

**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL  
(INFORMATION RIGHTS)**

EA/2015/0018

**B E T W E E N:-**

**CHRISTOPHER JOHN JACKSON**

**Appellant**

**-and-**

**THE INFORMATION COMMISSIONER**

**Respondent**

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**Tribunal**

**Brian Kennedy QC  
Suzanne Cosgrave  
Gareth Jones**

Oral Hearing: 23 July 2015. (26 June 2015).

Location: Bristol Magistrate Court...

Decision: Appeal Refused.

Appearances:

Appellant in Person

Respondent: Julianne Kerr Morrison of Counsel.

Subject Matter: Public Interest in disclosure of the disputed information and in maintaining the exemption, under 30(1) (a)(i) of the Freedom of Information Act 2000 ("FOIA").

Result: Appeal Refused.

Date of promulgation: 17<sup>th</sup> November 2015

## **Introduction:**

**1]** This is an appeal against a Decision Notice (“the DN”), issued by the Information Commissioner (“the Commissioner”) on 5 January 2015, (Reference FS50553030) involving the Ministry of Defence (“the MoD”). The DN related to a request for information made to the MOD on 6 January 2014. The papers before the Tribunal and the parties are in an Open Bundle (“OB”).

**2]** This appeal relates to the Appellant’s request for information about the MoD investigation into allegations, made by him, in respect of an alleged failure to carry out certain flight safety checking on the Sea King Mk3 helicopters (“the Request”).

**3]** The Commissioner concluded that the MoD is entitled to withhold all of the disputed information, relying on section 30(1) (a) (i) FOIA. Having considered the appellant’s Notice of Appeal, the Commissioner maintained that position.

## **Background:**

**4]** The background to this appeal starts on 23 March 2013 when the Complainant submitted a complaint to the MoD Police (“MDP”) alleging that certain aspects of testing on the Health and Safety Monitoring System (“HUMS”) wiring was not carried out prior to installation on the Sea King MK3 helicopters. Clearly this was a very serious allegation. The appellant raised his concerns in relation to the testing of the HUMS wiring as long ago as 2008. These concerns were investigated initially in 2009. The appellant has made allegations of fraud in relation to the HUMS testing and/or claims made in relation to the testing issue subsequently.

**5]** The MDP has statutory police powers, which enable it to conduct criminal investigations. Given the seriousness of the allegation made by the appellant, such an investigation was initiated in 2013 after he handed information to the MDP.

**6]** The MDP’s investigation results were revealed to the appellant on 6<sup>th</sup> January 2014 and in essence he was informed (a) there is minimal risk posed by the testing issue and that this risk does not impair aircraft safety; and b) no credible evidence had been found showing that any criminality had taken place. In outlining the outcome of the investigation, the MDP officer explained that his investigation had been “*two fold*” - in the light of the allegations made, the investigations had to cover the issue of the alleged lack of safety and criminality as these issues are intertwined.

**7]** On the same day (6 January 2014) the appellant submitted the request for information;

1. Details of the claimed report/reports from the military aviation authority MAA. Also reports in full
2. Details of the report/reports from the Royal Air Force
3. Full details of the investigation carried out by you into the case of

fraud by misrepresentation with regards to the HUMs Programme.

**8]** In response to a request for clarification sent by the MoD on 13 January 2014, the appellant clarified the scope of the request as set out at paragraph 3 of the DN. The MoD refused to disclose the disputed information relying upon, amongst other provisions, section 30 FOIA in response to both the request and the appellant request for internal review (see DN at paragraphs [4] and [6]).

**The Disputed Information:**

**9]** The Disputed Information consists mainly of witness statements, correspondence with the Military Aviation Authority (“MAA”) and the MDP Enquiry Officer’s notes. The Tribunal has seen this information in a Closed Bundle (“CB”).

**Section 30 FOIA:**

**10]** Section 30(1) FOIA is a class-based exemption, which provides, so far as relevant, as follows;

*“(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 - -“*

**10]** The Tribunal, having considered carefully the contents of the CB, accept the Commissioners assertion that; *“the disputed information is clearly information held by the MoD for the purposes of a criminal investigation”* and further that the Commissioner was correct when he held that the MoD was and is entitled to rely on Section 30(1)(a)(i) to withhold the disputed information (see DN at paragraphs [13] – [15]).

**The Public Interest Balance:**

**11]** At paragraphs 16 – 26 of the DN the Commissioner outlined the submissions of the parties on the applicable public interest factors and at paragraphs 27 – 36 of the DN he set out his reasoning for his assessment of the public interest balance.

**12]** The Commissioner rejected certain arguments advanced by the MoD namely the argument that (a) disclosure would be unfair to the subjects of the investigation; (b) the MoD’s claim that in effect the investigation was live at the time of the request; and (c) disclosure would impact on any re-opening of the investigation although the Commissioner concluded such a re-opening was unlikely (See DN at paragraphs [29 – [31]).

**13]** However the Commissioner's reasoning in his DN at paragraphs [32] – [34] as follows;

- (a) the nature of the disputed information, was as noted above essentially comprises witness statements, discussions with third parties and the investigating officer's notes – represents significant, and indeed sensitive, information which forms the major part of the MDP's investigation file:
- (b) as a result of the nature of the information, the MoD was entitled to argue that disclosure of such information risks having an adverse effect on the willingness of individuals to assist the MDP in its investigation, and indeed other police forces, with other investigations in the future; and
- (c) in particular, the disclosure of witness statements was, in the view of the Commissioner, likely to have a deleterious impact on the police's ability to secure the co-operation of individuals in the future. The Commissioner observed that he was not persuaded by the appellant's argument that a witness has nothing to fear if they have told the truth. For example, there are many situations in which, in particular, criminal investigations have to rely on the co-operation of individuals in relation to allegations made against their colleagues, superiors and other closely connected individuals. The public interest factor of maintaining the exemption attracted particular weight in this case given that, as at the time of the request, the information had been generated only a number of months previously.

**14]** Turning to the public interest in the disclosure of the disputed information, the Commissioner recognised that the issue at the center of the request, namely aircraft safety, is clearly one of significant and broad public interest (see DN at paragraph [34]). This interest is not an interest, which is simply a concern, or private interest of the appellant. Disclosure of the disputed information would provide the public with a clear understanding not only of the original safety issues that were raised by the appellant and how they were addressed, but would also provide the public with some insight into the MDP's investigation into criminal allegations made by the appellant and how they were addressed, but would also provide the public with some insight into the MDP's investigation into criminal allegations made by the appellant.

**15]** More broadly, the Commissioner also recognised that disclosure of the disputed information would provide the public with some insight into how individuals – such as the appellant - are treated when they raise concerns such as these with their employer. Importantly, having reviewed the disputed information, the Commissioner made clear that while he recognised this public interest, he did not consider that the contents of the disputed information could be used to support the suggestion that the MDP investigation was unfair or lacked credibility.

**16]** Overall, the Commissioner concluded that the balance of the public interest *"narrowly favours maintaining the exemption"* (DN at paragraph [35]).

He reached this decision in light of the recent age of the information and the significant risk he believed that its disclosure would have on the future provision of information to the police. In reaching this decision, the Commissioner emphasised that he was in no way dismissing the significance of the issues raised by the appellant. As the Commissioner stated his conclusion rested on the fact that:

*“ - - in his opinion the benefits that would be gained by the disclosure of this information in terms of providing greater transparency and openness in relation to this particular investigation are outweighed by the broader detrimental impact on future police investigations in general.”*

### **The Grounds of Appeal:**

**17]** The Commissioner identified what we accept are the relevant arguments within the grounds of appeal as follows;

- (a) The appellant challenges the Commissioner’s conclusion that section 30 FOIA entitled the MoD to withhold information where that information relates to safety rather than criminality. In making this argument, the appellant refers to the e-mail from the MDP official in which he explained that his investigation was “*two fold*”, which the appellant refers to as stating that the investigation was in “*two parts*”, While the Commissioner notes the indication that his investigation had been “*two fold*”, the issue of safety and the question of whether any criminal acts were committed are clearly intertwined and the subject of a single overall investigation prompted by the appellant’s allegations. All of the information is held for the purposes of the investigation whether it relates specifically to safety issues as opposed to allegations of criminality – section 30 FOIA therefore applies. Turning to the public interest balance, and having reviewed the disputed information, the Commissioner does not consider it to be appropriate to divide up the disputed information in the manner suggested and/or that such a division is possible in relation to all of the disputed information. These points, the Commissioner argues, also address the argument made by the appellant in response to paragraph 13 of the DN and we will return to this later.
- (b) As to the public interest in disclosure, the appellant refers to the fact that the procurement to which his allegations and the MDP’s investigation relate involved the expenditure of a considerable amount of public money, as well as the need for public scrutiny (to ensure, for example, the RAF and MAA were given the full facts on the issues). The commissioner acknowledged that these public interest factors were relevant; however, for the reasons given in the DN he remained of the view that the public interest balance favours maintaining the exemption.
- (c) The appellant also raised a number of similar points that he made to the Commissioner in the course of the Commissioner’s investigation of the complaint about his request. In particular, the appellant argues that there is no need to withhold information if it doesn’t contain evidence of

wrongdoing. The appellant contending that it is merely “*supposition*” to suggest that disclosure would have a detrimental or deterrent effect on potential witnesses and others in future investigations. In response the Commissioner referred to his reasoning as set out at paragraph [33 in his DN.

- (d) As the Commissioner has pointed out, it is apparent throughout his investigation, and this appeal, that the appellant is aggrieved by the outcome of the MDP’s investigation. The Commissioner suggests and we agree, that in explaining the outcome he is seeking by way of this appeal, as the appellant himself puts it;

*“ - - To gain information that will allow me to clear my name. As a result of this case I have been removed from employment and been branded as untrustworthy the result of this to my professional and personal life has been substantial – I would – like to take this case further to regain the lifestyle that I have lost as a result. Most of all I would like to gain peace of mind. Why is it given to some but not me? The release of all information would allow this matter to be resolved.”*

**18]** As the Commissioner pointed out, the appellant, in his grounds of appeal the refers repeatedly to the fact that he needs the disputed information for the purposes of his “*case*” , stating “ - - *I am not interested in releasing the information to the public at large, it is merely pivotal to my case*”.

**19]** We accept the Commissioner’s submissions, based on our own comments at the hearing, that it is not the role of the Commissioner, or this Tribunal, to determine whether or not the disputed information should be disclosed for such purposes as he has stated and we have referred to above. We too are sympathetic to the appellant’s position but his private needs are irrelevant in determining the public interest balance.

**20]** We recognise, as has the Commissioner, the significant public interest in aircraft safety issues as well as the depth and strengths of the appellant’s concerns in this regard. However this Tribunal is not the forum for the appellant to seek a remedy for his grievance/s and we must only consider the exemption that is engaged and whether or not the public interest requires disclosure.

**21]** We have not been persuaded that the Commissioner was wrong in the reasoning he gave in his DN that the public interest, in all the circumstances of the case, lies in maintaining the exemption and outweighs the public interest in disclosing the information. Two main factors weigh significantly in favour of withholding the disputed information; a) the fact that the disputed information is the compilation of material collated in the course of a Police investigation concerning the safety of aircraft in the context of a criminal investigation b) the risk that disclosure of such information risks having an adverse effect on the willingness of individuals to assist the MDP in its future investigations.. The Tribunal has had the advantage of carefully considering

the disputed information in the course of a closed session and have confirmed to our satisfaction that the material is inextricably linked almost in its entirety to a serious criminal investigation. As a consequence of our closed session hearing one document relating to a contract was identified as perhaps distinguishable in that it could be seen in isolation of the need for confidentiality and that document, subject to redaction of personal data of individuals, has during the course of this hearing now been released to the appellant.

**22]** We are satisfied that it is not possible to “carve up”, as the Commissioner has described it, the remaining investigation documents that comprise the disputed information. Two particularly significant reasons for this are apparent to us;

- a) The weight of the significance of the statements of evidence held is largely determined by the identity of the relevant individual, as well as their qualifications and experience. Disclosing limited sections of unattributed material would not achieve the public interest factors in favour of disclosure sought by the appellant, while at the same time giving rise to at least part of the harm that would flow from disclosure, and;
- b) There is substantial overlap in the material in relation to the issues of ‘criminality’ and safety. Not that we can or do comment on evidence of criminality in any detail or with any import on its veracity, as it is not our place to do so, but the investigation conducted by the MDP was twofold and considered both issues. As the appellant is aware the investigation considered both issues because it was alleged criminality which purported to flow from the appellant’s opinion as to the safety hazard posed by the subject matter of testing the HUM’s.

**23]** The Commissioner has properly recognised that there is a significant and broad public interest in the disclosure of the disputed information because it relates to the issue of aircraft safety. There is also a public interest in the disclosure of information, which provides;

- (a) an insight into the MDP’s criminal investigation (i.e. whether it was fair, thorough and so forth), and ;
- (b) an insight into how safety concerns like those raised by the appellant are investigated, and how such individuals are treated by their employers when they raise such concerns. We note in particular paragraph 34 of the DN at page 8 of the OB. The appellant has raised genuine concerns and his employer has applauded him for doing so. The ongoing dispute that concerns the appellant appears to be whether those concerns have been addressed properly or adequately. The appellant says they have not. Others, of standing, say they have. This apparent dispute is not a matter for this Tribunal.

**24]** Having carefully considered the contents of the closed material containing the disputed information, the Tribunal accepts the Commissioner's submissions on the following;

- a) the extensive material that has been withheld reflects a comprehensive and broad investigation. There is also no apparent basis for suggesting that the investigation was unfair or improper; and
- b) there is no inconsistency between the contents of the disputed information and the account of the outcome of the MDP's investigation as reported to the appellant.

**25]** We have not been persuaded by the appellant or any of the evidence before us that the Commissioner was wrong or erred in the reasoning and conclusions in his DN. We accept his closing submission that disclosure under FOIA, particularly in light of the format in which the material is held, could lead to a "trial" in the court of public opinion and early disclosure of the material of the type which is being withheld in this case would have a chilling effect on possible further investigations and is certainly not in the public interest.

**26]** Accordingly, we must refuse this appeal. We wish to thank counsel for her diligence, care and sensitivity throughout.

Brian Kennedy QC

13 November 2015.