



Neutral citation number: [2024] UKFTT 219 (GRC)

Case Reference: EA/2023/0204

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

**Heard by: remotely by video conference
Heard on: 29 November 2023 (hearing)
1 March 2024 (on paper)
Decision given on: 15 March 2024**

Before

**TRIBUNAL JUDGE HAZEL OLIVER
TRIBUNAL MEMBER PIETER deWAAL
TRIBUNAL MEMBER KATE GRIMLEY EVANS**

Between

CIARAN MCCLEAN

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND**

Respondents

Representation:

For the Appellant: In person

For the First Respondent: Did not attend

For the Second Respondent: Did not attend

Decision: The appeal is Dismissed

REASONS

Mode of hearing

1. The proceedings were initially held by video (CVP) on 29 November 2023. The parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way. The Tribunal reconvened as a paper hearing on 1 March 2024 with the consent of all the parties.

Background to Appeal

2. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 13 March 2023 (IC-177395-F4G2, the “Decision Notice”). The appeal relates to the application of the Freedom of Information Act 2000 (“FOIA”). It concerns information about meetings and communications about Galantas Goldmining Company requested from the Police Service of Northern Ireland (“PSNI”).

3. On 1 October 2021, the Appellant wrote to PSNI and requested the following information (the “Request”):

“Can the PSNI please provide me with notes of all meetings as well as all electronic and written communication between [Name Supplied], the Chief Constable, Galantas Goldmining Company and Fermanagh and Omagh Police District representatives dealing with Galantas Goldmining Company?”

4. The Appellant later clarified that the information he sought was correspondence between the named individual and all the third parties named above, and the period for the request was 1 January 2014 to 1 October 2021.

5. PSNI confirmed that they held some information to which the Request relates but refused to provide the information under section 31(1)(a) FOIA (law enforcement) and section 40(2) FOIA (personal data). The Appellant requested an internal review and PSNI maintained its position.

6. The Appellant complained to the Commissioner on 22 June 2022. The Commissioner decided:

- a. Section 31(1)(a) was engaged, as the disclosure of such information would provide details that will be useful to those with criminal intent and prejudice the law enforcement activities of the PSNI as well as the security of third-party companies listed in the complainant’s request.
- b. The public interest favours maintaining the exemption in this case. The interests of transparency and accountability in use of public funds was outweighed by wider public interest in the PSNI being able to carry out its law enforcement activity and for private companies to carry out their operations securely to protect the welfare and interests of their employees.

The Appeal and Responses

7. The Appellant appealed on 11 April 2023. His grounds of appeal are:

- a. The Request is linked to the public policy of providing policing services at no cost to the goldmining company, which was a policy change in 2017. He is not asking for operational policing information.
- b. The information about what the police are doing at the goldmine is already available, and Galantas made public their agreement with the police.
- c. There is strong public interest in disclosure of this information.

8. The Commissioner’s response maintains that the Decision Notice was correct:

- a. The Request was broad and the response necessarily includes information relevant to operational police matters which engaged section 31(1)(a).
- b. The nature of the prejudice was of a very grave sort.

- c. PSNI is well placed to consider the likelihood of such prejudice, given its experience of criminal and terrorist actors within Northern Ireland.
- d. PSNI and the Commissioner acknowledged that transparency and accountability were significant considerations. However, supporting that important public interest ultimately carries less weight than potential prejudice to the protection and detection of crime. Overall, the public interest favours withholding the information, rather than disclosing it.

9. PSNI was joined as a party to the proceedings Directions dated 15 August 2023. PSNI's response maintains that the Commissioner's decision was correct:

- a. The detail of the correspondence could reveal information which could impact on the PSNI's law enforcement activities and could be of use to those who may utilise this to further criminal activity, and this clearly engaged section 31(1)(a).
- b. The nature of the prejudice was very grave, with reference to the information redacted in the submission to the Commissioner of 13 February 2023.
- c. The risk of prejudice was considered in light of the general threat level at the time which was considered to be "severe", meaning an attack was highly likely. Disclosure of the detailed information sought by the Appellant very strongly engages section 31(1)(a), there is a causal relationship existing between the potential disclosure and the prejudice which is of real, actual or of substance, and that the risk is real and significant.
- d. PSNI accepted that the release of the information would provide openness and transparency and that there was a strong public interest in information that relates to the use of public funds. However, this interest had to be balanced against PSNI's duty and core function which is to keep people safe. The law enforcement function is of vital importance as is the ability of private companies to carry out their operations securely.

Applicable law

10. The relevant provisions of FOIA are as follows.

1 General right of access to information held by public authorities.

- (1) Any person making a request for information to a public authority is entitled—
 - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.

.....

2 Effect of the exemptions in Part II.

.....

- (2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
 - (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
 - (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

.....

31 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...

.....

58 Determination of appeals

- (1) *If on an appeal under section 57 the Tribunal considers—*
- (a) *that the notice against which the appeal is brought is not in accordance with the law, or*
 - (b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
- the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*
- (2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

11. The approach to prejudice-based exemptions was set out in the First Tier Tribunal decision of **Hogan v Information Commissioner** [2011] 1 Info LR 588, as approved by the Court of Appeal in **Department for Work and Pensions v Information Commissioner** [2017] 1 WLR 1:

- a. Firstly the applicable interests within the relevant exemption must be identified.
- b. Secondly the nature of the prejudice being claimed must be considered. It is for the decision maker to show that there is some causal relationship between the potential disclosure and the prejudice, and that the prejudice is “real, actual or of substance”.
- c. Thirdly, the likelihood of occurrence of prejudice must be considered. Whether disclosure “would” cause prejudice is a question of whether this is more likely than not. To meet the lower threshold of “would be likely to” cause prejudice, the degree of risk must be such that there is a “real and significant risk” of prejudice, or there “may very well” be prejudice, even if this falls short of being more probable than not.

Issues and evidence

12. The issues are:

- a. What are the applicable interests within the exemption, i.e. what is the actual harm relied on by PSNI?
- b. Is there a causal relationship between the disclosure and the prejudice, and is this real, actual or of substance?
- c. Would disclosure cause this prejudice, or would it be likely to do so?
- d. If section 31(1)(a) is engaged, in all the circumstances of the case, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

13. By way of evidence and submissions we had the following at the hearing, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents.
- b. A closed bundle of documents containing an unredacted version of PSNI’s letter to the Commissioner during the investigation.
- c. Submissions from the Appellant at the hearing.

14. Only the Appellant attended the video hearing on 29 November 2023. The Tribunal decided at the conclusion of this hearing that it did not have sufficient information to make a fair decision. In particular, the Tribunal did not have a copy of the disputed information. PSNI was directed to provide a copy of the disputed information and a closed witness statement which explained how the exemption relied on applies to the entirety of the disputed information, to be held under Rule 14(6).

PSNI provided a copy of the disputed information and a closed witness statement from Ross McKelvey, for the Crown Solicitor.

15. All parties agreed that the Tribunal could reconvene and finalise its decision on paper.

Discussion and Conclusions

16. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law or whether any discretion should have been exercised differently. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. We deal in turn with the issues.

17. ***What are the applicable interests within the exemption, i.e. what is the actual harm relied on by PSNI?*** The harm relied on is, in this case, serious criminal activity.

18. ***Is there a causal relationship between the disclosure and the prejudice, and is this real, actual or of substance?*** Having seen the disputed information, we are satisfied that there is a causal relationship between disclosure of the information and the prejudice to prevention of criminal activity, as the information covers operational policing matters. We are also satisfied that this prejudice is real. We have considered the explanation provided by PSNI in closed evidence as to how this information could be used for criminal activity, and accept that this account is accurate, taking into account PSNI's expertise on matters of crime and terrorism in Northern Ireland.

19. ***Would disclosure cause this prejudice, or would it be likely to do so?*** PSNI's position is that disclosure would prejudice the prevention or detection of crime. We have considered the closed information that was provided to us by PSNI. Some of this material is outside the scope of the Request. Of the material that is within scope, we accept that disclosure of some of the documents would cause this prejudice, meaning it is more likely than not to do so. This is because of the content of the material and the amount of detail about operational policing and other related matters. We find that some of the material that is within scope does not meet this threshold, but it is still likely to cause this prejudice, meaning this is a real and significant risk. This is because the documents contain less detail about operational policing, but nevertheless cover matters that could be used to assist criminal activity. We note PSNI's position that the terrorist attack threat level at the time of the Request was "severe", which increases the risk of the information being used for criminal or terrorist activity.

20. The Appellant says that the public is already aware of PSNI's activities at the goldmine and that Galantas has made public their agreement with the police. However, the disputed information contains additional information which would or would be likely to cause prejudice to the prevention or detection of crime.

21. The Appellant's position is that he only wants information on the public policy about escorting of explosives, and he did not ask for names or details about operational policing. We discussed this with him at the hearing. The Appellant accepted that his Request was for all notes and correspondence, and was not limited in this way. Having seen the disputed information, we can confirm that it contains details about operational policing and other information that could be used to facilitate criminal activity, and this material appears throughout the documents that are within the scope of the Request.

22. ***If section 31(1)(a) is engaged, in all the circumstances of the case, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?*** We have found that some of the disputed information would prejudice the prevention and detection of crime, and some of it would be likely to do so. There is very strong public interest in maintaining this exemption due to the very serious nature of this prejudice, in the context of criminal terrorist activity in Northern Ireland. It involves the safety of both the personnel of private companies and the general public. Although we cannot explain this in detail in the open decision as further information was provided by PSNI in closed material, we are satisfied that the public interest in not disclosing the disputed information under FOIA is particularly strong in this case.

23. There are clear public interests in disclosure of the information. There is a general interest in transparency on how policing resources are being used. The Appellant's particular interest is in how the public purse has been used to finance mining companies. He wants to know about the decision to provide policing services at no cost to a goldmining company, which he says was a policy change in 2017. He says there has been no explanation as to why this change occurred. We accept that this is a matter of considerable public interest.

24. We have considered the balance of public interests, and find that the public interest in maintaining the exemption does outweigh the public interest in disclosing the information. This is because the public interest in non-disclosure is particularly strong in this case, due to the very serious consequences of prejudice to the prevention of criminal and terrorist activity. Although there is public interest in transparency, both generally and in relation to policing services for the goldmining company, this is not sufficient to outweigh the strong public interest in maintaining the exemption. We can also confirm that the disputed information which we have seen is limited and does not directly address the issue of a policy change in 2017 that the Appellant is concerned about.

25. We dismiss the appeal for the reasons set out above.

Signed Judge Hazel Oliver

Date: 8 March 2024