



NCN: [2023] UKFTT 00277 (GRC)

Appeal Number: EA/2022/0080

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

Decision given on: 14 March 2023

Between:

Roger Little

Appellant:

and

The Information Commissioner

First Respondent:

and

Chief Constable of Thames Valley Police

Second Respondent:

Date and type of Hearing: 16 September 2022 a hearing on the papers resulting in joinder of the Public Authority as Second Respondent and Open and Closed Case Management Directions and further an Oral hearing on the CV Platform with the Appellant present and detailed and comprehensive written submissions on behalf of the Respondents on **3 March 2023**.

Panel: Brian Kennedy QC, Naomi Matthews, and David Cook.

Representation:

For the Appellant: Roger Little, as litigant in person.

For the First Respondent: Helen Wrighton, Solicitor by way of written submissions.

For the Second Respondent: Guy Lemon, Head of Legal Services.

Result: The appeal is dismissed.

REASONS

Introduction:

- [1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“DN”) dated 8 March 2022 (reference IC-104324-G6L8), which is a matter of public record.

Factual Background to this Appeal:

- [2] Full details of the background to this appeal, the complainant’s request for information and the Commissioner’s decision are set out in the DN. The appeal concerns a request for information relating to information from Thames Valley Police (“TVP”) concerning an incident involving the Kimblewick Hunt. TVP withheld the information, citing sections 30(1) (investigations and proceedings) and 40(2) (personal information) of FOIA. The Commissioner held that TVP were entitled to rely on section 30(1)(a)(i) to withhold the information.
- [3] The Commissioner maintains the position set out in the DN; namely that TVP were entitled to rely on section 30(1)(a)(i) to withhold the information. The Appellant now appeals against the DN. The Commissioner opposes the appeal and invites the Tribunal to uphold the DN. The Appellant seeks a paper hearing. The Commissioner agrees with this mode of hearing.

History and Chronology

- [4] On 16 March 2021, the Appellant wrote to the Second Respondent and requested information in the following terms:

"I understand that the conclusion from the investigation into the Kimblewick Hunt chasing and killing a fox in December 2020 is that no further action is being taken by the [sic] yourselves. It is clearly in the public interest for the Thames Valley Police to make known the detail of the investigation and why no prosecution has occurred, given the damning video footage of the incident which is easily available to view. The police clearly have a difficult job, particularly during the Covid pandemic, however your credibility is at stake and a comprehensive review of the decision-making process will help you retain public confidence. I look forward to hearing from you with the requested information, namely details of the investigation and how Thames valley police came to a no action decision".

- [5] TVP responded on 30 March 2021. It refused to provide the requested information, citing the following exemptions:
- *section 40(2) (personal information);*
 - *section 30(1) (investigations and proceedings conducted by public authorities).*
- [6] It did, however, confirm that the TVP did provide a link from the Crown Prosecution Service (CPS) that contained a statement declining to prosecute the matter
- [7] Following an internal review, TVP wrote to the Appellant on 30 April 2021 maintaining its original position.
- [8] On the 5 May 2021, the Appellant wrote to the Commissioner challenging TVPs' response to his Request.
- [9] On 8 March 2022, the Commissioner issued his decision notice in which he found that section 30(1)(a)(i) was engaged and that the public interest test favoured maintaining the exemption.
- [10] On 31 March 2022, the Appellant filed a Notice of Appeal.

Legal Framework:

Section 30 of FOIA states that:

“(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of- (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained – (i) whether a person should be charged with an offence, or (ii) whether a person charged with an offence is guilty of it...”.

Consideration of section 30(1)(a)(i) is a two-stage process. First, the exemption must be shown to be engaged. Secondly, as section 30 is a qualified exemption, it is subject to the public interest test. This involves determining whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information in all the circumstances of the case.

Commissioner’s Decision Notice:

- [11] The Commissioner investigated the matter and concluded that TVP had correctly applied section 30(1)(a)(i) FOIA. In applying the public interest test, the Commissioner held that the balance of interests was in favour of non-disclosure of the information sought. The Commissioner did have concerns that disclosing information considered as part of a criminal investigation, which identifies individuals who assisted with the investigation, could create a perception among the wider public that sensitive information about criminal investigations may be disclosed to the world at large, even where the evidence has not resulted in a prosecution. He considered that there is a real chance this may deter people (including witnesses, complainants and suspects) from coming forward and cooperating with prosecuting authorities, particularly where criminal offences have been alleged. The Commissioner argued that there is a very significant public interest in avoiding that outcome and it is a factor of some weight in favour of maintaining the exemption in this case.
- [12] Taking all the above into account and having given due consideration to the arguments on both sides, the Commissioner, whilst accepting that disclosing the withheld information would be likely to promote transparency, he considered that

the public interest in disclosure is outweighed by the public interest in ensuring that the investigation and prosecution of offences is not undermined.

- [13]** The Commissioner was therefore satisfied that TVP was entitled to rely on section 30(1)(a)(i) of FOIA to refuse the request and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Grounds of Appeal:

- [14]** The Appellant's Grounds of Appeal detailed that in paragraph 35 [of the DN] TVP refers to media statements to inform the public of their decision, however these statements in no way provide assurance or provide any information to the public regarding the reason(s) for not prosecuting Kimblewick Hunt.
- [15]** The Appellant argued that paragraph 39 [of the DN] states that the Commissioner recognises the importance of the public having confidence in public authorities that are tasked with upholding the law. Confidence will be increased by allowing scrutiny of their performance and this may involve examining the decisions taken in particular cases. This is one of those cases.
- [16]** Further, the Appellant contended that the TVP is concerned with witness identity and naming particular people involved in the investigation. The Appellant stated that the information already in the public domain includes a video of a fox running through outbuildings being chased and directed to be chased by one of the Kimblewick fox hunt. Witnesses, the owners of the outbuildings, came forward and gave first hand information on ITV news describing what they had seen.
- [17]** The Appellant stated that Paragraph 46 [of the DN] indicated concern for identifying individuals who assisted in the investigation and that their identification may deter others coming forward to testify. In this specific case (as stated above) the acts of Kimblewick Hunt are on video record, witnesses have come forward and been interviewed on national television.

- [18] The Appellant continued by indicating that the investigation is over, and there would be no further action. The public have seen the hunting with dogs', evidence, heard testimony by eyewitnesses and then been told that the TVP investigation is not proceeding. The Appellant indicated that he failed to understand how providing information about how the decision has been arrived at is not in the public interest.
- [19] The Appellant also added that he cannot understand how providing this information jeopardises future or ongoing investigations, or deters members of the public from testifying, on the contrary not providing the information regarding the rational for not prosecuting calls into doubt the credibility of the TVP.

The Commissioner's Response:

- [20] The Commissioner maintained the position as outlined in the DN and resisted the appeal. The Commissioner relied on the reasons for those findings as set out in the DN. The Commissioner noted that the TVP have confirmed the reason for not pursuing a prosecution, namely because the Crown Prosecution Service considered there was insufficient evidence to do so.
- [21] Further, the Commissioner stated that the statement to the media in March 2021 was also intended to reassure the general public that a thorough investigation had been completed given the references to a review of "*all the available evidence including CCTV, mobile phone footage and witness statements...*". It is the Commissioner's position that the public interest test does not favour the disclosure of the specific content of the requested information itself for the reasons set out in the DN.
- [22] The Commissioner said that the public interest test involves a balancing exercise weighing up competing factors both for and against disclosure. In this case, whilst the Commissioner recognised public confidence as a factor in favour of disclosure; he ultimately concluded that the factors in favour of non-disclosure weighed more heavily.

[23] The Commissioner referred to his own guidance that section 30 exemption is concerned both with possible prejudice to a live and specific investigation as well as preventing the disclosure of material that may prejudice future investigations and proceedings in general.

[24] The Commissioner adopted the argument from his DN:

“The Commissioner did have concerns that disclosing information considered as part of a criminal investigation, which identifies individuals who assisted with the investigation, could create a perception among the wider public that sensitive information about criminal investigations may be disclosed to the world at large, even where the evidence has not resulted in a prosecution. He considered that there is a real chance this may deter people (including witnesses, complainants and suspects) from coming forward and cooperating with prosecuting authorities, particularly where criminal offences have been alleged. The Commissioner argued that there is a very significant public interest in avoiding that outcome and it is a factor of some weight in favour of maintaining the exemption in this case.”

[25] The Commissioner invited the Tribunal to dismiss the appeal.

The Second Respondent’s Response:

- [26] The Second Respondent (“TVP”) put forward the following submissions:
- a. Legal principles – information gathered by the police for a criminal investigation
 - b. Legal principles – legal professional privilege
 - c. Section 30(1) – the public interest in maintaining the exception
 - d. Section 30(1) – the public interest in disclosing the information
 - e. Section 40(2) – personal information
 - f. Section 41 – information held in confidence
 - g. Section 41 – legal professional privilege

Legal principles – information gathered by the police for a criminal investigation:

[27] The TVP submitted that these propositions are uncontroversial and supported by a long line of authority.

[28] By way of examples only, in *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177, [1998] 4 All ER 801 Lord Hoffmann said at 211B:

“...Many people give assistance to the police and other investigatory agencies, either voluntarily or under compulsion, without coming within the category of informers whose identity can be concealed on grounds of public interest. They will be moved or obliged to give the information because they or the law consider that the interests of justice so require. They must naturally accept that the interests of justice may in the end require the publication of the information or at any rate its disclosure to the accused for the purposes of enabling him to conduct his defence. But there seems to me no reason why the law should not encourage their assistance by offering them the assurance that, subject to these overriding requirements, their privacy and confidentiality will be respected.”

[29] The TVP noted that all those cases were considering disclosure of material from a criminal investigation or prosecution for the limited purposes of civil proceedings. Even for those limited purposes, the question of disclosure is anxiously considered by the courts before striking a balance as to where the public interest lies. Where disclosure is ordered, this was usually subject to stringent requirements only to use the material for the limited purposes of the proceedings in which it is required. As Scott Baker LJ put it in *Rowe v Fryers* (commenting on and approving the approving the approach of the first instance judge):

“To that end he imposed stringent conditions on the extent and manner of disclosure. This, in my view, is a course which should always be followed in similar cases where the court decides that disclosure is required.” [at paragraph 39]

[30] In the context of a request under FOIA, this Tribunal is in effect considering whether the material should be made available to the public at large, without restriction i.e., to the World at Large. The TVP submitted that the clear legal principles about confidentiality apply with even greater force in that context.

Legal principles – legal professional privilege:

[31] The TVP submitted that it is well-established, and uncontroversial, that the public interest in withholding information covered by legal professional privilege is significant. In *R v Derby Magistrates Court, Ex parte B, [1996] AC 487*, Lord Taylor of Gosforth CJ summarised the rationale at 507D:

“The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.”

Section 30(1) – the public interest in maintaining the exception:

[32] The TVP understands it to be common ground that the exemption in section 30(1)(a)(i) is engaged. The TVP averred that the Appellant does not appear to challenge that conclusion of the Commissioner. If that is not the case, the TVP submits that it is plain that the material in question was gathered, and held, for the purposes of an investigation it was conducting, and in accordance with its duty, to ascertain whether a person should be charged with a criminal offence. That is the very reason the TVP holds the material.

Section 30(1) – the public interest in disclosing the information:

[33] The TVP stated that there are very strong public interest reasons for maintaining the exemption, however, they must be balanced against the public interest in disclosing the information. Whilst acknowledging the public interest in transparency

and accountability of public authorities alongside the Appellant's submissions, the TVP argued that the public interest in disclosing the information requested in this case is very limited. The TVP contended that it is overwhelmingly outweighed by the public interest in maintaining the exemption.

Section 40(2) – personal information:

- [34] The TVP argued that it would plainly be a breach of the data protection principles to release the personal data in question. Further, such disclosure would be in breach of duties of confidentiality, and would therefore be unlawful. The absolute exemption in section 40(2) therefore applies to that personal data.
- [35] The TVP accepted that some of the material held might not amount to personal data. However, to disclose that material would lead to an incomplete and, arguably, meaningless provision of information, which would necessitate a reconsideration of the balancing exercise carried out under section 30. In so far as it is contained in communications with the CPS, it would also be subject to legal professional privilege and exempt under section 42.

Section 41 – information held in confidence:

- [36] The TVP argued that it would be an actionable breach of confidence to disclose the information publicly. The absolute exemption in section 41, therefore, applies to that information.
- [37] The TVP accepted that some of the material might not be held in confidence. However, to disclose that material would lead to an incomplete and, arguably, meaningless provision of information, which would necessitate a reconsideration of the balancing exercise carried out under section 30. In so far as it is contained in communications with the CPS, it would also be subject to legal professional privilege and exempt under s42.

Section 42 – legal professional privilege:

- [38] The TVP argued that the communications between the police and CPS were for the purposes of giving and receiving legal advice and are therefore subject to legal professional privilege.

[39] Further, the qualified exemption under section 42 applies to those communications. In addition, the public interest in maintaining the exemption overwhelmingly outweighs any public interest in disclosing the communications.

[40] The TVP invited the Tribunal to uphold the Commissioner's decision and dismiss the appeal.

Further Open Submissions from the Commissioner:

[41] The Commissioner maintained that Section 30(1)(a)(i) is engaged in relation to all the information identified as falling within the scope at paragraph three above. For this reason, the Commissioner has not made any further submissions in relation to the other exemptions cited by Police. (The Tribunal agree with this assessment by the Commissioner.)

[42] The Tribunal had the benefit of further written submissions from the First and Second Respondents which were helpful in clarifying queries about which information was in scope and out of scope of the request. We also heard further written submissions from the Appellant which echoed his earlier written submissions and made clear that he felt that the public interest favoured disclosure.

[43] The TVP indicate that it appears to be common ground that the exemption in S 30 (1) (a) (i) is engaged. Therefore, it is a simply a matter of considering whether the public interest favours disclosure or not. We agree with this assessment.

[44] The Tribunal have noted, agreed with, and adopted the TVP Open submissions dated 12 October 2022 on the Public Interest test.

The Hearing on 3 March 2023:

[45] As a result of the detailed Case Management Directions provided by the Tribunal on 16 September 2022, the Tribunal had received expansive and comprehensive Open and Closed Submissions and Further Submissions from each of the Respondents. The Appellant attended the hearing on the CV Platform on 3 March

2023. The Tribunal explained the issues in the appeal to the Appellant and invited him to add any further submissions in relation to his grounds of appeal. The Appellant repeated his concern about the evidence that he had been aware of in the video recording he had seen and the obvious Public Interest in disclosure in all the circumstances. The Tribunal explained to the Appellant that we now had very detailed information about the nature and extent of the Police investigation and that it is fully accepted that there is significant Public Interest in the issues raised in this appeal.

- [46]** The Tribunal are grateful to both Respondents for their further submissions which have resolved the concerns we raised in our Case Management Directions. Having carefully considered the detailed information now before us we are satisfied that section 30(1)(a)(i) is engaged in relation to all the information held by the Second Respondent and as identified by the Commissioner as falling within the scope of the request. We further accept and adopt the Commissioners reasoning in the DN in relation to the finding that the balance of the Public Interest lies in favour of withholding the information.
- [47]** The Tribunal accept that the time we must consider is the time the request is made, which means that it was not a particularly historic investigation which may add to the public interest test as put forward by both Respondents.
- [48]** The Tribunal accept and understand the Appellants' concerns and acknowledge that he is a conscientious citizen who wishes to raise sincere and genuine issues. With the benefit of access to the Closed material the Tribunal have further insight and can indicate that what might appear to have been substantive evidence that should have been available for prosecution purposes is not always available or accessible in such form. In any event generally both the prosecution service and the police, as in this case, have very good reasons for withholding such information as they do hold, as the TVP has clearly set out in their detailed submissions in this appeal. We accept the arguments in the closed submissions and as set out above, and that disclosure of the withheld information would not be in the Public Interest. We also note that the Appellant stated in his oral submissions that he accepted

that it was not the TVP who made the decision not to prosecute but the Crown Prosecution Service.

[49] The Commissioner maintains that section 30(1) is applicable, and the Tribunal agree with this. The TVP relies heavily on section 41 and 42. This case relates to Communications from the CPS i.e., Evidential material provided to or obtained by the police in the course of their investigation; and Communications and correspondence with the CPS for the purposes of the CPS advising and deciding whether any charges should be brought. Further to the production of all relevant material arising from our specific and detailed Directions, the Tribunal have had an opportunity to scrutinise all of the withheld information within scope of the request. We are satisfied that Section 30 (1) is engaged, and we are further satisfied for the reasons given by the Commissioner that the public interest test lies in favour of non-disclosure. Again, having considered the information before us in Closed form we accept the Second Respondents reliance upon Sections 41 and 42 but agree that the Commissioner did not need to make a decision on that reliance given the reliance in the DN on Section 30(1).

[50] Without prejudice to the generality of the comprehensive submissions made by the Second Respondent on 12 October 2022, on the Public Interest considerations, both those in favour of disclosure and those in favour of withholding the impugned information, we accept, endorse, and adopt these submissions and we refer to the following:

At Paragraph 22 the citation from Para 46 of the DN as set out at Paragraph [11] above.

At Paragraph 23:

“ - - - the public interest in maintaining the confidentiality of information gathered for the purposes of a criminal investigation, is not only important to avoid the deterrent, or chilling, effect on future investigations of a perception that there might be disclosure to the world at large. There are also fundamental duties of

confidentiality and fairness to those who have already provided such information. As the authorities referred to in Section B of these submissions exemplify, those duties are real and significant. That is a weighty factor in favour of maintaining the exemption”.

At Para 24:

“Making comments to the media, which may or may not have been reported or broadcast in full or in context, is a wholly different process to giving a formal statement or being interviewed by the police. In any event, what a person says when interviewed on TV may, or may not, be the same as what they subsequently say in a witness statement to the police (or when interviewed by the police). If it is the same, then nothing is added by making their statement publicly available. If it is not, then that reinforces the need to uphold the duty of confidentiality to that person.”

[51] In all the circumstances and on the evidence before us, we find no error of Law in the DN and we find no error in Law or in any discretion exercised by the Commissioner in the impugned DN and accordingly we must, and unanimously do, dismiss this appeal.

Brian Kennedy KC.

6 March 2023.