



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

Appeal Reference: EA/2018/0277

Between

THOMAS BURKE

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

SECRETARY OF STATE FOR INTERNATIONAL DEVELOPMENT

Second Respondent

**TRIBUNAL: Judge Moira Macmillan
Mrs Suzanne Cosgrave
Mr Michael Jones**

**Decided on the papers pursuant to rule 32(1)(b) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009
On 11 September 2019 and 3 October 2019**

Subject matter: s. 31 Freedom of Information Act 2000
ICO Decision Notice FS50774119

DECISION

For the reasons set out below the appeal is allowed in part.

SUBSTITUTED DECISION NOTICE

Public Authority: The Department for International Development

Complainant: Mr Thomas Burke

Decision

For the reasons set out below, the Tribunal decides that the Public Authority failed to deal with the Complainant's request for Information made on 22 December 2017 in accordance with FOIA in that they ought to have made additional parts of "05-17 IAD Investigation Report - Development Aid from People to People (DAPP)" as referred to below available to the Complainant.

Steps to be taken

The Public Authority must by 17.00 on 16 January 2020 supply to the Complainant the following:

- 1) A re-formatted copy of the report reflecting the original page numbering and headings, redacted only to the extent indicated in the Closed Schedule hereto; and
- 2) Those parts of the report indicated as being disclosable in the Closed Schedule.

REASONS FOR DECISION

Factual background

1. This appeal concerns an information request made by Mr Burke to the Department for International Development ('DFID') on 22 December 2017 about its funding arrangements with a charity in Malawi called Development Aid from People to People ('DAPP Malawi').
2. On 2 August 2016 the BBC broadcast a radio programme in which it alleged that DAPP Malawi was under the control of an international organisation called the Teachers Group, and that the leadership of the Teachers Group was implicated in criminal misconduct. The programme followed a joint

investigation between the BBC and the US Centre for Investigative Reporting ('CIR'). One of the allegations was that staff working for DAPP Malawi were forced to pay a portion of their salary to the Teachers Group.

3. At the time of the broadcast DFID was funding DAPP Malawi as a primary partner in 2 projects. The funding was by way of an Accountable Grant, which is an arrangement based on a mutual agreement between parties about services to be delivered and a payment schedule associated with outcomes.
4. Following the BBC broadcast DFID suspended payments to DAPP Malawi under the Accountable Grant. Officers from DFID's Counter Fraud Service ('CFS') carried out an investigation in Malawi between 5 - 11 August 2016.
5. On 16 August 2016 a submission about the investigation was made to a department minister to which a draft report was attached. A redacted copy of this submission was disclosed to Mr Burke on 26 July 2018 following an information request he made on 17 May 2018.
6. This appeal relates to the final version of the report that was attached to the submission. It was finalised on 14 September 2016 and on 5 October 2016 DFID decided to terminate all DAPP Malawi programmes in place at the time.
7. Mr Burke is associated with the CIR. Following CIR's reporting of the outcome of the joint investigation, two representatives of DAPP Malawi have brought a defamation claim in the US against CIR and two of its investigative journalists, seeking punitive damages.

The Request and DFID's response

8. On 22 December 2017 Mr Burke requested from DFID:
 - i. *The DFID internal assessment in early August 2016 of allegations concerning DAPP [referred to in a letter sent to Mr Burke on 28 November 2017];*
 - ii. *[confirmation of] whether DFID funding to DAPP Malawi remains suspended or has been terminated, and if it was terminated, the date upon which the decision to terminate was taken; and*
 - iii. *[If funding to DAPP Malawi remains suspended or has been terminated], any final report which underpins the decision to continue to suspend or terminate such funding.*
9. On 25 January 2018 DFID responded to Mr Burke, confirming that it held information falling within the scope of his request which it considered to be exempt from disclosure under sections 31, 36 and 43 of FOIA. DFID

explained that it needed more time to consider the balance of public interest test.

10. On 29 March 2018 DFID provided a substantive response. In response to request part (i) DFID explained that it held an Internal Audit Investigation Report ('the Report') but considered this exempt from disclosure on the basis of sections 31(1)(a) & (b), 40(2), 41(1) and 43(2) of FOIA. In relation to request part (ii) DFID told Mr Burke that funding for DAPP Malawi had been suspended during DFID's internal investigation and terminated on 5 October 2016. In relation to request part (iii) DFID explained that DAPP Malawi was not barred from bidding for other work with the department.
11. On 24 May 2018 Mr Burke requested an internal review of this decision. When the result of the review was not forthcoming on 30 July 2018 Mr Burke complained to the Information Commissioner.

The Commissioner's Investigation and Decision Notice

12. The Information Commissioner investigated the complaint. She issued Decision Notice FS50774119 ('the DN') on 13 November 2018. At this stage DFID had still not completed its internal review but it had indicated its intended response in correspondence with the ICO (see OB/132 - 144).
13. During the investigation Mr Burke argued that s. 31 should not apply to the information in the report because it was too late to prevent any crimes that may have been committed. He also raised the public interest of protecting the freedom of speech of journalists as considered by CJEU in *Magyar Helsinki Bizottag v Hungary (18030/11)* which he argued was relevant given the US litigation against CIR.
14. The Commissioner concluded that the majority of the Report came within the s. 31(1) exemption. In doing so the Commissioner accepted DFID's argument that disclosure of a confidential report would be likely to prejudice future law enforcement because it would have 'a chilling effect' on those who provide information to such investigations on an understanding of confidentiality. The Commissioner was not persuaded by DFID's secondary argument under s. 31 (1) that disclosure would prejudice future investigation because it would reveal details of DFID's investigatory techniques.
15. Because s. 31 is a qualified exemption, the Commissioner went on to consider the public interest test set out in s. 2 (2) (b). She concluded that, although there is a significant public interest in transparency in relation to DFID's use of public funds for overseas development, and in its response to allegations of the misuse of such funds, there was also a 'very important' public interest in ensuring that DFID was able to carry out robust investigations in order to safeguard the use of such funds.

16. The Commissioner dismissed Mr Burke's argument in relation to the *Magyar* case on the basis that the UK's domestic law does not yet recognise a general right of access to information under Article 10 of ECHR. She concluded that the public interest 'narrowly favours' maintaining the exemptions contained in s. 31(1)(a) & (b).
17. The Commissioner decided that DFID should disclose to Mr Burke any part of the Report which does not contain information provided by a 3rd party or comments on 3rd party information.
18. The Commissioner rejected DFID's argument that s. 43 (2) FOIA was equally engaged by the material. She did not consider DFID's arguments in relation to ss. 40 (2) and 41 (1) because she concluded that s.31 (1) applied to those parts of the Report DFID had indicated would be subject to these exemptions.
19. Once the DN had been issued DFID sent further correspondence to the Commissioner and obtained her agreement to some further redactions. (OB/149-153).
20. DFID then disclosed a redacted version of the Report to Mr Burke which is 4 pages long. The unredacted report is 18 pages long.

The Legal Framework

21. Section 31 of FOIA provides as follows:

Law enforcement.

- (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) ...

22. The application of this exemption requires consideration of a prejudice-based test. The prejudice must be real, actual or of substance, and in this context "likely" means a very significant and weighty chance of prejudice to an identified public interest.¹
23. The public interest balancing test is described in s.2 (2) as circumstances where '*the public interest in maintaining the exemption outweighs the public interest in disclosing the information*'.

¹ R (Lord) v Secretary of State for the Home Department [2003] EWHC 20173 (Admin) para 106

24. S. 40 (2) provides an exemption for the disclosure of personal information if specified conditions are satisfied. One of these conditions is contravention of a data protection principle, including the principle of lawfulness, fairness and transparency set out in Article 5 (1) (a) of GDPR. However, disclosure of personal information may still be lawful where it is necessary for the legitimate interests of a third party.²

Grounds of Appeal

25. In Grounds of Appeal dated 11 December 2018 Mr Burke seeks disclosure of the redacted portions of the Report. He accepts that s. 31 is engaged but submits that the Commissioner has wrongly weighed the balance of competing public interests. He suggests that the identities of those who provided information could be protected while still allowing disclosure of additional information.

26. Mr Burke argues that transparency concerning aid funding is an overwhelming reason for disclosure. He says that the Commissioner has placed too great a weight on the argument that disclosure would inhibit future willingness to provide information to DFID investigations. This is because the department 'holds the purse strings.' and because those who provided information must have anticipated publication. He argues that those who provided information are aid workers who will take the same view as him of the strong public interest in publishing information about financial wrongdoing, and that they would have anticipated publication.

27. Mr Burke states that he is not appealing the Commissioner's conclusions on the applicability of *Magyar* but argues that she failed to consider the public interest of protecting the freedom of speech of journalists.

28. Mr Burke challenges the Commissioner's description of the redacted information as being a 'very detailed analysis' because the redacted Report is 4 pages long and is numbered in a way that suggests the original is the same length.

Submissions

29. The Commissioner notes that Mr Burkes does not challenge her conclusion that s. 31(1) is engaged. She explains that the unredacted Report is considerably longer than 4 pages and reiterates her observation that it is a detailed analysis of the issues. She submits that the public interest in that transparency has been satisfied by revealing that an investigation has taken place and by partial publication of the Report.

² GDPR Art 6 (1)(f)

30. The Commissioner submits that it is unrealistic to argue that DFID could compel individuals to cooperate with future investigations. She observes that there are different degrees of cooperation in such a context. The Commissioner observes that significant changes have been made in the past to government policy due to investigation reports of this nature. She argues that there is a strong public interest in avoiding prejudice to future reports.
31. The Commissioner submits that the outcome of the defamation litigation in the US is a private interest rather than a general public interest.
32. The Secretary of State adopts the Commissioner's submissions as they relate to s. 31 (1). He observes that DFID has no statutory powers to compel cooperation with any investigation. CFS investigations are conducted in accordance with the confidentiality principle set out in the Guidelines of the Conference of International Investigators. CFS investigation reports are not shared externally other than with fraud investigation agencies and then under a sharing agreement.
33. The Secretary of State submits that the public interest in transparency has already been served in part by the earlier publication of the redacted submission of 16 August 2016.
34. He states that the individuals who gave information to the CFS investigation include DAPP Malawi employees and beneficiaries of DAPP Malawi projects. The Secretary of State argues that it is naive to assume that individuals who live in a State where the rule of law is weak will want information of this nature to be made public. There is a real risk of reprisals and the Report cannot be disclosed with fewer redactions while still protecting the identity of 3rd parties. This is because of the risk they will be identified from the specific information they provided.
35. In relation to the US litigation the Secretary of State argues that the issue of freedom of speech, if engaged, will be managed by a sophisticated legal system with the power to obtain documents in the possession of 3rd parties in the UK.
36. The Secretary of State contends that, should the Tribunal find that s. 31 is not engaged by the Report, s. 40 (2), 41 and 43 should be considered.
37. In reply Mr Burke states that the basis for invoking s. 31 in the context of a DFID investigation is marginal and unsubstantiated. However, he acknowledges that this was not raised in his Grounds of Appeal. He asks the Tribunal to consider ordering DFID to provide a summary of the withheld material.

Relevant findings of fact

38. Notwithstanding the comments in Mr Burke's reply, it is accepted between the parties that s. 31 is engaged by the Report.
39. We agree that the s. 31 (1) (a) exemption is engaged by the DFID investigative process. It seeks to prevent prejudice to the prevention or detection of crime. We find that the investigation of crime is not limited to an investigation carried out with the objective of bringing a criminal prosecution. Two objectives of the CFS Malawi investigation were to detect whether a crime had been committed and to prevent the repetition of unlawful behaviour. These objectives will be equally present in future investigations.
40. We also find that the s. 31 (1) (b) exemption applies to the Report since, at the date it was written, the investigation of potential wrongdoing was not complete and there is nothing to suggest that this had changed at the date of request.
41. We note that DFID did not challenge the Information Commissioner's finding that some of the Report could be published. We conclude that DFID must have been satisfied that the information already disclosed in the redacted Report was not information received in confidence during the course of CFS's investigation and did not require the protection of the s. 31 (1) exemption.

Public interest in disclosure

42. We have considered several public interest factors in favour of further disclosure. There is clearly a general public interest in openness and transparency about DFID's conduct in terms of how it uses public money, how it responds to allegations of misuse and the effectiveness and robustness of its investigations.
43. We agree with the Commissioner's conclusion that there is significant public interest in this transparency, which is increased by DFID's public stance of having a zero-tolerance approach to misuse of funds, giving rise to a public interest in transparency about the actions taken in support of this approach.
44. In the present case the public interest in transparency is further increased by the BBC's reporting of alleged wrongdoing, giving rise to an important public interest in transparency about how DFID's zero tolerance policy has been applied.
45. There is also a strong public interest in the publication of the outcome of the investigation, although we note that the publication of the report's conclusion may not reveal a substantive position.

46. We have also considered several public interest factors against further disclosure. The Secretary of State has identified a number of documents relating to this investigation that have already been published, giving rise to increased transparency.
47. There is also a clear public interest in not undermining investigations into fraud and misconduct. We agree with the Commissioner's assessment of the importance of confidentiality, and in particular being able to rely on an assurance of confidentiality when speaking to individuals who have no contractual or other obligations to cooperate with the investigation.
48. We consider an assurance of confidentiality to be key when encouraging people to come forward and instilling confidence in 3rd parties that they can give a frank account to investigators without fear of reprisals.
49. We note the Commissioner's conclusion in paragraph 39 of the DN that the public interest balance test narrowly favours maintaining the s. 31 exemption from disclosure.
50. In light of this finely balanced decision, had the information released by DFID about this investigation in any way misrepresented its position we consider there might have been greater weight in favour of transparency. Having reviewed the withheld information, however, we have found no basis to conclude that DFID has been anything other than transparent in terms of the information it has released in respect of this investigation. The evidence suggests that DFID has not sought to avoid its responsibility and has followed FOIA processes.
51. We have considered the public interest in freedom of speech both generally and in the context of the US litigation. Mr Burke has asked the Tribunal to give weight to a wider public interest in defence of freedom of speech in the context of the US litigation. We have concluded that the conduct of this litigation, as described by Mr Burke, is a private interest rather than a general public interest.

Conclusions

52. We find that the s. 31 (1) (a) and (b) exemptions apply to information given to this investigation in an expectation of confidentiality and to the analysis of any such information.

53. We have considered Mr Burke's request for a summary of the withheld information. We find that DFID has already published summaries of the content of the investigation in both the redacted report and the redacted 16 August 2016 submission to ministers.
54. We have concluded that it is not appropriate for the Tribunal to second guess the Information Commissioner and DFID's assessments of the information within the Report that cannot be disclosed without revealing either information given to the investigation in confidence or an analysis of such information, other than in relation to the Report's Contents page.
55. We find that the headings currently redacted from the Contents page are so general in nature that they do not meet the description of being information given to the investigation in confidence. That definition will apply to the content of each section the headings represent but not to the headings themselves. These should be disclosed.

The Closed Schedule

56. In the Closed Schedule we have set out our conclusions on the applicability of s. 31 in relation to the withheld parts of the Report and of s. 40(2) in relation to one public official. We have taken into account all the circumstances of the case in assessing the public interest balance, including the general public interest consideration we have set out below. We have also had regard to all submissions made.
57. The Closed Schedule indicates the parts of the Report we consider should be disclosed and those which were properly withheld, and we have issued a substituted Decision Notice.
58. In the normal way a copy of this Decision was sent to the Commissioner and to DFID for them to check the draft and make representations as to whether any parts of the Decision should not be disclosed. The version of the Decision provided to Mr Burke and promulgated generally will have been redacted and/or edited if necessary in light of such representations.

Signed

**Judge Moira Macmillan
(Judge of the First Tier Tribunal)**

Date of Decision: 2nd January 2020