



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2013/0136

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50477863
Dated: 16 May 2013**

Appellant: Rob Waugh

Respondent: The Information Commissioner

**2nd Respondent: The Office of the Police and Crime Commissioner for
Cleveland**

Heard at: Field House

Date of Consideration: 17 December, 14 & 21 January

Before

Chris Hughes

Judge

and

Paul Taylor and Alison Lowton

Tribunal Members

Date of Decision: 29 January 2014

Date of Promulgation: 30 January 2014

Subject matter:

Freedom of Information Act 2000

Cases:

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 16 May 2013 and dismisses the appeal.

Dated this 29th day of January 2014

Judge Chris Hughes

[Signed on original]

REASONS FOR DECISION

Introduction

1. An investigation was conducted by a former Chief Constable of Warwickshire, Keith Bristow for the Independent Police Complaints Commission (IPCC), into allegations of misconduct by the Chief Constable of Cleveland, Sean Price and Derek Bonnard (Deputy Chief Constable). The report was submitted in July 2012 and was sent to the Cleveland Police Authority.

The request for information

2. On 11 October 2012 Mr Waugh (a journalist) wrote to the Cleveland Police Authority:-

I would like to ask for the outstanding information held on Sean Price's alleged misconduct which will now not be heard at a disciplinary given his dismissal last week.

He stated that he was seeking disclosure of the investigation report, but not the background evidence.

3. The Cleveland Police Authority's relevant functions were transferred to the Second Respondent (The Office of the Police and Crime Commissioner for Cleveland – OPCCC) with effect from 22 November 2012. This body responded on 14 December 2012 refusing disclosure on the basis of s31(1)(b) and (g) FOIA. The OPCCC explained:-

- Premature disclosure would be likely to prejudice the fair trial of **any** person against whom proceedings might be instituted,
- DCC Bonnard had yet to face misconduct proceedings
- The information was live as part of a wide-ranging criminal investigation which was incomplete

4. On 21 November Mr Waugh requested the report from the IPCC. The IPCC replied on 7 December setting out the terms of S31 and continuing:-

you are aware that Sean Price remains subject of investigation by the Operation Sacristy team and no decisions have yet been taken on how that enquiry will be resolved and it remains very much a live investigation.

5. The IPCC reviewed the handling of the request and on 15 February 2013 wrote further to Mr Waugh to clarify the reasoning and why reliance on s31(1)(b) was justified:-

“you are aware that Mr Price remains on bail, with others, in respect of matters currently being investigated by Operation Sacristy.

You make the point that Mr Price’s dismissal is public knowledge, but the case which led to that outcome was narrowly based and focused on a single event. The information you request is much broader and touches on a number of issues over an extended period of time and includes references to the actions of the numbers of people, one or more of whom are still on bail. Our reasons for upholding the exemption are not limited to prejudice to Mr Price.

You have stated that any matters that are criminal do not form part of your request, so our starting point was that the report relating to the managed misconduct investigation could fall to be disclosed. I have then gone on to consider whether it is in the public interest to withhold the information.

The IPCC is not concerned in the management of the criminal investigation by Operation Sacristy, so in considering your request we sought the opinion of that team. Taking into account their views, I have decided not to disclose the information requested. Furthermore the report could not be reasonably redacted to remove the risk of prejudice.”

6. On 27 March 2013 Mr Waugh wrote to OPCCC and requested them to provide:-

“... The investigatory report prepared on Derek Barnard for his disciplinary hearing and the documented findings of the independent panel in relation to each count of gross misconduct, including the reasons for the sanctions.”

7. On 24 April the OPCC confirmed to him that it would not provide the report, relying on s 22(1) FOIA (information intended for future publication) and s31 (law enforcement). The reply stated:-

“For the avoidance of doubt, no separate investigatory report was prepared for Derek Barnard's recent misconduct hearing. The misconduct panel considered the IPCC managed investigation report, which was a joint report into potential misconduct or gross misconduct by the former Chief Constable Sean Price, the former Deputy Chief Constable Derek Barnard and others. Your previous requests for this report as it related to Sean Price dated 12th of November 2012 is currently the subject of your appeal to the Information Commissioner. The IPCC have advised that this report will be published in full at some future date.”

8. Mr Waugh complained to the Commissioner on 17 December 2012 about the response to the 11 October request, arguing that the Police Authority had obtained clearance to go ahead with the disciplinary proceedings because they would not prejudice any ongoing criminal inquiry and he was not seeking information about any such criminal inquiry.
9. The Commissioner considered the application of s31(1)(b) (that disclosure would, or would be likely to, prejudice the apprehension or prosecution of offenders) to the circumstances. The OPCCC confirmed to him that alongside the disciplinary process with respect to Mr Price, there was a continuing police investigation (“Operation Sacristy”) into allegations of corruption. The officers conducting this operation had indicated that premature disclosure would result in serious prejudice to the investigation; in particular it could lead to contamination of evidence as witness statements could be tailored or witnesses interfered with. Adverse publicity could be generated which would prejudice any resulting criminal proceedings, or misconduct proceedings against serving or former police officers.
10. The Commissioner considered (DN para15) that Operation Sacristy was directly linked to the investigation of professional misconduct against the former chief constable and deputy chief constable. Premature disclosure would prejudice the apprehension or prosecution of offenders. He noted that the report was very detailed and included transcripts. He considered it *“highly likely”* that disclosure could infringe the right to a fair trial. He noted that the former deputy chief constable had not been dismissed at the time of the request and that the report related to other individuals who could also be prosecuted. He considered that in the event of disclosure it was *“highly likely”* that evidence would be contaminated. He noted that since misconduct proceedings were not conducted in public this would have been crucial to the decision

to have simultaneous criminal and disciplinary investigations. He noted "*it is difficult to see how revealing details of the misconduct proceedings would not have had a prejudicial effect on the criminal investigation*".

11. He acknowledged that there was a substantial public interest in the fullest possible account of the IPCC's investigation, however "*...there was a very strong public interest in not damaging the integrity of the investigation by disclosing the disputed information.*" He added that: "*It was also not in the public interest to infringe the right to a fair trial of the individuals who could potentially be charged following the conclusion of the criminal investigation.*" He concluded that the public interest was best served by not disclosing the information.

The appeal to the Tribunal

12. Mr Waugh disputed this decision and appealed to the tribunal. He made a series of arguments based on his interpretation of the actions which the various public authorities had taken. In the light of his analysis of aspects of the statutory framework for police disciplinary issues he claimed:-

- that the CPS had decided that none of the allegations in the report related to things which were criminal in themselves
- that the matters referred to a disciplinary hearing, were not criminal and had been accepted as not prejudicing other criminal matters
- that a full unredacted copy of the report and associated documents and statements were served on the lawyers for Mr Price and Mr Barnard
- that since it would have been possible for the misconduct proceedings to have been held in public there was no potential for prejudice to the criminal investigation

13. The Commissioner and OPCCC disputed this. They argued:-

- The report was sent to the CPS and the CPA at the same time and at the time of the request Mr Price was on police bail in connection with Operation Sacristy
- Some matters in the report could raise criminal issues

- Neither Mr Price nor Mr Bonnard received an unredacted version of the report.
- While it is possible for misconduct hearings to be held in public, that is a theoretical consideration – the hearings were not held in public.

The questions for the Tribunal

14. Although there are voluminous documents and submissions in this case the core issue for the tribunal to decide is whether or not disclosure of the disciplinary report which constitutes the disputed material would unacceptably prejudice law enforcement and so be contrary to the public interest.

Evidence

15. It is understandable that Mr Waugh should adopt his assumptions and put them forward as the basis of his appeal. However they are precisely that – assumptions. In support of his position Mr Waugh put forward a witness statement arguing his case as an investigative reporter and saying that evidence put forward by the OPCCC criticising him damaged his professional credibility. The tribunal agrees that to go into that material would be to be needlessly sidetracked.

16. Similarly details of the overall approach of the Cleveland Police Authority to disclosure, provided by the former chief executive of that authority – Mr Pudney (and again focused on rebutting criticisms of Mr Waugh) do not take matters further forward. He helpfully puts matters in context:-

“when I moved to Cleveland Police Authority, the authority had just started a major investigation (Operation Sacristy) involving the Chief Constable, Deputy Chief Constable (who were suspended and have since been dismissed), the authority's Chairman, the previous Chief Executive and a number of other individuals with association or past association with Cleveland Police or Cleveland Police Authority. This was, and remains the largest such investigation ever undertaken in the UK involving wide ranging and serious allegations of misconduct and criminal behaviour.”

17. Mr Waugh submitted evidence of material which had already entered the public domain including a number of articles he had written for the Yorkshire Post and the particulars of claim in proceedings brought by OPCCC against Mr Price.

18. The closed material in this case is in two parts. The first is the report. This is a substantial and wide ranging report covering many issues. The second is the material supplied to the Tribunal at its request. This latter demonstrated that prior to the decision to proceed to a disciplinary hearing with respect to Sean Price there was consultation with the Operation Sacristy investigation and also with the CPS. With respect to Sean Price only certain matters in the report were considered to be matters which would not continue to criminal proceedings. These were then the basis for proceeding to a disciplinary procedure. In the period between the request and the reply to Mr Waugh, a document indicates that the CPS advised against the disclosure of detail which could identify individuals or evidence which might be part of a criminal case, it also confirmed that the CPS had not at that stage considered the full file and that criminal prosecutions had not been ruled out.
19. This material confirms the factual basis upon which OPCCC made its decision and upon which the Commissioner made his decision. It is unnecessary to carry out a detailed textual analysis of material in the public domain and the report to see that there is considerable material in the report which is not in the public domain.
20. The intention of the OPCCC remains to publish the report as soon as it can without prejudicing criminal proceedings. Individuals remain on police bail and decisions on prosecution are still awaited.

Analysis

21. It is clear from the evidence that at the time of the request and subsequently there has been a major investigation covering a large number of individuals.
22. While Mr Waugh strongly argues for public accountability by public bodies and their employees through disclosure of the information, it is of course pellucidly clear that the primary form of accountability for such individuals is to the criminal law if they have in some way abused the position of trust in which they are or were placed. The statutory framework of FOIA recognises this through s31 which protects the fundamental right of an individual to a fair trial as well as the possibility of proper public accountability through the process of the criminal law. It is perhaps unfortunate that Mr Waugh, despite having had the position fully explained to him in respect of several requests he has made to obtain sight of this report, has failed to

acknowledge the validity of this argument and continued to put forward his own based on untenable assumptions. Clear evidence was given that a large scale criminal investigation was underway dealing with individuals identified in the report and running alongside the issues identified in the report.

23. Mr Waugh has also sought to argue that the report could be redacted to avoid the need to consider s31. However the request was for the complete report and that is the basis upon which the Commissioner and (on appeal) the Tribunal must decide. In any event the misconduct and criminal issues in the report overlap and could not be disentangled in a robust and secure way.

Conclusion and remedy

24. The Tribunal is satisfied that the Commissioner correctly analysed the facts and law in coming to his conclusion. There would have been a very serious risk to a fair prosecution if the report were disclosed both by reason of potential contamination of evidence and through the impact of the report on potential jurors. Despite the passage of time, in the event that there were to be a disclosure now, the latter risk would be greater since the time to any such trial is less. The balance of public interest clearly lies in ensuring that the process of public accountability through a fair trial (if such is needed) is upheld.

25. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 29 January 2014