



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2018/0202

**Determined, by consent, on written evidence and submissions
Considered on the papers on 17 April 2019 and 21 June 2019**

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Dr Henry Fitzhugh
and
Mr John Randall CBE

Between

BBC

Appellant

and

**The Information Commissioner (1)
Office of the Police and Crime Commissioner for West Yorkshire (2)**

Respondents

BACKGROUND

1. The background to this case is explained in the Commissioner's decision notice dated 16 August 2018. The Commissioner states that the Office of the Police and Crime Commissioner of the West Yorkshire Police Authority (OPCC) advises that the following is in the public domain and we repeat it here:-

“Neil Taggart was a former councillor in Leeds (between 1980 and 2014), Lord Mayor of Leeds (in 2003) and Chair of the West Yorkshire Police Authority (between 1998 and 2003). He was sentenced to 32 months in prison on 04/07/2017 after being convicted of making, possessing and distributing indecent images of children between 2010 and 2016. This information has been widely reported by local media”.

2. We understand that West Yorkshire Police Authority was superseded by the OPCC in 2012.
3. A request for information was made by Nicky Hudson on behalf of the British Broadcasting Corporation (BBC). On 3 October 2017, 5 December 2017 and 17 January 2018 requests were made to the OPCC and in the following terms:
 - 1) Did the office of the West Yorkshire Police and Crime Commissioner have a hard drive and/or any computer peripherals or storage devices (floppy discs/tapes/memory sticks) that had been used by the former West Yorkshire Police Authority Chairman Neil Taggart?
 - 2) How long was the computer hardware in your possession? From what year has it been in storage with the office of the PCC?
 - 3) Did [name removed] keep this computer equipment from his time as [job title removed] West Yorkshire Police Authority?
 - 4) How long has the computer equipment been in the possession

of [name removed]? From what year?

- 5) Has this computer equipment been stored in a safe?
 - 6) Why was this computer equipment kept?
 - 7) What information was on this computer equipment that you wanted to keep?
 - 8) Has this computer equipment been given to West Yorkshire Police?
 - 9) When was this computer equipment given to West Yorkshire Police?
 - 10) Has this computer equipment been analysed by West Yorkshire Police?
4. Upon each request being received the OPCC responded, on 27 October 2017, 14 December 2017 and 31 January 2018 respectively. On the first two occasions the OPCC decided to neither confirm nor deny holding any information citing, and cited section 31(3) FOIA (law enforcement). On the third occasion it cited section 14(2) FOIA on the basis that this was a repeat request.
 5. An internal review of all three requests was requested on 2 March 2018. On 23 March 2018 the OPCC withdrew its reliance on section 14(2) FOIA but maintained its position in respect of 31(3) FOIA for all three requests.
 6. The Appellant complainant to the Commissioner on 12 April 2018 about the way her request for information had been handled.
 7. The Commissioner noted that the OPCC had made a confidential submission to the Commissioner, and this had been taken into account but not set out in the decision notice.

THE LAW

8. This is a sensible place to set out the relevant law as it is relied upon by the

Commissioner in the decision notice and the response to this appeal by the OPCC and the Commissioner. Section 31 FOIA states that:

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice

...

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

9. Section 31(3) FOIA provides that a public authority is not obliged to confirm or deny holding information described in a request if to do so would, or would be likely to, prejudice any of the matters mentioned in section 31(1) FOIA. In the decision notice, the Commissioner explains the effect of the guidance she issues on this point as follows:-

The Commissioner's guidance on section 31 explains that the prejudice in terms of section 31(3) will depend on how the request is phrased. Typically, where a request identified an individual or an organisation as the possible subject of an investigation, or a particular line of enquiry a public authority could be pursuing, the more chance there is that confirming the information's existence would, or would be likely to, prejudice that investigation.

The guidance goes on to explain that there is a need, in some circumstances, to apply the neither confirm nor deny (NCND) provision consistently. Where confirmation or denial would reveal whether a particular party was under investigation and where this would, or would be likely to, prejudice such an investigation, public authorities should be alert to the need to apply the NCND provision.

10. In our view, the guidance correctly sets out the approach to be taken by the OPCC, the Commissioner, and also now by the Tribunal.

11. S31 FOIA is a qualified exemption, and is therefore subject to a public interest test.

APPLICATION OF THE LAW BY THE COMMISSIONER

12. The Commissioner explained that the OPCC had relied on the matters set out at sections 31(1)(1)(b) and 31(1)(c), namely the apprehension or prosecution of offenders, and the administration of justice, and said:-

The issue for the Commissioner to consider in this case is whether confirming or denying that the requested information is held would, or would be likely to, prejudice the apprehension or prosecution of offenders or the administration of justice.

When considering a prejudice based exemption such as this the Commissioner will:

- identify the applicable interests within the relevant exemption;
- identify the nature of the prejudice and that the prejudice claimed is real, actual and of substance;
- show that there is a causal link between disclosure and the prejudice claimed; and,
- decide whether prejudice would or would be likely to occur.

13. The approach of the Commissioner to these issues can be summarised as follows:-

- (a) If the OPCC confirms or denies that it holds any of the requested information that would effectively disclose whether there was still an investigation into the named party, and therefore this relates to the apprehension/prosecution of an offender and the administration of justice.
- (b) The OPCC had explained that disclosing potentially sensitive information about a police investigation could undermine the

investigative processes. Relying in addition on more specific closed submissions made by the OPCC, the Commissioner was of the view that there was sufficient evidence that confirmation or denial as to the existence of the requested information would be likely to result in a real and significant likelihood of prejudice to the apprehension or prosecution of an offender and the administration of justice.

(c) Although the Appellant had argued that the information was already in the public domain, in the Commissioner's view there was only suspicion as to the existence of the information.

(d) The OPCC was able to show a causal link between disclosure and the prejudice claimed, and also that this prejudice would be likely to occur.

14. As the exemption in section 31(3) FOIA is qualified by the public interest test in section 2(2)(b) FOIA, the Commissioner considered whether the public interest in maintaining a neither confirm nor deny (NCND) stance outweighed the public interest in confirming whether or not any information is held.

15. The Commissioner recognised that revealing whether the information was held would better inform the public about investigative processes and the investigation into the individual case. There would also be increased transparency and confidence in relation to the OPCC. However, the Commissioner recognised the very strong public interest in protecting law enforcement capabilities and any further investigations. On balance she decided that the public interest favoured non-disclosure.

16. The Appellant's appeal is dated 12 September 2018. The appeal concentrates on the public interest balance struck by the Commissioner, and it is argued that the public interest in disclosure is much stronger than assessed by the Commissioner. It is said that the Appellant 'believes' that a number of matters are true about a hard drive which it is said is relevant to the investigation, and an 'understanding' as to when the hard drive had been examined. It is believed that fundamental questions are raised about the decision-making of the police and the investigation of crime. It is believed that NCND is being used to avoid disclosing information that may reveal unlawful activity. The Appellant emphasises transparency, accountability, public understanding and public reassurance.

17. The Commissioner responded to the appeal on 9 November 2018 on the basis that it was accepted that the exemption in s31(3) FOIA applied, and the issue was whether the public interest otherwise favoured disclosure. The Commissioner repeated the findings in the decision notice set out above. The Commissioner also pointed out that:-

'should the police come to a decision regarding any possible investigation - either not to take any further action, or to reach a conclusion and make a charging decision- the important objectives of transparency and accountability can be achieved then, without prejudicing law enforcement objectives'.

18. The Appellant replied to this on 22 November 2018. It was not, in fact, accepted that the exemption in s31(3) FOIA was correctly applied as the Appellant had not seen the confidential submissions made by the OPCC and did not know what investigations were ongoing. It was said that it was understood that a decision had been made that no further charges would be brought. It was argued that it was hard to see why the existence of the hard-

drive and how, and for how long, it had been stored, should be subject to a NCND response.

19. In relation to the public interest test, the following matters were referred to:-

- (a) The public interest in establishing whether there had been a cover up of information.
- (b) That the Appellant had 'grounds to suspect' that a hard-drive had been kept from the police even after Mr Taggart was arrested.
- (c) That there was a public interest in knowing the 'facts surrounding the hard drive' and why it was not available to the police investigation as 'this could suggest activity ranging on a spectrum from incompetence to genuine corruption'.
- (d) The public interest in ensuring confidence in the police, and police accountability; and in clearing up misconceptions or indicating that suspicions of wrongdoing are justified.
- (e) The fact that Mr Taggart had been released from prison at the start of October 2018 'is crucial in assessing the OPCC's reliance on section 31(3) of FOIA.

20. As a result, the Commissioner made further submissions on 15 February 2019 which addressed the applicability of the s31(3) FOIA exemption.

21. The essential point made by the Commissioner is that in the very specific circumstances of the request (made with a named individual included), confirming or denying any details relating to the matters raised would have a 'direct and significant impact on any potential legal investigation or proceedings connected with that individual'. The Commissioner then referred to the matters raised in the decision notice as explaining why the exemption in s31(3) FOIA was applicable.

FURTHER PROCEDURAL MATTERS

22. The Tribunal first considered this case on the papers on 17 April 2019. However, there was some lack of clarity about the closed information provided by the OPCC and the Commissioner. Therefore we issued closed directions to the OPCC and the Commissioner, the responses to which provided the necessary clarification. Having considered the responses and additional documents it is our view that s14(6) of the Tribunal rules should be applied to prevent disclosure to anyone other than the Commissioner and the OPCC. To do otherwise would defeat the purpose of the proceedings.
23. We note that there is a 'no reporting' order issued in the Leeds Crown Court on 4 July 2017, which is relevant to the subject matter of the request.
24. The Tribunal was not able to convene again to consider the case until 21 June 2019, and the decision has been issued as soon as possible thereafter.

CONSIDERATION

25. In this case we accept that to confirm or deny that the information was held would have effectively disclosed whether there was still a live investigation into an offence, and therefore this relates to the apprehension/prosecution of an offender and the administration of justice.
26. We also accept that disclosing potentially sensitive information about a police investigation could undermine the investigative processes. In our view this would be true about very many investigations which may be ongoing. The Commissioner relied in addition on more specific closed submissions made by the OPCC, to form the view that there was sufficient evidence that confirmation or denial as to the existence of the requested information would be likely to result in a real and significant likelihood of

prejudice to the apprehension or prosecution of an offender and the administration of justice.

27. We have also reviewed that submission and further information and agree with that analysis. However, although the Commissioner did not issue a closed part to the decision notice, in our view it is necessary for us to issue a closed judgment to supplement our open reasons, and we have done that.
28. We also agree with the Commissioner that although the Appellant had argued that the information is already in the public domain, what the Appellant has expressed is only a suspicion as to the existence of the information, and therefore it has not been established that the information sought is in the public domain. We also agree with Commissioner that the OPCC was able to show a causal link between disclosure and the prejudice claimed.
29. In relation to the point made by the Appellant that the release from prison of Mr Taggart at the beginning of October 2018 (if, indeed, that is what has happened) was crucial to the application of the s31(3) FOIA, we would note that our job is to assess the applicability of any exemptions at the time the request was made, and thus the date at which we are considering the position is 21 January 2018, which is well before the release of Mr Taggart. That is also the case even if we consider the position on review on 23 March 2018. Mr Taggart's release would only be relevant (if at all) to a request for information determined after the date of his release.
30. As the exemption in section 31(3) FOIA is qualified by the public interest test in section 2(2)(b) FOIA, the Commissioner considered whether the public interest in maintaining a neither confirm nor deny (NCND) stance outweighed the public interest in confirming whether or not any information is held.

31. We agree with the Commissioner that revealing whether the information is held would better inform the public about investigative processes and the investigation into the individual case. There would also be increased transparency and confidence in relation to the OPCC. As the Appellant submits disclosure may go some way towards establishing exactly what is the current position in relation to any further evidence that may be in existence.
32. However, we also agree with the Commissioner that there is a very strong public interest in protecting law enforcement capabilities and any further investigations.
33. In our view this strong public interest in protecting law enforcement capabilities outweighs any other interests in disclosure. We have expanded on this point in the closed judgment.
34. On that basis this appeal is dismissed. There are no further steps that the Commissioner or the OPCC are required to take.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 2 July 2019

Promulgation date: 30 August 2019