



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

Appeal Reference: EA/2018/0118

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50713352

Dated: 22 May 2018

Date of Hearing: 22 November 2018

Before

JUDGE ROBERT GOOD

TRIBUNAL MEMBER(S)

MR HENRY FITZHUGH AND MS MARION SAUNDERS

Between

CHIEF CONSTABLE OF BEDFORDSHIRE POLICE

Appellant

and

(1) THE INFORMATION COMMISSIONER

(2) THE GARDEN PRODUCTIONS LIMITED

(3) NATALIA COX

Respondents

Subject Matter:

Freedom of Information Act 2000 (FOIA)

Section 43(2) (Commercial Interests)

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal allows the appeal. The withheld information is not disclosable under S43(2). It is not in the public interest for this information to be disclosed.

REASONS FOR DECISION

Factual background

1. The third respondent, Ms Natalia Cox, applied under FOIA, on 8 November 2016, for disclosure of all information concerning the agreed code of practice and relationship between Bedfordshire Police (BP) and Garden Productions (The Garden) with regards to the Channel 4 production '24 hours in Police Custody'.
2. This request was replied to on 22 June 2017 providing some information and the Ofcom Broadcasting Code. Ms Cox replied stating that she was seeking the details of the agreement that covers BP's advice and guidance to The Garden on protecting the privacy and respecting the dignity of victims of crime and family members and on the footage The Garden were invited to film. In response, BP stated they were unable to provide any further information because it was exempt by virtue of S43(2).
3. Ms Cox sought a review stating that she was not satisfied by the response. She said 'I want access to the consent and advice given to Garden Productions on contacting me and my family. I specifically want access to the advice with regards to protecting the privacy and respecting the dignity of victims of crime and family members, specifically me and my family members'. On review the decision was not changed.

4. Ms Cox contacted the Information Commissioner (IC) on 21 November 2017 to complain about the decision and the IC investigated this complaint and upheld it on the grounds that S43(2) was not engaged. She identified that BP held two items of information, the Access Agreement between itself and The Garden and the Code of Conduct appended to that agreement. The IC reached agreement that the camera rig plan and individual contact details should be excluded from the scope of her investigation. BP appealed the IC's decision.
5. The appeal bundle consists of 272 pages including a skeleton argument on behalf of The Garden and a skeleton argument on behalf of the IC. There are also two closed bundles.
6. The appeal was made by BP. However, the commercial interests involved relate to The Garden, who were joined as a second Respondent. At the hearing it was agreed that The Garden would, in effect, take the role of the Appellant with the IC as the Respondent. No further issue was raised about this. It was also agreed that officers from Channel 4 would not be excluded during the closed evidence.
7. The Tribunal raised the point mentioned in the IC skeleton argument that the IC appeared to consider that there may be other disclosable documents. It was agreed that this was not a relevant consideration for this appeal. It was also agreed that information disclosed to Ms Cox in a letter in an error should be treated as part of the withheld information. Although Ms Cox had received this information it has not been disclosed to the 'world at large'.
8. Ms Cox attended with her brother. She initiated the request which resulted in this appeal. That request was upheld by the IC who then became the first Respondent. Her concerns about her treatment and the treatment of her family which led to her request has become an issue as to the prejudice to The

Garden's commercial interests. This is understandably frustrating for Ms Cox. Unsurprisingly, she did not have questions for the witnesses about the access agreement, but she set out her concerns about the way she and her family had been treated. The correspondence and written evidence in the appeal bundle makes it clear that the access agreement under consideration does not deal with the issues relating to the impact on Ms Cox and her family. Unfortunately, this leaves Ms Cox dissatisfied by the information she has obtained.

9. The Chief Constable of Bedfordshire Police was represented by Ms Kate Stephenson, Head of Legal Services at Bedfordshire Police. By agreement, she took no active part in the hearing but was rightly present to represent the appellant. Mr Robin Hopkins, of counsel, represented The Garden and it was agreed The Garden was the de facto appellant. Ms Elizabeth Kelsey, of counsel, represented the Information Commissioner.
10. The Tribunal heard from two witnesses each in open session and closed session. Mr Simon Ford, the Executive Producer from The Garden and Mr Danny Horan, Head of Factual at Channel 4. Although not appearing as expert witnesses they are both experienced practitioners in the area of developing and making this type of documentary film. At the end of each closed session, Ms Kelsey reported back a gist of what was discussed in the closed session.
11. The hearing started at 10.00am. It broke for lunch at 12.35pm having heard from Mr Ford in open and closed session. The Tribunal resumed at 13.30pm and heard evidence from Mr Horan in open and closed session. There were then closing submissions from Mr Hopkins and Ms Kelsey. At the end Ms Cox addressed the Tribunal about her concerns about the way she and her family had been treated.
12. Upper Tribunal Judge West attended as a judicial observer. He remained throughout the proceedings and the deliberations but took no part in the

hearing or the decision. Mr Rippon also attended under the judicial shadowing scheme but, again, took no part in the proceedings.

13. The hearing concluded at 3.00pm.

Decision notice, Appeal and Directions

14. On 22 May 2018 the IC decided that BP was not entitled to rely on S43(2) to withhold the Access Agreement and Code of Conduct appendix between it and The Garden. She required BP to disclose to Ms Cox the information withheld under S43(2) excluding the camera rig plan and the personal data of the individuals identified in the withheld information.

15. Detailed Case Management Directions were issued on 20 June 2018. This was necessary because an appeal can only be made by either the original requester (Ms Cox) or the Public Authority (Bedfordshire Police). In this case it was The Garden who, in effect, wanted to appeal the IC's decision. The Directions added both Ms Cox and The Garden as Respondents and directed that Bedfordshire Police provide grounds for appeal and that The Garden provide submissions explaining why they say the decision notice is wrong in law.

16. The Garden provided a submission setting out their case for an exemption under S43(2) and why the public interest balance did not support disclosure. The Garden also provided a copy of the redacted information provided to Ms Cox. It also provided an unredacted copy of the agreement to the IC. This has now been provided in the closed bundle.

17. On 25 July 2018 BP appealed this decision. In the appeal BP state that it is not their commercial interests in question but that of The Garden. BP state that it does not have 'expertise about the competitive dynamics of The Garden's

business'. BP stated that the best it could do was to consider the arguments put forward by The Garden. It observed that The Garden is only seeking to withhold parts of the agreement. In respect of the balance of public interest, BP stated that it may take a slightly different view from The Garden but, even if finely balanced, it was in favour of withholding the information sought.

18. The IC's response accepts that the withheld information would be of interest to The Garden's competitors. However, she says the agreement sets out arrangements in fairly broad terms and there was little in this information which could not be surmised by competitors. In her view, the prejudice to The Garden's commercial interests is not made out. Accordingly, the IC does not consider the public interest test. The IC does make the point that this conclusion is based on the information available to her. This is before the evidence of Mr Ford and Mr Horan.

19. Mr Ford provided a written statement. In addition, he provided a closed addendum, where he sets out his reasons for withholding each redacted section of the agreement. Mr Horan also provided a written statement.

Findings, Reasons and Conclusions

20. The issues in this appeal are relatively straightforward. Although, BP is the appellant, the legislation applies to the commercial interests of others, in this case The Garden, who have acted as de facto appellant in this appeal with the agreement of all the parties.

21. Two witnesses gave evidence on behalf of The Garden. Their evidence is in their written witness statements. They were both asked questions by Ms Kelsey, on behalf of the IC, and by the Tribunal.

22. Mr Ford's evidence was that the access agreement was of crucial commercial importance to The Garden and would be of significant benefit to its competitors. He described this specialised area of 'fly on the wall' documentaries revealing the operations and the complexity of the work of public bodies. The documentary '24 hours in police custody' is a ground breaking, acclaimed, series. It reflects the public interest in the working of public bodies and the commitment of those public bodies to be transparent and to explain their role to the wider public. There is both public appetite and official desire to see documentaries such as these made.

23. However, the challenges in making such a documentary are great. There are significant logistic difficulties to convey the work without impeding the performance of that work. There are issues of trust and confidence and there is the necessary compliance with other rules, for example the legal requirements related to the judicial process, consent and privacy issues.

24. Mr Ford described that the access agreement was key to overcoming these issues. If disclosed, it would allow a competitor to present themselves as understanding the issues and would allow them to present an approach which would gain the initial meetings which are a substantial barrier to their many competitors.

25. He described a market which is highly competitive with public authorities being approached to make similar documentaries. In terms of police forces, there are 47 police forces all of whom look at Bedfordshire Police and the possibility of being able to explain their role, function and the obstacles they face to an interested public. He described these forces as receiving significant numbers of requests from rival companies, who were seeking ways to make an effective initial contact. It was suggested to Mr Ford that The Garden had nothing to fear from its rivals because it held such a commanding position. He disagreed because situations change and develop and any advantage is tenuous.

26. In closed session, Mr Ford took each of the redacted bits of the access agreement and explained why these passages should be redacted and the benefit a competitor would get from disclosure. He was questioned about some of these passages, but not all of them. This was because Mr Ford advanced a similar argument in respect of each area. This was that the commercial advantage was in seeing how the agreement was worded and how the problems were approached in the different areas that would give a rival company a significant advantage in approaching another police force. He said that he had gone through each of the headings to see what could be disclosed and had decided that the headings should be disclosed. He said that he was committed to the maximum amount of transparency and wanted, if possible, to disclose the maximum amount of information.

27. The Tribunal also heard from Mr Horan. At the relevant time he was working for the BBC. He told the Tribunal that the BBC had wanted to make a similar programme to '24 hours in police custody' but did not know how it had been made and, in the end, had to give up on the project. Seeing the programme had not enabled them to surmise how it had been made and how the access agreement had been created. Since leaving the BBC about 6 months ago he had seen the agreement in his role as Head of Factual at Channel 4. In his view, provision of this agreement would significantly prejudice The Garden's commercial interests by giving its competitors a road map of how to make these programmes.

28. The Tribunal accepted their evidence. It was consistent and persuasive. Although not giving expert evidence, their expertise in this area was clear. In answer to questions they both provided clear answers consistent with their written evidence.

29. Ms Kelsey in her closing statement suggested that the information in the access agreement fell into three categories. One category is generic paragraphs that anyone would expect to be in an access agreement and that these paragraphs should be disclosed because they can be easily surmised and there would be no prejudice in their disclosure.
30. She suggested that a second category are those paragraphs that are unique to the making of '24 hours in police custody'. These paragraphs are of no competitive value because they cannot be replicated because they only relate to this particular programme. If they represented a starting point this was not enough to get over the threshold of a real and significant risk. At best, these paragraphs could possibly be of some assistance, but this is not sufficient to meet the prejudice test.
31. The third category of paragraph are those which would not be expected to be in other agreements but these paragraphs are not so specific to meet the test. In her submission, they barely provide a starting point for competitors.
32. Ms Kelsey gave an example of the first category as the section on Health and Safety. In her submission this was a generic paragraph which anyone would expect to see in an access agreement and that the wording was such as could be easily surmised by a competitor. This was one of the areas where Ms Kelsey questioned Mr Ford. In his response, Mr Ford said that while he was not an expert on Health and Safety and would rely on colleagues with that expertise, he considered that the approach taken in this agreement, if disclosed, would be commercially useful to competitors. It demonstrated how this necessary area had been approached and the wording provided commercially useful information as to how to negotiate in this area.
33. The Tribunal considered whether it should attempt an exercise of going through each sentence of the redacted material to see whether it could be

disclosed. The Tribunal considered that this was not the correct approach. The result of this exercise might produce a meaningless collection of words and sentences and would not address the central argument put forward by Mr Hopkins, Mr Ford and Mr Horan. This argument is that this document is a key road map that would allow competitors to 'see behind the curtain'. The publication of this documents would significantly elevate the prospects for rivals in a highly competitive market.

34. There is an argument that the whole of this document should not be disclosed, that any glimpse gives an advantage. Mr Ford made it clear that his guiding principle was transparency. This was a central aim of his documentaries. Because of this, he had considered what could be disclosed. The fact that the headings and some parts of the agreement have been disclosed does not undermine his argument that disclosure of the rest would significantly prejudice The Garden's commercial interests.
35. The Tribunal accepts that disclosure to 'the world at large' would place the access agreement into the hands of The Garden's competitors and that the disclosure would very well be of significant commercial advantage to those competitors and would damage The Garden's commercial interests.
36. The Tribunal went onto consider the public interest test. This has to be considered in relation to the specific contents being withheld. Mr Hopkins submitted that it was relevant, in considering this test, that information held by broadcasters has been protected by Parliament. The issue arises here only because the information in this agreement is also held by Bedfordshire Police as a party to the agreement. This suggests there is public interest in non-disclosure.
37. The area where public interest is strongest, the privacy rights of individuals and the rights of victims and their families, is not part of this agreement. Ms

Cox sought this type of information but it does not form part of the access agreement. There is an Ofcom code which it intended to protect the public. There is a public interest in these documentaries being made and the protection of information which allows them to be made in a commercial context.

38. The Tribunal accepted Mr Hopkins' submission on this issue. The Tribunal is satisfied that the public interest is in maintaining the exemption.

Signed

R Good

Judge of the First-tier Tribunal

Date: 22 November 2018

Decision: 5 December 2018

Promulgated: 10 December 2018