

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 February 2013

Public Authority: Crown Prosecution Service
Address: Rose Court
2 Southwark Bridge
London
SE1 9HS

Decision (including any steps)

1. The complainant has requested the final report of an independent review produced by the public authority concerning a court case which involved his brother (the "Report"). The public authority withheld it citing the exemptions at sections 40(2), 30(1) and 31(1) of the FOIA. The Information Commissioner's decision is that the Report is exempt from disclosure under section 30(1). He does not require the public authority to take any steps.

Background

2. The complainant has had a related decision notice¹ served concerning a request made to Norfolk Constabulary for information about the same investigation. This was subsequently appealed to the First-tier Tribunal when it was dismissed². This current request was made as a result of the findings of the First-tier Tribunal.

¹[http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fs_50317438.ashx](http://www.ico.gov.uk/~/media/documents/decisionnotices/2011/fs_50317438.ashx)

²<http://www.informationtribunal.gov.uk/DBFiles/Decision/i710/20120327%20Decision%20&%20PTA%20Ruling%20EA20110057.pdf>

3. Further information concerning the background to this request can also be found on the "they work for you" website³.

Request and response

4. On 11 October 2011, the complainant wrote to the public authority and requested information in the following terms:

"In line with the Tribunal's comment that it is open to me, the Appellant in the above matter, [within the time scale of this appeal] to apply to see documentation held by the CPS relating to this FOI Act appeal, I wish to ask for the text of the full report prepared by Ms E Bailey [relating to my brother's request for an independent review to be undertaken concerning the role of the CPS in charging my brother, Andrew Breeze] to be disclosed under the current FOI Act".

5. The public authority responded on 9 November 2011. It advised him:

"It may be helpful if I explain that the Freedom of Information Act is a public disclosure regime, not a private regime. Information disclosed under it is thereafter deemed to be in the public domain, and therefore freely available to the general public upon request".

6. It advised that the information was exempt from disclosure under sections 30(1)(c) and 40(2) of the FOIA.
7. On 16 January 2012 the complainant asked for an internal review. This was sent on 7 March 2012. It cited the same exemptions, adding section 31(1)(g). The public authority also offered to meet with the complainant, along with the author of the Report, to discuss his concerns.

Scope of the case

8. On 18 September 2012 the complainant contacted the Information Commissioner to complain about the way his request for information had been handled. He asked for the Information Commissioner to consider the withholding of the Report.

³ <http://www.theyworkforyou.com/debates/?id=2011-03-21b.825.0>

Reasons for decision

9. The Information Commissioner has had sight of the Report.

Section 30(1) – investigations and proceedings

10. Section 30 has been considered first as it has been applied to the Report in its entirety.

11. Section 30(1)(c) of FOIA states that:

*"Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-
(c) any criminal proceedings which the authority has power to conduct".*

12. The phrase "at any time" means that information is exempt under section 30(1) if it relates to an ongoing, closed or abandoned investigation. It extends to information that has been obtained prior to an investigation commencing, if it is subsequently used for this purpose.
13. Section 30 of the FOIA is a class-based exemption, which means that there is no need to demonstrate harm or prejudice in order for the exemption to be engaged. In order for the exemption to be applicable, any information must be held for a specific or particular investigation and not for investigations in general. Therefore, the Information Commissioner has initially considered whether the Report would fall within the class specified in section 30(1)(c).
14. The public authority in this case is the Crown Prosecution Service. It was created by the Prosecution of Offences Act 1985 and it is responsible for prosecuting criminal cases investigated by the police in England and Wales. As such, it has the power to conduct criminal proceedings. The Information Commissioner is therefore satisfied that it has the power to carry out investigations of the sort described in sections 30(1)(c).
15. He has also considered the interpretation of section 30(1)(c), and is mindful that the exemption applies to information that has *at any time* been held by the authority for the purposes of criminal proceedings. Although the Report itself did not form a part of the criminal proceedings, its content is drawn directly from information gathered for those proceedings. As the content of the Report relates to a specific criminal case, the Information Commissioner concludes that this exemption is properly engaged.

Public interest test

16. Section 30(1) provides a qualified exemption and is therefore subject to the public interest test under section 2(2)(b) of the Act. Section 2(2)(b) provides that such an exemption can only be maintained where:

"... in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information".

17. In considering where the public interest lies in this exemption, the Information Commissioner is guided by the Information Tribunal in the case of *Toms v Information Commissioner & Royal Mail* where it stated:

"... in striking the balance of interest, regard should be had, inter alia to such matters as the stage or stages reached in any particular investigation or criminal proceedings, whether and to what extent the information has already been released into the public domain, and the significance or sensitivity of the information requested".

18. The Information Commissioner in considering the public interest test starts by focusing on the purpose of the relevant exemption. The Information Commissioner's view is that the general public interest served by section 30(1) is the effective investigation and prosecution of crime, which inherently requires, in particular:

- the protection of witnesses and informers to ensure people are not deterred from making statements or reports by fear it might be publicised;
- the maintenance of independence of the judicial and prosecution processes;
- preservation of the criminal court as the sole forum for determining guilt.

19. As stated above, although the Report itself was written up after the prosecution failed, it necessarily draws directly from the information that was gathered prior to that point. Therefore, it makes direct reference to some of that information, including parties involved.

In favour of disclosure

20. The public authority advised the complainant:

"I agree that there is a very strong public interest in providing the public with information about cases where the CPS have

acknowledged that they have made mistakes and errors in judgement”.

In favour of maintaining the exemption

21. In respect of the errors that it admitted that it had made, the public authority advised the complainant:

“In this particular case, a very public acknowledgement of fault, on behalf of the CPS, was made in Parliament by the Solicitor-General, who shares, with the Attorney-General, overall superintendence for this government department. The public interest in favour of accountability and transparency has therefore already been answered”.

22. It then went on to add:

“... it is essential that CPS senior managers, who are tasked to consider serious complaints and conduct Third Tier Reviews under the CPS Complaints Procedure, are able to conduct their reviews without a general fear that the product will be aired in the public domain. In order to be effective, these reviews need to be frank and openly address the issues involved, potentially levelling serious criticism at parts of their own organisation. If it were the case that such reviews were routinely aired in public, it is likely that they would be written more defensively, with a view to a wider audience. This may be counter-productive, potentially compromising the rigour of the independent internal review and thereby limiting its effectiveness.

I note that the Information Tribunal [see paragraph 2 above] recognised and accepted the strength of the public interest in maintaining frank and open lines of communication between the police and the CPS ‘free of any concern that every recommendation or reservation will be routinely exposed to public scrutiny, if the prosecution fails’ (paragraph 27). Whilst that view was expressed in the context of consideration of the case summary prepared by the police, I consider that it applies with equal force to Ms Bailey’s report”.

Balance of the public interest

23. The Information Commissioner acknowledges the validity of the public interest argument in favour of releasing the exempt information and he agrees that the admission of guilt by the public authority provides a strong argument in favour of disclosure on this occasion. Releasing the requested information could add to the public’s knowledge of how the

public authority deals with prosecutions and how things 'went wrong' this time. It would also throw more light on the steps taken by the public authority in conducting its internal investigation and the failures that it discovered.

24. However, the Information Commissioner notes that the errors made have been openly acknowledged and public statements have been made which clearly exonerate the parties concerned of any guilt (see link at paragraph 3 above). Indeed, the public statement made by the Solicitor-General clearly accepts blame, including the following statement:

"I am accountable for the CPS, which was responsible for deciding whether to institute and continue the prosecution in this matter. The police were responsible for investigating the case on the basis of a complaint from NHS Counter Fraud, but not for deciding whether to prosecute. The prosecution in this case should never have reached the stage that it did, and I repeat, without restating verbatim, the judge's words and my apology".

25. The Information Commissioner also notes that much of the content of the Report has been commented on in the public statement and he believes there is little that would be gained by further disclosure of the report in its entirety. This therefore adds little weight in favour of disclosure.
26. Conversely, the Information Commissioner understands that there is a strong public interest in supporting protection of this public authority's internal investigative process which must remain full and frank without fear of its content being made routinely available to the public. Were a public authority concerned that the full content of a detailed investigation may find its way into the public domain then it seems likely that it may serve as a deterrent to it including honest and potentially negative findings; he believes this argument to be particularly weighty in favour of maintaining the exemption. This is not to say that he would never conclude that such a report should not be published, but, on this occasion, he is of the opinion that sufficient detail about its content has been made available in order to keep the public fully informed.
27. Although he recognises the complainant's understandable desire to have sight of the full Report - and he does attach some weight to this in view of the errors that have been uncovered - the Information Commissioner also recognises the importance to a public authority of being able to undertake internal investigations without any hindrance to the process.

28. Additionally, the content of the Report draws directly from information that was gathered in advance of the prosecution. There is some direct reference to parties involved and comments made. The Information Commissioner believes there is a further strong argument in favour of maintaining the exemption to protect those parties involved who would not have the expectation that their details would be put into the public domain in this way. Were this the case there is a risk that this would dissuade witnesses from providing honest statements to the relevant authorities for fear that these would be disclosed.
29. Although he notes that there is a public interest in disclosure, on this occasion the Information Commissioner finds the public interest arguments in favour of maintaining the exemption to be more compelling. He therefore concludes that the public interest in maintaining the exemption outweighs that in disclosure.
30. As he has found the exemption at section 30(1) to apply he has not gone on to consider the other exemptions cited.

Right of appeal

31. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0116 249 4253
Email: informationtribunal@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

32. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
33. Any notice of appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

**Jon Manners
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