IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2011/0112 & 0113
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:
The Information Commissioner's
Decision Notice No: FS50352663

Dated: **28th. March, 2011**

Appellant: **Ian Cobain**

Respondents : **The Information Commissioner (1)**
The Crown Prosecution Service (2)

Hearing : **16th. and 19th. December, 2011**

Date of Decision: **8th. February, 2012:**

Before

David Farrer Q.C.(Judge)

and

Narendra Makanji

and

Richard Enderby

Attendances:

For the Appellant: Aidan Eardley
For the First Respondent: Ben Hooper
For the Second Respondent: Rory Dunlop.

Subject matter: **Late reliance on exemptions**

FOIA S.32

Information held by reason of being contained in documents filed in court proceedings :

FOIA S.40(2)

Fair processing of sensitive data.

FOIA s.30(1)(c), 30(2)(a)(ii)

Material held, obtained or recorded in connection with criminal proceedings

Cases: *Birkett v DEFRA [2011] EWCA Civ 1606*

Armstrong v. Information Commissioner, EA/2008/0026

All Party Parliamentary Group on Extraordinary Rendition v. Information Commissioner [2011] UKUT 153 (AAC)

Kennedy v ICO [2011] E.M.L.R.24

Kennedy v The Charity Commission EA 2008/0083- report to the Court of Appeal 18.11.11.

Leander v Sweden (1987) EHRR 43

Tarsasag a Szabadsagjogokert v Hungary (2009) ECHR 618

Kenedi v Hungary (2009) ECHR 786

A v Independent News and Media Ltd. EWCA Civ 343

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal in part and substitutes the following Decision Notice.
"Save as regards the information to which the instruction "Disclose" is applied in the table at paragraph 70 of this Decision, the Second Respondent dealt with these requests in accordance with the Act".

STEPS TO BE TAKEN

The Second Respondent must disclose the information marked "Disclose" in that table within 28 days of the publication of this Decision.

Dated this 8th. day of February, 2012

Signed:

David Farrer Q.C.

Judge

Introduction

1. Mr. Nicholas Griffin, now fifty two, has played a prominent role in right – wing politics for many years. As a young man he was a member of the National Front and fought two parliamentary elections as one of its candidates. In 1995 he joined the British National Party ("the BNP") and became its leader in 1999. He is currently a member of the European Parliament representing North West England, having won his seat in 2009.

2. He professes abandonment of many of the more extreme policies on repatriation of immigrants and holocaust denial, which have characterised these organisations for the last thirty years or so and has sought to give the BNP a more moderate and reasonable image.

3. In the 1990`s Mr. Griffin edited two periodicals which promoted the views of the BNP, "Spearhead" and "The Rune".

4. In 1998, at Harrow Crown Court, together with an associate, Paul Ballard, he was charged with an offence of publishing material likely to stir up racial hatred, contrary to section 19 of the Public Order Act, 1986. The charge, which he contested but to which Ballard pleaded guilty, related to Issue 12 of the Rune.

5. A police investigation was triggered by a complaint from Alex Carlile Q.C. M.P. as to the content of various issues of "The Rune". The police conducted searches of Mr. Griffin`s home, offices and other premises under the authority of warrants issued under PACE 1984. Mr. Griffin was interviewed at length under caution by police officers. To raise funds for his defence, he compiled a selection of extracts from the audio tapes of his interviews for sale to the public. At trial he insisted on the full unedited record of those interviews being played to the jury, regardless of relevance to the charge that he faced. He withdrew instructions from counsel who was due to represent him in order to present his case in person. A significant motive for that decision appears to have been the greater freedom to expound his political views and his disapproval of the restrictions on free speech which the statute imposed. It is apparent that he was and is keen to propagate his political beliefs, whenever and wherever the opportunity arises.

6. Mr. Griffin was convicted and received a sentence of nine months imprisonment suspended for two years. He was also fined a substantial sum. Ballard received a similar but shorter sentence.

7. He remains a figure who attracts and welcomes strong public interest, as demonstrated by an appearance on "Question Time" in the recent past.

8. The request for information

   Mr. Cobain is a respected and experienced investigative journalist, working for the Guardian. He has taken a keen interest in the activities of the right wing organisations in which Mr. Griffin has been prominent and in the development of Mr. Griffin`s political profile.

9. In 2009 Mr. Cobain wished to research the details of the Harrow case, having regard to the stance adopted by Mr. Griffin in recent years as an MEP. It became apparent during the hearing that his interest was, not surprisingly, the political views expressed by Mr. Griffin in "The Rune" and other contemporary publications and subsequently during the police investigation and at his trial. He approached the court for assistance but learned that it no longer held records relating to the trial.

10. On 9th. October, 2009 he made the following request of the Crown Prosecution Service ("CPS") : - *"I would like to see all of the papers that the Crown Prosecution Service holds relating to the prosecution during 1997 and 1998 of Nicholas John Griffin (dob 19.03.59). Mr Griffin was successfully prosecuted under the 1986 Public Order Act, with his trial taking place at Harrow Crown Court between April 27th and 30th 1998"*.

11. On 29 October 2009 CPS confirmed that it held the information but stated that it was exempt under sections 30(1)(c), 30(2)(a)(ii), 40(2) and 42 of the Act. That position was asserted again following review. It asserted, clearly rightly, that, in so far as the requested information was Mr. Griffin`s personal data, it was his sensitive personal data

12. On 21 January 2010, the Appellant further asked the CPS to provide him with:

    "*... a full schedule of the material that you hold*."

CPS confirmed that it held such a schedule but this request was also refused in reliance on s.40(2). Again, correctly, CPS claimed that it included Mr. Griffin`s personal data.

13. The Complaints to the Information Commissioner ("the ICO")

Mr. Cobain complained to the ICO on 29th. January, 2010. A delay was caused by the mistaken assertion by the CPS of a further exemption and consequent modifications to the request. Suffice it to say that, by early October, 2010, the ICO had resumed the investigation of the request which gives rise to this appeal.

14. The upshot of that investigation was two Decision Notices dated 28th. March, 2011 which upheld, as to everything held by CPS within the scope of the request and as to the request for the schedule, the claim for the absolute exemption provided by s.40(2), on the basis that the information concerned was "sensitive" data within DPA s.2(g)(data as to the commission of an offence). The ICO made no finding as to the further exemptions then relied on.

15. He rightly criticised CPS for claiming the exemptions referred to without reading the documents within the scope of the request and expressed the hope that such a practice would not be repeated.

The appeal to the Tribunal

16. Mr. Cobain appealed to the Tribunal on a number of grounds which included the argument that the ICO was wrong to find that none of the grounds set out in Schedules 2 or 3 to DPA were established and that he had misconstrued Schedule 1 paragraph 3 of the Data Protection (Protection of Personal Data) Order, 2000.

17. At a late stage, CPS raised further exemptions under ss. 21, 32 and 44 of FOIA. Of these, only s.32 was maintained to the end of the hearing and that is the only one of the three on which we shall rule. It was clearly an instance of "late reliance", the explanation for which was set out in a supplementary response of CPS. Following the conclusion of the hearing but before our deliberations, the Court of Appeal decision in *Birkett v DEFRA [2011] EWCA Civ 1606* was reported. It decided that a public authority was entitled as of right to assert before the Tribunal a different exception from those relied on in refusing a

request or answering a complaint to the ICO in respect of environmental information. We concluded that the distinction between the provisions of FOIA and EIR, 2004 was immaterial in this context and that we were bound to entertain this exemption, notwithstanding very belated reliance. The interpretation of s.32 proved to be the principal issue of law in this appeal.

18. We observe that the abandonment of any claim to the exemptions under ss. 21 and 44 was plainly right. Neither had any application here. No issues arise under s.42 because the appellant abandoned any request for information to which that exemption might apply.

19. The documentation held by CPS potentially within the scope of this request was very considerable. It ran to six lever arch files. It was clear to the Tribunal from its preliminary reading that only a very small proportion was likely to be of interest to the requester or the public at large. So it proved. Whilst the files contained around two thousand pages, the parties were able to agree that certain documents were beyond the scope of the request because they related to Ballard and a very large number could be described in terms that enabled Mr. Cobain to withdraw his request so far as it related to them. A further group of documents was disclosed. Having seen the entirety of these files, the Tribunal is satisfied that the public interest was in no way prejudiced by these refinements to the original request. It is perhaps unfortunate that they did not take place at the stage of the ICO`s investigation. Whether or not that is so, Mr. Cobain is certainly not to be criticised for failing to narrow his request earlier when he had no clear idea as to what CPS held, due, in large measure, to the refusal of his request for the schedule.

20. A very helpful schedule was prepared on the first day of the appeal which itemised about fifty documents and classes of documents contained in the files, indicating by colour – coding those that were no longer requested and those that had been disclosed. By the stage of final oral submissions, only thirteen of those items remained in issue. In this Decision and in the very short closed annex we adopt the numbering of that schedule to identify the relevant documents.

21. <u>The categories of document</u>

So far as they are relevant to this decision, they may be summarised as follows :

(i) Issue 12 of "The Rune", the source of the charge (Item 8 FOIA ss.30(1)(c) and 32 exemptions claimed.

(ii) CPS internal minutes and correspondence (Items 2A, 3A, 4A, 5A, 6A, 26A - ss. 30(1)(c) and s.40(2).

(iii) The amended indictment - Item 7 - ss.30(1)(c),32 and 40(2).

(iv) The unedited[1] record of Mr. Griffin`s police interviews – Item 9 - ss.30(1)(c),32 and 40(2).

(v) Material, whether in hard copy or downloaded, which emanated from Mr. Griffin or BNP and which was not obtained or produced as a result of the execution of PACE search warrants – Items 14 and 14B - s.30(1)(c).

(vi) Material of that character which was seized in the execution of such warrants – Items 14A, 32B - s.30(1)(c).

(vii) Correspondence between Mr. Griffin and CPS referring to how he would conduct his defence – Item 18A - ss.30(1)(c),32 and 40(2).

(viii) Any outline of allegations that was not provided in confidence to HM Attorney General – Item 27A - ss.30(1)(c), and 40(2).

(xi) Counsel`s annotated opening note[2] – Item 38 - ss.30(1)(c),32 and 40(2).

(xii) The witness statement and any exhibits produced by the defence witness M. Faurisson – Item 41- ss.30(1)(c),32 and 40(2).

22. The exemptions under ss. 32 and 40(2) are absolute exemptions. No question of the public interest, as such, arises, therefore, in so far as either of those exemptions is engaged, save in the context of the Data Protection (Processing of Sensitive Personal Data) Order 2000 (see below). S.30(1)(c), on the other hand is a qualified exemption, if engaged, as it clearly is, the balance of public interest must be considered.

[1] This refers to the original record without proposed excisions of irrelevant material. This was the record read to the jury.
[2] The working note used for opening the case to the jury.

23. Much of the information in categories (i) – (xii) was freely publicised at the trial in 1998. Some, specifically unused material retained by CPS, was not. Where the public interest is engaged (as here where s.30(1)(c) is invoked) it does not by any means automatically follow that such publication in the past determines the question of disclosure today[3]. Most witnesses are entitled to expect that their exposure to public scrutiny ends with the conclusion of their evidence. Those who make statements do so in the expectation that, if not used at trial, they will not surface later.

24. Nevertheless, standing back for a moment from the application of particular exemptions to the facts of this case, it seemed to us at the outset very odd that in an open society there could be any lawful obstacle to any member of the public obtaining access, for example, to the indictment on which Mr. Griffin was convicted, the records of interviews, which he offered for sale before the trial or the witness statement of a French associate who gave "expert evidence" in support of the political defence which Mr. Griffin chose to mount.

25. Equally, it was soon obvious that a significant amount of material, within the requests, held by CPS was not Mr. Griffin`s personal data at all. There were, for example, periodicals containing articles propagating the views of BNP on a range of issues, for which no party claimed the s.40(2) exemption before us (see categories (i), (v) and (vi) above). It was clear that the broad and unparticularised approach adopted in the First Decision Notice could not be upheld. The fact that it is information held in a file assembled for the purposes of criminal proceedings against Mr. Griffin (see DPA s.2(g)) does not make it sensitive personal data, unless it is personal data in the first place. Whether some other exemption applied is quite another matter.

26. We turn now to the application of the three exemptions to the information with which we are concerned and our consequent approach to the different classes of information. We deal first with the absolute exemptions, where the sole issue is whether either or both are engaged.

[3] See *Armstrong v. Information Commissioner*, EA/2008/0026, at §§81-86

27. FOIA s.40(2)

This was the exemption upheld by the Decision Notices, which is one of the reasons for tackling it first. There was no dispute that the requested information, in so far as it related to Mr. Griffin, was his sensitive personal data.

28. S.40 provides, so far as material:

"(2) Any information to which a request for information relates is also exempt information if

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

(3) The first condition is

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of data in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene

(i) any of the data protection principles,"

The data protection principles are found at Part 1 of Schedule 1 to DPA 1999. The first principle, so far as relevant, reads:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless

(a) at least one of the conditions in Schedule 2 is met and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

§6(1) of Sch. 2 provides:

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

The term "sensitive personal data" is defined by s. 2 of the DPA. So far as material, it provides:

"In this Act 'sensitive personal data' means personal data consisting of information as to—

...

(b) [the data subject's] political opinions,

...

(g) the commission or alleged commission by him of any offence, ..."

In so far as the requested information consists of Mr. Griffin`s personal data it is therefore sensitive personal data within s.2. That proposition was common ground.

29. So far as relevant Schedule 3 of DPA provides :

"5. The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.

10. The personal data are processed in circumstances specified in an order made by the Secretary of State for the purposes of this paragraph."

30. The Data Protection (Processing of Sensitive Personal Data) Order 2000, SI 2000/417 ("the 2000 Order") was enacted for the purposes of §10 of Sch. 3. By Art. 2 of the 2000 Order, the circumstances specified in any of the paragraphs in the Schedule to the 2000 Order are circumstances in which sensitive personal data may be processed.

31. §3(1) of the Schedule requires that:

"The disclosure of personal data—

(a) is in the substantial public interest;

(b) is in connection with—

(i) the commission by any person of any unlawful act (whether alleged or established) (or),

(ii) dishonesty, malpractice, or other seriously improper conduct by, or the unfitness or incompetence of, any person (whether alleged or established) . . .. . . ,

(c) is for the special purposes as defined in section 3 of the Act; and

(d) is made with a view to the publication of those data by any person and the data controller reasonably believes that such publication would be in the public interest."

S. 3 of the DPA provides that the "special purposes" include "the purposes of journalism".

32. §9 of the Schedule to the 2000 Order provides, so far as material :

"The processing—

(a) is in the substantial public interest;

(b) is necessary for research purposes ...;

(c) does not support measures or decisions with respect to any particular data subject otherwise than with the explicit consent of that data subject; and

(d) does not cause, nor is likely to cause, substantial damage or substantial distress to the data subject or any other person."

33. The effect of this labyrinthine series of provisions is to impose the following tests for disclosure in relation to the information in this case, so far as it relates to Mr. Griffin:

(a) Would it be fair and lawful ?

(b) Is it necessary for the purposes of legitimate interests pursued by the Appellant ?

(c) If the answers to (a) and (b) are "yes", would the processing be unwarranted by reason of prejudice to Mr.Griffin`s rights and freedoms or legitimate interests ?

(d) If it would not, has the information contained in the personal data been made public as a result of steps deliberately taken by Mr. Griffin ?

(e) Alternatively to (d),

(i) Is it in the substantial public interest?

(ii) Is disclosure in connection with the matters specified in §3(1) (i) or (ii) of the Schedule ?

(iii) Is it for the purposes of journalism ?

(iv) Would it be made with a view to publication, presumably by The Guardian ?

(f) Alternatively to (e), assuming (e)(i) is satisfied,

(i) Is disclosure necessary for research purposes ?

(ii) Would it cause, or be likely to cause, substantial damage or substantial distress to Mr. Griffin or any other person ?

(§9 (c) is clearly inapplicable.)

34. As regards Mr. Griffin`s sensitive personal data, the CPS largely adopted the position of the ICO as to the application of these tests to this request.

35. As to fairness and lawfulness, the ICO argues that the passage of time is a material factor and the fact that information was placed in the public domain in a court case does not mean that it remains fair to disclose it for an indefinite period thereafter (see *Armstrong v. Information Commissioner* EA/2008/0026, at §§81-86). We accept those principles as general guidance but note that Mr. Griffin was himself anxious after his trial to publicise his account of it and his claims as to the principles of freedom which, he said, his conviction violated, for example in issues of "Spearhead" in 1998 and evidently in collaborating with other reviews of his trial broadly supportive of his "libertarian" position (see the piece by David Botsford in "Aagh"). Given his marked preference for publicity, not least as to the trial, and his prominent and sensitive political role since, we conclude that disclosure to the world at large of the personal data requested would be fair and lawful.

36. We do not doubt, nor was the point seriously contested, that disclosure is necessary for a legitimate investigative purpose of journalism. Given his position and his own attitude to such publicity, we find no prejudice to Mr. Griffin`s rights and freedoms or legitimate interests.

37. As to the Schedule 3 conditions applicable to sensitive personal data, certain personal data within the scope of the request have been made public, in the view of the Tribunal, as a result of steps deliberately taken by Mr. Griffin. Examples are the account of his views gratuitously[4] declared in the course of his evidence and published as described in paragraph 34 and the verbatim record of his police interviews which he chose to sell and to have played in full at his trial so as to publicise his views. To the extent that such material is within the request, §5 of the Schedule to the 2000 Order is satisfied.

38. However, in the Tribunal`s view, a broader justification, which also applies to that material, is to be found in §3(1) of the Schedule to the 2000 Order. Disclosure of the

[4] "Gratuitously" since they provided no defence to the charge that he faced but were delivered, it seems, as a public expression of his political philosophy from a platform provided by the criminal justice system.

sensitive data would be "in connection with" the commission of an unlawful act (hence the conviction), seriously improper conduct and arguably Mr. Griffin`s unfitness for political office. It would be for the purpose of journalism, Mr. Cobain`s occupation, and would be intended for publication in his newspaper and possibly thereafter, in a book. Given the issues involved, namely racial and/or religious hatred and the right to express even extreme views, we find that disclosure would be in the substantial public interest. We do not consider that the passage of eleven years before the request renders disclosure unfair, or unwarranted by reason of prejudice to Mr. Griffin`s interests nor likely to cause substantial damage or distress to him. In making that judgement we have regard to Mr. Griffin`s age (50 at the date of the request, 39 at the date of trial), his continuing political prominence and his apparent claim to be an educated, reasonable and responsible MEP and party leader who has rejected any racial extremism formerly associated with his party.

39. Subject to the ICO`s argument considered in the next paragraph, at least one condition of Schedule 3 to the DPA, as specified in §3(1) of the Schedule to the 2000 Order, is therefore satisfied.

40. The ICO submits that, notwithstanding the references to particular legitimate interests, research and the concerns of journalism in DPA Schedules 2 and 3 and Schedule 3 to the 2000 Order, s. 40(3)(a) provides an absolute exemption where disclosure to "a member of the public otherwise than under [FOIA]" would contravene any of the data protection principles in Part I of Sch. 1 to the DPA.. Hence these conditions can never be satisfied for the purposes of s.40 since a member of the public will not generally be a journalist, a researcher or have legitimate interests to pursue. Their relevance is confined to the DPA.

41. We do not accept this argument, which was rejected, admittedly obiter, by the UT in *All Party Parliamentary Group on Extraordinary Rendition v. Information Commissioner* [2011] UKUT 153 (AAC) at §113 – 115. We respectfully adopt the UT observation that a requester who fulfils one or more of the schedule conditions is also a member of the public (and is not the data processor) who is receiving the information under FOIA. If this were not so, FOIA would be a valueless tool for the serious researcher, journalist, writer, politician or scholar seeking to investigate serious wrongdoing within the

preceding thirty years. If that were the case, it would be reasonable to ask whether FOIA was worth enactment.

42. We conclude that, as to Mr. Griffin`s sensitive personal data and, still more obviously his non – sensitive personal data, s. 40(2) cannot be relied on.

43. There are two examples of the sensitive data of third parties[5] which are contained in the CPS files and are within the scope of the request. Different considerations plainly apply. The absolute exemption is rightly claimed in respect of the relevant information and we deal with them in the closed annex.

44. FOIA s.32(1)

This exemption was invoked at a late stage by CPS, following, we were told, a change of view as to its proper interpretation. Having regard to *Birkett* (see paragraph 17) we are bound to consider it. If the CPS is correct, it operates as an absolute exemption in respect of a high proportion of the information at issue.

45. It reads :

> *"(1) Information held by a public authority is exempt information if it is held only by virtue of being contained in—*
> *(a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,*
> *(b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or*
> *(c) any document created by—*
> *(i) a court, or*
> *(ii) a member of the administrative staff of a court,*
> *for the purposes of proceedings in a particular cause or matter."*

S.32(2) provides :

> *(2) Information held by a public authority is exempt information if it is held only by virtue of being contained in—*

[5] Se item 14B in the table at paragraph 70.

(a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration; or
(b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.

46. The relevant paragraph in this appeal is s.32(1)(a). At first sight the rationale for an absolute exemption to cover such information is the paramount need for the court – and no other party – to control information contained in material lodged with the court for the purposes of litigation proceeding before that court. That suggests that such an exemption would continue for as long as the matter concerned is live, probably until some reasonable time after any appeal is determined or the time for appealing is past. The need for the exemption many years after the relevant proceedings had been determined is not obvious.

47. The Tribunal, when considering the possibly ambiguous drafting of this provision, is clearly bound, in our view, by the decision of the Court of Appeal in *Kennedy v ICO [2011] E.M.L.R.24*, as to the meaning of s.32(2), since, as that court observed, there is no sensible basis for distinguishing the interpretation of the material words in the two subsections.

48. The appellant, a journalist, requested information that had been filed with the Charities Commission for the purpose of an inquiry into the operation of the Mariam appeal which had been promoted by George Galloway M.P. The inquiry had concluded. The issue for the Tribunal and thereafter on appeal was whether the s.32(2) exemption ended when the inquiry was over or continued for thirty years or so.

49. The Court of Appeal, like Calvert J. and the FTT below, concluded that the critical question of construction was whether the adverbial phrase "*for the purposes of the inquiry or arbitration*" qualified "*held by a public authority*" or "*placed in the custody of a person conducting an inquiry or arbitration*".[6] If the former construction was right then the critical question was : is the information held by the authority for the purposes of the inquiry ? The authority would cease to hold it for the purposes of the inquiry once

[6] For the full ruling on this point of construction see paragraphs 15 – 27.

the inquiry had concluded. If the second interpretation was correct, then the exemption continues after the inquiry ends. It concluded that the text was ambiguous. The presence of a comma after *"arbitration"* suggested that the phrase qualified *"held"* and a purposive construction pointed in the same direction. However, the removal of the s.32 exemption after 30 years, enacted in FOIA s.63(1) concluded the matter since it would be otiose in all save the rarest of cases, if the exemption lapsed when the proceedings were completed So s.32(2), subject to consideration of ECHR Article 10, maintained the absolute exemption until the court documents became historical records.

50. The Court observed that the same approach must apply to both court and inquiry records. The absence of a corresponding comma in s.32(1) permits the second construction more easily than in s.32(2) anyway.

51. However, the court did not leave the matter there. The appellant had raised for the first time before the Court of Appeal the argument that s.3 of the Human Rights Act, 1998 required the court to read down s.32 so as to take account of the impact of ECHR Article 10. The Court acceded to that submission to the extent of remitting the matter to the Tribunal for the factual issues and arguments relating to Article 10 to be resolved and for the Tribunal to report its findings to the Court of Appeal.

52. This it did in *Kennedy v The Charity Commission EA 2008/0083 report to the Court of Appeal 18.11.11.*

53. It reported that four questions had to be answered :

(i) Does the refusal to disclose the information applying the s.32(2) FOIA exemption interfere with Mr. Kennedy`s right to freedom of expression under Article 10(1) ECHR ?

(ii) If yes, is such an interference justified under Article 10(2)?

(iii) If no, should s.32(2) be construed in a way which is consistent with Article 10 ?

(iv) If yes, does limiting s.32(2) to information held until the termination of the relevant statutory inquiry avoid the breach of Article 10?

54. For our purposes, the critical question is the first, which involves the scope of Article 10. Is it limited to a prohibition on a government from restricting a person from

receiving information that others may be willing to impart to him ? That is the test laid down by the European Court of Human Rights in *Leander v Sweden (1987) EHRR 43* and has been followed in a line of Strasbourg authorities cited at paragraphs 25 and 26 of the report. Or does it, on the other hand, confer a right to receive information of general interest, free of unjustified administrative obstacles, where that information is held by an organ of the state, subject to the conditions described in Article 10(2)?

55. In later decisions, namely *Tarsasag a Szabadsagjogokert v Hungary (2009) ECHR 618* and *Kenedi v Hungary (2009) ECHR 786,* both arising from appeals against administrative obstacles to the legitimate gathering of information on matters of general interest imposed by government authorities, the Second Chamber ruled that Article 10 was engaged. One researcher was a member of Parliament, the other a historian. The European Court, like our domestic courts, emphasised the particular importance of the freedom to receive information where the press was concerned. These decisions evidently extended the scope of Article 10 beyond the limits set in *Leander* by focussing on the right to receive information.

56. In its report the Tribunal concluded that, whilst there was no general right to receive information under Article 10, the scope of the right had broadened since *Leander* as noted by Lord Judge C.J. in *A v Independent News and Media Ltd. EWCA Civ 343* at paras.41 and 42.

57. Having taken account of arguments as to information monopolies and considered the relevance of Mr. Kennedy`s role as an investigative journalist, the Tribunal concluded that the conventional interpretation of s.32(2) was an interference with Mr. Kennedy `s rights[7].

58. In doing so it was plainly influenced by the readiness of the Court of Appeal in *A v Independent News and Media Ltd* to reflect recent developments in Strasbourg jurisprudence. So are we. We adopt with gratitude and respect the very careful reasoning of the report on this issue, which we believe accurately states the law as to Article 10 as recently developed.

[7] See paragraphs 11 – 54 of the report for the full review of issue (1)

59. Is that interference justified? We, like the report, have well in mind the relevant principles that the interference must have a legitimate objective, the measures must be rationally connected with that objective, must be no more than necessary to accomplish that objective and must reflect a fair balance between the rights of the individual and society.

60. The first two principles pose no problem. Information lodged with a court, as with a Tribunal, requires a significant degree of protection.

61. *Kennedy* involved a thirty – year restriction on all information lodged with the inquiry, however trivial or harmless. The report had no difficulty in concluding that it was grossly disproportionate and achieved no reasonable balance of interests. In our judgment, such a restriction on any information lodged with a court and continuing decades after any appeal process is exhausted fails the tests of proportionality by a similar margin.

62. We do not doubt that s.32(1) can be read down in a way which is consistent with Article 10. We consider that limiting the restriction in Article 32(1) so that it ends once a reasonable time has elapsed after the exhaustion or evident abandonment of the available appeal process would avoid a breach of Article 10. S.30 is available as a further safeguard for information which truly requires thirty – year protection.

63. We therefore reject, in relation to any part of the requested information, the reliance on the exemption provided by s.32(1).

64. <u>S.30(1)(c)</u>

This is a qualified exemption which is unquestionably engaged, as was s.30(2)(a)(ii) which added nothing in the context of this appeal and was consequently ignored in argument.

65. The Tribunal acknowledges the substantial public interest in many circumstances in protecting from disclosure information gathered for the purposes of a criminal case,

including the need to offer informants and witnesses protection from public exposure and a prosecuting authority a proper space in which to discuss and decide issues that arise.

66. On the other hand, the public has a legitimate interest in criminal investigations and resulting court proceedings, especially where the defendant was a prominent political figure charged with an offence of great current importance in proceedings that he was keen to publicise. The passage of time is also a consideration. Legitimate public interest in such a case continues due to the profile of the defendant but the risk of any impact on the resulting proceedings disappeared long ago. More importantly, the relevant information in this appeal does not include statements from potentially vulnerable witnesses or highly sensitive material. In general, we conclude that the public interest is not shown to favour a refusal to disclose. We have regard to the factors recited in our ruling on s.40(2)(a) as also applicable to the balance of public interest.

67. Though not raised by the parties, we considered the question whether the disclosure of Issue 12 of "The Rune" might be contrary to the public interest in the light of the fact that, on the jury`s verdict, it contained racially inflammatory material. We bear well in mind that disclosure is to the public at large, not just to a responsible journalist. We conclude, however, that this is not a significant factor given that the content of this document has been condemned by the jury`s verdict. No reasonable reader thereafter could properly regard it as a serious or fair contribution to historical research into the holocaust or to any of the other topics of white nationalist concern contained within Issue 12. Moreover, if this view of the public interest prevailed, the public would never be able to judge for itself the standards which the jury in such a case set in reaching its verdict. It might even be an argument for refraining from prosecution at all, since the trial could publicise the offending content.

68. There are, however, three categories of information where we conclude that the exemption under s.30(1)(c) is properly relied on :

(i) Material seized by the police from whatever premises in the execution of PACE warrants ;
(ii) Internal CPS records which say nothing about Mr. Griffin`s defence.

(iii) Material of such limited public interest that the general interest in privacy prevails though both are slight.

69. Classes (ii) and (iii) are self – explanatory and of very limited application. Class (i) should not be disclosed, in our judgment, because PACE and similar warrants, which are coercive and highly intrusive weapons in the investigator`s armoury, are granted for the exclusive purpose of a criminal investigation and it would be unfair and contrary to principle to require their further disclosure. It is plainly contrary to the public interest for such material to be made available to the public, regardless of its intrinsic character.

70. <u>The application of these rulings to the information still in issue</u>.

A spreadsheet was produced and amended, showing the documents which remained the subject of disputed exemptions and the exemptions on which the respondents relied. The scope of that spreadsheet shrank significantly as the hearing proceeded. The general nature of such documents was identified. We shall indicate our decision, in the light of our conclusions as to the application of the three exemptions, by reference to that spreadsheet, omitting all agreed or abandoned items and using the numbering which appeared on the original document. The application of those conclusions to particular items is very briefly stated in the comment column. Unusually, the closed annex to this decision contains only a two references to material which should not be disclosed, having regard to the rights to protection of sensitive personal data of persons other than Mr. Griffin. Otherwise we consider that the Tribunal`s views can be expressed in this open decision.

The spreadsheet appears below

Item No.	Document	Exemption(s) asserted	Decision of the Tribunal	Comments
2A	CPS internal minutes recording details of pre – trial Crown Court	s.30(1)(c) s.40(2)	**Exempt** under s.30(1)(c) only	No public interest in content.

	appearances			Identified interests in non – disclosure prevail.
3A	Note of trial proceedings	s.30(1)(c) s.40(2)	**Exempt** under s.30(1)(c) only	No public interest in content of this note. Identified interests in non – disclosure prevail.
7	The final form of the Indictment	s.30(1)(c) s.40(2) s.32	**Disclose** (A copy was disclosed to the appellant personally during the hearing.)	There is a strong public interest in knowing the charge of which NG was convicted.
8	Issue 12 of "The Rune"	s.30(1)(c) s.32	**Disclose**	See paragraph 67
9	Unedited record of NG`s taped interviews	s.30(1)(c) s.40(2) s.32	**Disclose** (A copy was disclosed to the appellant personally during the hearing)	See paragraph 5. NG chose to publicise his answers to the greatest extent

				possible.
14A	Published material emanating from NG or the BNP (other than item 8) which were seized under PACE search powers	s.30(1)(c)	**Exempt**	See paragraph 69
14B	Published material emanating from NG or the BNP which were obtained without the exercise of PACE search powers.	s.30(1)(c)	**Disclose** save as indicated in the closed annex.	This consisted of material downloaded from the internet or otherwise obtained without resort to coercive powers
18A	Correspondence between CPS and NG (after he decided to represent himself).	s.30(1)(c) s.40(2)	**Exempt** under s.30(1)(c) only	No public interest in content. Identified interests in non – disclosure prevail.
26A	Counsel`s notes of proceedings in open court.	s.30(1)(c) s.40(2)	**Exempt** under s.30(1)(c) only	No public interest in content. Identified interests in non –

				disclosure prevail.
27A	Any outline of allegations that was not provided in confidence to the AG	s.30(1)(c) s.40(2)	Probably nothing within scope of this request but otherwise **Exempt** under s.30(1)(c) only	No public interest in content. Identified interests in non – disclosure prevail.
32B	Articles or draft articles downloaded from NG`s computer(s) in execution of PACE warrant(s)	s.30(1)(c) s.40(2) s.32	**Exempt** under s.30(1)(c) only	As item 14A
38	Counsel`s annotated opening note.	s.30(1)(c) s.40(2) s.32	**Exempt** under s.30(1)(c) only	Annotations justify protection from public scrutiny
42	Witness statement and supporting exhibits supplied by defence witness Faurisson	s.30(1)(c) s.40(2) s.32	**Disclose**	This witness chose to give “expert evidence” and that evidence was subsequently publicised in “The Rune”, clearly with his consent

71. Our decision is unanimous.

Signed:

David Farrer Q.C.

Judge

8th. February, 2012