



**IN THE FIRST-TIER TRIBUNAL**  
**GENERAL REGULATORY CHAMBER**  
**(INFORMATION RIGHTS)**

**Appeal No: EA/2012/0106**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50422684**  
**Dated: 1 March 2012**

**Appellant: Stephen Court**  
**Respondent: The Information Commissioner**  
**2nd Respondent: The Crown Prosecution Service**  
**Heard on the papers: Field House**  
**Date of Hearing: 24 September 2012**

**Before**  
**C Hughes OBE**  
**Judge**

**and**

**Alison Lowton and Dave Sivers**  
**Tribunal Members**

**Date of Decision: 17 October 2012**

**Subject matter:**

Freedom of Information Act 2000

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal upholds the decision notice dated 1 March 2012 and dismisses the appeal.

Dated this 17th day of October 2012

C G Hughes OBE

Judge

## **REASONS FOR DECISION**

### **Introduction**

1. The Appellant was convicted of a VAT fraud and money laundering in July 2010 and is currently serving a term of imprisonment as a result. The trial lasted 11 weeks and there were full representations on disclosure issues considered by the Judge during the trial. There are on-going related criminal proceedings concerning another individual.
2. The Appellant continues to contest his conviction. In correspondence a Crown Prosecution Service (CPS) official with responsibility for his case informed his solicitors in March 2011:-

*“My obligations of disclosure to you following the conclusions of [the criminal] proceedings are to consider disclosure of material that might cast doubt upon the safety of [the Appellant’s] conviction. I am not in possession of any material that casts doubt upon the safety of [the Appellant’s] conviction either generally or specifically in relation to your suggestion that police officers in the case misled the Court during questioning as to whether they knew the whereabouts of [a named individual].*

### **The request for information**

3. On 11 August 2011, his solicitors made a request to the CPS for the following information:

*“I request... a copy of the [company name] report (the investigators report)”.*
4. The CPS responded on 9 September 2011 indicating that it could neither confirm nor deny possession of such a report relying on section 40(5)(b)(i) FOIA (personal information and section 30(3) (investigations and proceedings conducted by a public authority. On review the CPS confirmed this stance and stated that (having applied the public interest test) it was in the public interest that any trial be carried out in accordance with the criminal procedure rules and the disclosure regime which those rules provide for and that disclosure outside these rules would undermine that regime. It maintained the neither confirm nor deny stance.

### The complaint to the Information Commissioner

5. On 31 October 2011 the solicitors for the Respondent complained to the ICO and maintained that the report was held by the CPS and that it was in the public interest to disclose the report.
6. The ICO found that the request was made in the context of criminal proceedings and in his view s30 FOIA was the relevant provision. This provides for certain information relating to investigations to be exempt from disclosure and also for the duty to confirm or deny holding that information not to apply:-

*“30. – (1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-*

*(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-*

*i. whether a person should be charged with an offence, or*

*ii. whether a person charged with an offence is guilty of it,*

*(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or*

*(c) any criminal proceedings which the authority has power to conduct.*

*(2) ....*

*(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2)”.*

7. The ICO noted that investigations may be prejudiced by premature disclosure and that confidential sources may need to be protected from disclosure. While a neither confirm nor deny stance may not be sustainable where there is independent evidence that such information is held, he had invited the complainant to provide such independent evidence and none had been forthcoming.
8. He therefore explored the public interest balance in whether or not the existence or non-existence of the information should be confirmed. He noted that the connected proceedings at the time of the request were on-going and there was the possibility of proceedings in another jurisdiction; there was no evidence that information relating to the “confirm or deny” was in the public domain. He noted that confirming or denying that information was held could increase public confidence that the CPS was acting in accordance with the rules and also that the solicitors had argued that it was of importance to a possible appeal against conviction on the grounds that the CPS and police had withheld important evidence at the criminal trial.
9. The Commissioner concluded that in the light of the ongoing nature of related matters and the confirmation by the CPS that it held no information that could call into question the safety of the conviction the balance of public interest lay in maintaining the exemption from confirming or denying the existence of the material.

#### The appeal to the Tribunal

10. The Appellant (no longer acting through solicitors) appealed to this Tribunal against the Respondent’s decision on 4 May 2012. He stated:-

*“The information was suppressed at my trial and was first asked for in February 2011. It was refused in March and requested again and then requested from ICO. Their refusal was only received by me 15/4/2012 due to my complaining about my solicitor’s actions in my defence. My co-defendant is in custody in France and has knowledge of the information I have requested. This was suppressed at my trial and was vital in establishing my innocence. I am appealing the ICO finding and it is vital evidence which is required at appeal.”*

11. The Appellant is therefore seeking to challenge the decision of the First Respondent that the Second Respondent was entitled to neither confirm nor deny and he is also seeking to obtain the information that he believes exists for the purpose of his appeal.

#### Legal analysis and conclusion

12. The issue which this Tribunal has to consider is whether or not the First Respondent was right in law to decide that the Second Respondent was entitled to neither confirm nor deny the existence of this information.

13. The Appellant has not produced any independent (or indeed any) evidence that this material exists, and the assertion in his notice of appeal adds nothing to what was already considered by the First Respondent.

14. In his DN the First Respondent weighed the competing public interests of disclosure to enhance public confidence and trust in the CPS and criminal justice system, and in ensuring that evidence is available which might cast doubt on conviction, against the countervailing public interest in the protection of the confidentiality of the investigation process particularly while associated matters were unresolved. He found that since the CPS had a continuing duty to disclose any such material that might cast doubt on conviction and had considered the matter, that argument fell away and the only argument was the general argument for transparency, which was outweighed in this case by the need to protect the confidentiality of an ongoing investigation.

15. This approach is reinforced by the submissions of the Second Respondent. These demonstrate that, if the material existed, it would be because the second respondent is required to consider whether a person should be prosecuted for an offence and therefore falls with section 30(1)(c). It is in the public interest to ensure that criminal trials are conducted in accordance with the criminal rules of procedure and since there are ongoing criminal proceedings, confirming or denying the request could potentially prejudice other criminal trials. The Second Respondent has already confirmed that it holds no material which might undermine the conviction. Since section 30 is class based it is not necessary to show any actual prejudice to those criminal proceedings by confirming or denying that the information is held.

16. The Tribunal is satisfied that both Respondents have correctly carried out the analysis of the public interest. The fundamental public interest embodied in the exemption – ensuring that the Second Respondent can carry out its prosecution function – outweighs the interest in disclosure of whether or not this information exists. The Tribunal is satisfied that the Decision Notice correctly analyses the legal and factual issues and this appeal is without merit and is therefore dismissed.

17. Our decision is unanimous

Judge C Hughes

Date: 17 October 2012