

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 December 2013

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

Decision (including any steps ordered)

1. The complainant requested a copy of the file(s) held by the public authority in connection with the trial (and associated appeals) of Paul Chambers who was prosecuted for posting a message on Twitter considered to be of a *menacing character* within the meaning in section 127(1)(a) of the Communications Act 2003.
2. The Commissioner's decision is that the public authority was entitled to withhold all the information within the scope of the request (the disputed information) on the basis of the exemptions at sections 32(1) and 42(1) FOIA
3. The Commissioner does not require the public authority to take any steps.

Background, Request and response

4. Paul Chambers was arrested and prosecuted for posting a message/tweet on his Twitter account considered to be of a *menacing character*¹ in relation to a flight out of Doncaster Airport. He was convicted at Doncaster Magistrates Court on 10 May 2010 and his conviction was upheld by a Crown Court on 11 November 2010. The conviction was however overturned by a High Court on 27 July 2012.
5. On 6 August 2012 the complainant wrote to the public authority and requested information in the following terms:

'Please could I have a copy of your file(s) on the "Twitter joke trial" (R v Paul Chambers) and associated appeals?'
6. The public authority responded on 7 August 2012. It claimed that the information in the files (the disputed information) was exempt from disclosure on the basis of sections 30(1)(c) (investigations and proceedings) and 40(2) (personal data) FOIA.
7. Following an internal review the public authority wrote to the complainant on 23 October 2012. It upheld the decision to apply sections 30(1)(c) and 40(2) to the disputed information.

Scope of the case

8. On 7 January 2013 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to review the application of the exemptions on the grounds summarised below.
9. He acknowledged that some of the material in the files could be exempt but did not believe that all of the information was exempt. He further acknowledged that section 30(1)(c) is generally considered to be a 'strong' exemption requiring significant public interest arguments to overcome. He however argued that the prosecution was an exceptional one which led to substantial criticisms of the public authority and also had a substantial impact on the accused even though he was eventually

¹ Within the meaning in section 127(1)(a) of the Communications Act 2003

acquitted. The fear of being prosecuted in similar circumstances could have a substantial chilling effect on free speech.

10. The public authority had not shown how disclosure in this particular case would harm the prosecution process.
11. The complainant accepted that there was a strong public interest in protecting information privately provided to the Police or the public authority for purposes of investigations and proceedings. However, he considered it unlikely that this would apply to much of the information in the files, particularly given the large amount of information already in the public domain about the case. He further argued that the public interest in maintaining the confidentiality of communications between the Police and the public authority is not a blanket one. It would depend on the nature of the communications.
12. In terms of the application of section 40(2), he argued that disclosure would be fair in view of the amount of information in relation to the case already made public. Even where the information constitutes sensitive personal data much of it may already have been deliberately made public by the data subject.
13. The complainant also explained that although he was interested in the whole file, he was particularly interested in any material that relates to the public interest test that the public authority must conduct before prosecuting. He clarified that this is a separate test from whether or not the public authority considers that it could obtain a conviction.
14. During the course of the Commissioner's investigation, the public authority further relied on the exemptions at section 21 (information accessible by other means), section 32(1) (Court records etc), section 41 (information provided in confidence) and section 42(1) (legal professional privilege) FOIA.
15. The public authority however provided the complainant with the information it considered was reasonably accessible to him and therefore exempt on the basis of section 21. That information did not therefore form part of the investigation because it had been supplied to the complainant.
16. The public authority's initial submissions to the Commissioner focussed primarily on the exemption at section 30(1)(c) to all the disputed information. Although it also argued that different parts of the disputed information were exempt on the basis of sections 32(1), 40(2), 41 and 42(1), it was clear that it had not fully identified the various parts of the

disputed information it had withheld on the basis of the remaining exemptions.

17. After considering the disputed information and the public authority's submissions in respect of the application of section 30(1)(c), the Commissioner informed the public authority that he was not prepared to accept the public interest was in favour of maintaining the exemption. He therefore invited the public authority to fully identify the parts of the disputed information withheld under each of the remaining exemptions relied on and to also provide him with detailed submissions in respect of the application of those exemptions. The public authority responded accordingly.
18. This notice therefore contains the reasons for the Commissioner's decision in relation to the application of sections 32(1), 40(2), 41(1) and 42(1) to the disputed information.

Reasons for decision

Out of scope of information

19. The public authority explained that it did not consider information in the file which relates to subsequent matters arising from the trial and associated appeals, such as FOIA requests and parliamentary questions as falling within the scope of the request. The request was for information on the trial and associated appeals.
20. The Commissioner accepts the public authority's interpretation of the request. He notes that in his arguments in support of disclosure, the complainant also focussed on information which he believes would increase public understanding of the decision to prosecute Paul Chambers and to contest the subsequent appeals. In other words, information pertinent to the trial and appeals.
21. He finds that the information which the public authority has listed in *schedule 1* is not within the scope of the request.

The disputed information

22. The disputed information is therefore all the material held by the public authority for the purposes of the prosecution of Paul Chambers including the subsequent appeals to the Crown Court and the High Court.

Section 32(1) – court records etc

23. Information held by a public authority is exempt information if it is held only by virtue of being contained in-
- (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
 - (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
 - (c) any document created by a court, or a member of the administrative staff of a court for the purposes of proceedings in a particular cause or matter.
24. Section 32(1) is a class based exemption. This means that *any information* falling within the category described is automatically exempt from disclosure regardless of whether or not there is a likelihood of harm /prejudice if disclosed. It is therefore conceivable that the exemption could apply to information which may otherwise be available to an applicant via other means or to information which is already widely available. What is important is that the information is held in the context of paragraphs a, b and c above.
25. The public authority described the information withheld on the basis of this exemption as falling within the following categories:
- Indices to Court Bundles; s10 Admissions; Orders and Judgements of the Magistrates', Crown and High Courts; Costs Schedules, Court Application Notices; Miscellaneous Documents for use in Court; Witness Statements; Skeleton Arguments; Court Exhibits and Related Documentation; and Correspondence with the Courts.
 - Emails and Letters serving (or purporting to serve) documents for use in Court; and Emails and Letters created for the purpose of proceedings by way of negotiations with the other side.
 - Correspondence from the Courts.
26. The Commissioner notes that some of the orders and judgements of the Magistrates', Crown and High Courts filed with the courts for the purposes of the prosecution of Paul Chambers had been published (at the time of the request) and were therefore widely available. The exhibits also include messages/tweets on Twitter – a social networking and microblogging site that enables those registered on the site to post messages and also read messages posted by other users whom they

follow and/or who follow them. Messages posted on Twitter would therefore also be widely available.

27. The Commissioner is however satisfied that section 32(1) was correctly engaged in respect of all the information withheld by the public authority on that basis, and any other information listed in the remaining schedules (ie excluding schedule 1) which has not been marked as exempt on the basis of section 32(1) but which the Commissioner considers falls within the categories of information described above in paragraph 25. As mentioned, the exemption applies regardless of whether or not there is a likelihood of harm in disclosure. The information is held in documents for the purposes described in paragraphs a, b and c above, specifically in connection with the prosecution of Paul Chambers.
28. Section 32(1) is an absolute exemption so there is no requirement to consider whether there was a public interest in disclosure.

Section 42(1) – legal professional privilege

29. Information in respect of which a claim to legal professional privilege (LPP) could be maintained in legal proceedings is exempt on the basis of section 42(1).
30. There are two types of privilege within the concept of LPP; litigation privilege, and advice privilege.
31. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation. Litigation privilege can apply to a wide variety of information, including advice, correspondence, notes, evidence or reports.
32. Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant purpose of seeking or giving legal advice.
33. The public authority described the information withheld on the basis of this exemption as falling within the following categories:

- Instructions to external counsel.
 - Advice received from external counsel.
 - Formal legal advice drafted by internal lawyers and conference notes.
 - Internal emails and file notes discussing the merits of the litigation and progressing the case.
34. The public authority considers that information in the first three categories above is subject to legal advice privilege and that information in the last category is subject to litigation privilege.
35. As mentioned, the disputed information is material held by the public authority primarily for the purposes of the prosecution brought against Paul Chambers. Paul Chambers was initially convicted by a Magistrates Court. His conviction was upheld by a Crown Court. However, his appeal to the High Court was allowed and the decisions of the lower courts overturned. The information withheld on basis of section 42(1) primarily covers discussions relating to Paul Chambers' appeal to the High Court.
36. The Commissioner considers that information in the first three categories was created for the dominant purpose of giving or obtaining legal advice in the face of a real prospect of litigation. The information is subject to litigation privilege rather than legal advice privilege. The Commissioner accepts that the last category which covers internal emails and file notes discussing the merits of litigation is subject to litigation privilege. It covers discussions between the public authority's lawyers, between the public authority's lawyers and other staff, and between the public authority's lawyers and third parties in relation to Paul Chambers' appeals. He is satisfied that in the circumstances, litigation privilege applies to this category of information.
37. The Commissioner therefore finds that section 42(1) was correctly engaged in respect of all the information withheld by the public authority on that basis, and any other information listed in the remaining schedules (ie excluding schedule 1) which has not been marked as exempt on the basis of section 42(1) but which the Commissioner considers falls within the categories of information described above in paragraph 33.

Public interest test

38. Section 42(1) is a qualified exemption. The Commissioner must therefore consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

39. As can be seen from the *scope of the case* section above, the complainant's public interest arguments in favour of disclosure were primarily in the context of the exemption at section 30(1)(c) given that was the only qualified exemption the public authority had relied on at the time the request was made. Therefore, the Commissioner has only considered those parts of the arguments he considers are relevant to the public interest in disclosure in relation to section 42(1) in this case. These are as follows:

- The prosecution was an exceptional one which led to substantial criticisms of the public authority and also had a substantial impact on the accused even though he was eventually acquitted. The fear of being prosecuted in similar circumstances could have a substantial chilling effect on free speech.
- The strong public interest in disclosing the *public interest test* that the public authority conducted before deciding to prosecute Paul Chambers.

40. In addition, the Commissioner also recognises the more general public interest arguments regarding the accountability of public authorities and the transparency of decision making. Disclosure would assist the public interest in authorities being accountable for the quality of their decision-making and ensuring that decisions have been made on the basis of good quality legal advice is part of that accountability. Transparency in the decision making process and access to the information upon which decisions have been made can enhance this accountability.

Public interest arguments in favour of maintaining the exemption submitted by the public authority

41. It is a recent case and the advice remains relevant to the prosecution of similar offences in the future.

42. The information already in the public domain indicates that the decision to prosecute was affirmed by both the Magistrate's Court and the Crown Court. There is no indication that the public authority has either not followed or has misrepresented the advice it received, nor is there any evidence of malfeasance, fraud or corruption. There is simply evidence that the High Court took a different view to the lower courts and that, in the run up to the appeal, the public authority had considered revising its position. Ultimately, it was a matter of judgement whether the relevant communication (ie the message or tweet posted by Paul Chambers on

his Twitter account) was *menacing* within the meaning in the Communications Act 2003.

Balance of the public interest

43. It is well established that the public interest inherent in maintaining LPP will always be strong due to the importance of the principle behind LPP which is to safeguard openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice. Clear, compelling and specific justification that at least equals the public interest in protecting legally privileged information must be shown in order to override the strong public interest inherent in the exemption.
44. The Commissioner considers that there is a public interest in knowing the nature of the legally privileged discussions including advice which sheds light on the public authority's decision to prosecute Paul Chambers. Given the nature of the criticisms levelled at the public authority by some members of the public, the Commissioner can understand why the complainant believes that the public authority's decision to prosecute could have a chilling effect on free speech.
45. The Commissioner however considers that in the circumstances, the public interest in that sense has been largely met via the statement posted by the public authority on its website on 30 July 2012 in which it explained that it could not concede the appeal to the High Court as a matter of law.² In other words, the decision to contest the appeal had been properly considered and ultimately, a decision was made on the basis of law. In terms of the decision to prosecute in the first place, there is no indication that the decision was taken unlawfully. A judgement was made at the time that in the circumstances, the tweet was menacing within the meaning in the Communications Act 2003 and the public authority decided to prosecute on that basis. Both the Magistrates and Crown Courts agreed with the public authority's interpretation of the tweet. The High Court ultimately disagreed but not because the decision to prosecute was considered unreasonable. It simply took a different view to the public authority and the lower courts. These factors combine to weaken the public interest in disclosure against the inherent strong public interest in maintaining LPP.

² <http://blog.cps.gov.uk/2012/07/clarification-on-decision-making-in-paul-chambers-case.html>

46. The Commissioner also accepts that legal advice in relation to the case remains relevant to the prosecution of similar offences in the future. There is a public interest in ensuring that the public authority does not prejudice the successful prosecution of similar offences in future.
47. Therefore, in all the circumstances of the case, the Commissioner finds that the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure.

Section 40(2) – personal data

48. The public authority applied the exemption at section 40(2) to the following categories of information:
 - Names of junior members of staff and a private individual.
 - Direct contact details ie addresses, email addresses, fax and telephone numbers.
49. The Commissioner notes that the information to which this exemption was applied is contained in documents he has already found were correctly withheld (on the basis of sections 32(1) or 42(1)) or documents not considered within the scope of the request. Therefore, he has not considered the applicability of this exemption.
50. In view of his decision that sections 32(1) and 42(1) were correctly engaged, he also did not consider the applicability of section 41.

Right of appeal

51. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

52. 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.
53. 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

Gerrard Tracey
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