undermine the trust in whole [sic] CHIS system. As a result, the MPS, other LEA's [law enforcement agencies] and the Security Services would lose many of its existing CHIS and many people would be deterred from becoming CHIS. Equally, I believe that such an effect would rapidly extend beyond the MPS and directly undermine the ability of all UK LEA's and Security Service to recruit and retain CHIS."*¹¹
- 37 Officer "A" has produced a powerful expert witness statement which the majority finds compelling. In light of this we have no hesitation in finding that s.24(1) is engaged and recognise the significant weight accorded to the public interest argument in favour of withholding the requested information. As outlined earlier, the Appellant himself says in his skeleton argument that he accepts *"...any adverse impact on the ability to recruit and retain informants poses a threat to national security."* With great respect to him, he is in no way better placed than the Second and Third Respondents to assess the likelihood of such an impact.

⁹ Open bundle, p.30, para.7: MPS Response

¹⁰ Open bundle, p.30, para.6(5): MPS Response

¹¹ Open witness statement of Officer "A", para.13

38 We say further, in relation to the Appellant's point about the age of the disputed information that there is a defining difference between a revelation of this nature (i.e. about informants in Irish history from the late 19th and early 20th centuries) and similar historical matters from say the 17th century (i.e. the time of the English Civil War). It is that totally different systems were in place. Informants in the Irish conflict were operated by agencies still in existence today and still in full operation. Furthermore, there are lingering embers from this conflict, however tangential they may be. Revelations about informants in 17th century affairs cannot be held the responsibility of anyone or any organisation still existing, whereas a revelation about Ireland could easily be linked to the MPS or MI5. As long as the MPS is operating in this way, anything they did in the past retains strong protection because it would be exactly they and no one else that would be responsible for redeeming the promise of perpetual secrecy.

Risk of harm to descendants of informers

- 39 Another argument advanced by the Respondents in relation to s.24(1) is that disclosure of the disputed information could expose descendants to risk of harm through reprisals.¹² As the Home Office put it in their Response: "*Risk of retribution against individuals can extend beyond a single generation, and could be used as a tool to dissuade potential informers.*"¹³
- 40 The Appellant refutes this suggestion, stating in his skeleton argument that having talked both on and off the record with relatives of both informers and those informed upon, he is unaware of any issue of risk to any such person.¹⁴ He says, based on his research and personal knowledge, that no group with an interest in events in Ireland which pre-date 1910 poses a risk to descendants of informants.¹⁵

¹² Open bundle, p.4, para.15: Decision Notice

¹³ Open bundle, p.24, para.7: Home Office Response

¹⁴ Appellant's skeleton argument, para.18

¹⁵ Ibid note 14; para.17

- 41 The Appellant again refers us to the Marriot case,¹⁶ specifically paragraph 40, which says:

40. Both the majority and the minority also take note that none of the witnesses was able to:

- a. give any specific example of an informant's descendants being targeted many years after his or her death (all their evidence was of the impact on informant perception of disclosures occurring in the present or recent past);*
- b. provide us with any information about the impact on Irish police informant programmes of the public disclosure of their informant names and activities dating from the same time as Ledgers and the Register (this notwithstanding that the period of time covered by those activities witnessed intense brutality on both sides of the conflict over Irish independence, the scars of which persist to this day); or*
- c. demonstrate that informants had reacted negatively to the, admitted limited, publicity given to the Clutterbuck and Lowdes disclosures.*

- 42 He adds to this (in relation to the Home Office's late reliance on s.38(1) FOIA, but which is equally relevant to this argument under s.24(1)) that a bland assertion of danger is not enough to support the exception. He argues that many of the identities of informants in this period of Irish history are already known and expresses confidence that no harm has come to the descendants of any such individual. His confidence is derived from interviews with grandchildren and great-grandchildren of identified informants from 1922 (which is twelve years after the last date in the disputed file) who still live in Ireland and Great Britain. His research discovered no examples where any descendants had cause for concern.¹⁷

¹⁶ Appellant's Response, para.24

¹⁷ Ibid note 16; para.25

- 43 In his grounds of appeal, the Appellant refers to the parent file, from which the disputed information was filleted, which, at the time, was available at The National Archives ("TNA"). This, he says, identifies five people as spies and informers. He suggests that as the Home Office reviewed this file on two occasions, deciding that s.24(1) did not apply to those persons, there is no logic in applying this exemption to other named individuals.¹⁸
- 44 In their response, the Home Office say, in relation to the file formerly available at TNA, that a distinction can properly be drawn between the material that has been disclosed and that which has been withheld. Of particular note is their following statement:
*"The Home Office neither confirms nor denies whether any information released assists in identification of an individual as an informer".*¹⁹
- 45 The Home Office added that the UK Government retains a legitimate interest in protecting the identities of those informants referred to in the retained extracts.²⁰
- 46 As alluded to above, at a late stage, the Home Office sought to rely on s.38(1) FOIA, raising concerns for the safety of descendants of informants named in the disputed information. We find that these arguments are equally relevant to s.24(1) given the claimed deterrent effect that such harm might have on prospective informants or CHIS in the present day.
- 47 The Home Office contends there is a real risk that upon disclosure of the identities of the informants, their descendants will be able to be traced. They go on to say that groups or communities within which those informants operated are likely to seek retribution against descendants. They claim that this is particularly the case in Ireland and Northern Ireland where there remain threats to individuals from paramilitary dissident groups. Whilst the risk is acknowledged to be a small one, the nature of the harm that could result (serious injury or death) is so serious that identification should be avoided.

¹⁸ Open Bundle, p.10: Appellant's notice of appeal, Part D - "Reasons for appealing"

¹⁹ Open Bundle, p.25, para.11: Response by the Home Office

²⁰ Ibid note 19; para.12

- 48 Officer "A" acknowledges that it is impossible to quantify the ease of tracing any of the names contained within the files by those with a particular community or family knowledge. He goes on to remind us that "*the absence of publicly held data does not preclude the existence of similar knowledge that establishes a general link that is retained within families and communities.*" ²¹ In view of this, he states, one cannot say that it is impossible to trace individuals from public records alone. ²²
- 49 In their closing submissions, the MPS conceded that the tracing of relatives is not always going to be possible; however, that is not to say that it will be impossible in every instance. They refer to the Appellant's own evidence under questioning from the Tribunal where he described how he had himself traced living relatives of informants, not only in Ireland but in Great Britain. This was done by using the disclosed name of an informant and the location in which he or she lived and then researching the local telephone book for the same surname. We were told that families often remain within the same area for generations so it is likely that descendants will be found. Failing this, an alternative method which the Appellant had himself successfully used was to go to the local public house and ask around. It was said that given the small size of local communities, where everybody knows one another, this is a good way of finding someone.
- 50 The Appellant has argued that a bland assertion of danger is not enough to support the exception. That places a heavy burden on the Respondents, meaning they would have to provide evidence of a causal link between revelation of an informant's identity and subsequent retribution against a descendant. The majority sees this as a very difficult task, it is the proverbial "*proving of a negative*". Indeed, a similar burden could be placed on the Appellant, requiring him to prove definitively that no harm would come to a descendent following disclosure. It is our view that he could never realistically

²¹ Open witness statement of Officer "A", para.28

²² Ibid note 21; para.29

provide any such assurances.

- 51 We add here that even had Officer "A" been aware of a current informant or CHIS who had expressed concerns about harm to future generations, how would he prove this or present evidence? An informant is very unlikely to agree to appear at a Tribunal hearing, even if similar measures as those taken to protect Officer "A" were put in place. Even if such a person did agree to attend court, what weight would be given to their evidence given that informants have been described as persons involved in criminal activity; in other words, someone who is unlikely to be trustworthy? In our view, in the absence of determinative evidence, it is appropriate to give weight to whichever argument, based on the knowledge, expertise and credibility of the relevant party.
- 52 The majority accept the notion that a number of descendants will be traceable, if not through open-source resources (such as on-line genealogy websites and census records), through informal methods such as those described by the Appellant. Indeed, we note that the Appellant himself has had some success in tracing descendants of informants in this way.
- 53 Having accepted this, we must now consider the likelihood of harm to traceable descendants. We note the Appellant's firm belief that no group with an interest in events in Ireland which pre-date 1910 poses a risk to descendants of informants. We acknowledge his expertise in matters of Irish history in relation to events of the period in question; we similarly acknowledge the quality of his research and the depth of knowledge he has acquired through interviews with descendants of informants.
- 54 However, we are not satisfied this guarantees that no harm could possibly come to such descendants following release of the disputed information. Despite his extensive research, the Appellant cannot possibly have interviewed every descendant of every informant from the period in question, particularly because there may be names within the disputed information of which he is unaware.

- 55 Neither can the Appellant be sure of the good nature of every disaffected group in response to the revelation of informant identities. Indeed, much has been said about the possible actions of such groups but little has been said about the possible reaction of local communities. It is by no means fanciful to suggest that on revelation that a person's ancestor was an informer, elements of the local community might choose to shun him or her, causing them distress. Whilst obviously not to the same degree as physical harm or even death, as has been suggested, mental distress is just as undesirable an outcome and an impact on safety.
- 56 This means that there is sufficient room for doubt about the safety of traceable descendants, no matter how small that may be. In view of this the majority sees no justification for imperilling their safety, however remote that possibility. In our view, in the absence of certainty it is far better to err on the side of caution than to give rise to such a risk through disclosure.

Public Interest Balancing Test

- 57 The Appellant argues that it is in the public interest that society should be able to engage in historic research. He quotes the author, Michael Crichton: "*If you don't know history, then you don't know anything. You are a leaf that doesn't know it is part of a tree.*" He goes on to note, in his own words, that "*...to restrict access to primary sources for historians is to remove the very ability of a society to understand its past and so shape its present and future.*"²³
- 58 He suggested that it is in the public interest for people to be able to have access to information about the activities of their ancestors given the interest in family history. He argues that many similar files are publicly available in Ireland, including recorded interviews of those involved in the "*war for independence*".
- 59 Against this the Home Office argue that there is an exceptionally strong public interest in favour of not disclosing the identity of informants. They claim that the

²³ Appellant's Response; para.13

strength of this public interest argument is reflected in the rule that documents identifying informants are generally immune from disclosure in civil and criminal proceedings.²⁴

60 They acknowledge public interest factors in favour of disclosure, such as those advanced by the appellant and in terms of the general case for greater transparency and accountability. Also the public interest (recognised by the Commissioner as a "strong" public interest)²⁵ in understanding the Government's efforts over the years to counter terrorism and the methods they employed.

61 However, the Home Office say that these public interest factors are relatively weak and do not come close to outweighing the significant factors in favour of withholding the disputed information. Further, they say that the age of the information in question does not significantly affect the public interest balance and neither does the alleged disclosure of informant identities through TNA. In the latter respect they draw our attention to the Marriot case where at para.44 it was stated:

*"The deliberate disclosure of a batch of names by the MPS itself, albeit under direction from a Tribunal, would have a greater impact than the occasional loss of control over a single name and would be seen as an important precedent."*²⁶

62 Their arguments in relation to s.38(1), which we say are equally applicable to s.24(1), are that the public interest in favour of disclosing are outweighed by the real risk of serious harm to surviving descendants of informers. They further argue that disclosure would engage and potentially breach surviving descendant's rights under Articles 2, 3 and 8 of the European Convention on Human Rights.

²⁴ Open Bundle, p.25, para.15: Home Office Response

²⁵ Open Bundle, p.4, para.18: Decision Notice

²⁶ Open Bundle, p.26, para.16: Home Office Response

- 63 The MPS add that the potential harm to the ability to retain and recruit informants, and the potential harm to descendants of historic informants, weigh very heavily in the public interest balance against disclosure.²⁷
- 64 The Commissioner accepted the Appellant's public interest arguments in favour of disclosure. He also recognised that in any case in which s.24(1) is found to be engaged there exists strong inherent public interest in avoiding prejudice to the safeguarding of national security.²⁸
- 65 He accepted the Home Office's public interest arguments weighing against disclosure, noting the basis on which the exemption is engaged is that it is required in order for HM Government to be able to maintain its ability to recruit and retain informants. He was satisfied that informants continued to perform an essential and important role in protecting the UK from threats to its national security. He stressed the importance of being able to assure informants that the information they provide and their identity will be treated with utmost discretion and not be disclosed. It was only through maintaining a reputation for absolute discretion that HM Government could recruit and retain informants.²⁹
- 66 In summing up the balance of public interest arguments, the Commissioner considered that, where s.24(1) is engaged there will always be a compelling argument in favour of maintaining the exemption given the severity of the harm that is likely to arise from disclosure. To counter this he says that there must be specific and clearly decisive factors in favour of disclosure but concluded that in this case he had found none. Accordingly he found that the public interest weighed in favour of maintaining the exemption.³⁰
- 67 The Tribunal majority endorses the Commissioner's findings with regard to the public interest. We too acknowledge the importance of historic research and the Appellant's laudable efforts to cast light onto a once dim area of history.

²⁷ Open Bundle, p.31, para.9: MPS Response

²⁸ Open Bundle, p.5, para.21: Decision Notice

²⁹ Ibid note 28, para.22

³⁰ Ibid note 29, para.26

However, it is our view that the ability of the United Kingdom to maintain its national security and the safety of descendants, who may be at risk of exposure to harm, to whatever degree, and the consequences this would have on current and future informants, must prevail.

- 68 For these reasons and those above, the Tribunal majority rules that the appeal is dismissed.

The Minority Decision

- 69 The minority decision was that the exemptions in s.24 and s.38 were not engaged. The minority noted and found highly persuasive in relation to the issue of the engagement of s.24 the comments of the minority in the *Marriott* case at para 45:

'The minority view is that, despite the seniority of the witnesses and the strength of their convictions, their reasoning – that a current day informant, having sufficient emotional resilience to serve any useful purpose, would withdraw co-operation upon seeing that the freedom of information regime requires 120 year old records to be disclosed – simply fails a very basic common sense test...'

- 70 Like the minority in *Marriott* the minority in Mr Keane's case also took into account the certain specific factors in concluding that neither s.24 nor s.38 were engaged:

1. The lack of any evidence of any informant's descendants ever being targeted many years after an informant's death and the significantly decreased likelihood of this ever happening in the context of informants against Irish secret societies given the success of the peace process in Northern Ireland following the Good Friday agreement.
2. The lack of any evidence that any informant or potential informant

had ever been discouraged from participation as an informant by the possibility of their identity being disclosed 100 years later and, indeed, the lack of evidence that such an issue had ever been discussed with an informant or potential informant.

3. The clear inconsistency of policy relating to the disclosure of the identity of historical informants between different public authorities as clearly illustrated by the fact that part of the information sought by Mr Keane was placed, after, one would assume, a thorough and competent review (by the Foreign Office), into the National Archives only to be removed at the request of the MPS as a direct result of these appeal proceedings.

4. The fact that during the quite lengthy period that the information was available through the National Archives (2009-2015) there was no evidence of any adverse consequences flowing from its availability even though that information identified at least one potential historical informant.

Signed:

Angus Hamilton DJ(MC)

Tribunal Judge

Date: 13 August 2015