The protection from terrorist threats and the preservation of civil liberties are among the key concerns of contemporary UK law and politics. Debate has tended to focus on detention without charge, controversial stop and search powers, and the associated issues of immigration and asylum. Sitting alongside those issues, but attracting somewhat less attention, is a no less critical tension between the principle of open justice and a need to control and restrict access to certain information relating to the investigation of terrorist offences and the workings of our security services.

Open justice essentially means that court hearings will ordinarily be accessible to members of the public and that information disclosed in them can be reported to the public at large. As well as helping to ensure the fairness of trials and being a dimension of free speech rights, open justice also has broader implications for democratic governance and government accountability. The government derives its authority from the democratic process. Executive action should, in theory at least, be carried out in the public interest. The public are able to express this interest through a variety of forums and channels, the most obvious being general elections. In order for the public to be able to express its opinion in an informed way, it is heavily reliant on the media’s ability to scrutinize the executive.

Generally, information about terrorism and security is not readily revealed by the state. Even powerful media organizations face great difficulties in obtaining information in this area. Interviews with journalists in Australia have shown some of their concerns in the post-9/11 environment. Some feel there is an “environment of secrecy” in which officials conveyed the sense that “secret information is held which indicates that there is something more than what you have been told.” When information is released the view is that officials “have an agenda for making it available.” Another journalist cautioned that when information is released, not only does it have an agenda, but “you don’t know what you’re getting – you don’t know what agenda’s being run.” The implications of all this was explained by one journalist who stated that the tendency to secrecy is damaging because “when things become so secretive and nebulous then reporters – not all, but some – conjure up fictions.” In particular, journalists become vulnerable to off the record briefings, especially by police, or strategic leaks by government and if the information that is obtained in this way cannot properly be tested, it tends to be published in the form provided.

In this context, open justice is extremely important because in court cases information can be elicited, exposed and tested in ways which are generally not possible in other environments. The judicial process demands primary sources of evidence wherever possible. In other words, it generally shirks hearsay evidence which is so susceptible to spin. Witnesses have to swear to the truth of their evidence and if they are discovered to have deliberately misled the court they can be sent to prison for perjury. The rules of evidence govern what is revealed, and these are applied by an independent judiciary which can limit the extent to which parties can craft and shape information for public consumption.
The problematic nature of secrecy has long been observed by the courts and the principle of open justice holds constitutional importance. In the 1913 case of Scott v Scott, Lord Shaw of Dunfermline famously warned against the dangers of justice behind closed doors. Quoting Jeremy Bentham and the historian Henry Hallam, he stated:

“In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice…. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.”

The principle of open justice has its limits of course. Common examples include cases involving children or vulnerable adults, where a court order prevents publication of the parties’ identities for their protection. Where national security is concerned, there are frequent restrictions on public access to evidence or information adduced at hearings, and these may have a sound basis. For example, the revelation of the identity of a security service witness who is still operating in the field may place them in grave physical danger. However, limiting public access to evidence on national security grounds is invariably controversial because the decision to impose restrictions will often be based on information which is itself secret and cannot be publicly tested.

When justice is open, court reporting is a crucial avenue for public knowledge about what the government does. It is particularly important where the government is one of the parties in a case and where other sources of information are limited – and sources will be most limited in cases involving national security or counter-terrorism. The courts face a dilemma where any party – but in practice usually the government – claims that openness would result in a danger to national security and restrictions must be placed on the ability of the public to scrutinize the judicial process. On the one hand, the court should be convinced that the danger is genuine and that national security is not just being used as an excuse to keep politically embarrassing information from the public. On the other, the courts may not always be in the best position to judge whether information will pose a danger to national security as it is the executive government which arguably has a more complete picture of the circumstances and relevance of the information concerned.

In the UK, the intersection of secrecy, open justice and civil liberties has been starkly visible in the decision early this year in The Queen (on the application of Binyam Mohamed) v The Secretary of State for Foreign and Commonwealth Affairs. Mr Mohamed sought an order forcing the government to disclose documents referring to his alleged mistreatment whilst being detained at the behest of the US, and which would help him defend himself against criminal charges being brought in the US. The court ruled that the documents should be disclosed in confidence to Mr Mohamed’s lawyers, and, in a partially closed judgment, quoted a 7 paragraph summary of the contents of the documents which revealed elements of Mr Mohamed’s mistreatment. Mr Mohamed and media organisations then asked for the closed parts of the judgment (i.e. the summary) to be made public. The Government argued that because the information had been provided by the US government in confidence, making it public would potentially damage the intelligence sharing relationship between the UK and the US.
Mr Mohamed and various media organizations argued that the government was being manipulative, using a national security argument when actually it was only concerned to avoid political embarrassment. When the Court of Appeal eventually ruled that the relevant material should be made public, it appeared that the submissions of the media and Binyam Mohammed were not without substance.

Counter-terrorism law and policy involve a complex and difficult web of issues, as does the protection of civil liberties. A commitment to open justice does not mean that there should always be unrestricted reporting of court or tribunal hearings that touch upon national security, nor that there may not be good and genuine reasons why information should sometimes be restricted. It is also not necessarily the case that the protection of civil liberties is at odds with measures taken to protect the public from terrorism. On the contrary, more openness and visibility about government activities helps build citizens’ trust in their government which is in turn necessary for counter-terrorism strategies to be effective in the community. However, recent events suggest that a commitment to open justice will be imperative if individuals suspected of terrorism offences – and the public at large – are to know about the actions governments take in their attempts to protect the citizenry from terrorism.