



Case Reference: EA-2022-0224
Neutral Citation number: [2023] UKFTT 00126 (GRC)

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: On the papers
Heard on: 1 February 2023
Decision given on: 20th February 2023

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER SUSAN WOLF
TRIBUNAL MEMBER KATE GRIMLEY EVANS

Between

EDWARD WILLIAMS

and

THE INFORMATION COMMISSIONER

Appellant

Respondent

DECISION CORRECTED UNDER RULE 40

Decision: The appeal is dismissed.

MODE OF HEARING

The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Chamber's Procedure Rules.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-125998-K0S6 of 16 August 2022 which held that the Independent Office for Police Conduct ('the IOPC') were entitled to rely on section 30(1)(a)(i) of the Freedom of Information Act 2000 (FOIA). The Commissioner did not require the public authority to take any steps.

Factual background to the appeal

2. The requested information relates to the death of an individual in custody of Devon and Cornwall Police in 2012. The matter was referred to the IOPC under police complaints legislation and the IOPC investigated the case in line with its functions under the Police Reform Act 2002.
3. The conduct of staff and officers was investigated by the IOPC, and a file of evidence submitted to the CPS for them to determine whether criminal charges would be brought. The investigation also considered if the officers had cases to answer for misconduct. A file of evidence was submitted to the Health and Safety Executive for the consideration of corporate charges.
4. The CPS decided in December 2014 that three officers should face criminal charges of unlawful act manslaughter, gross negligence manslaughter and misconduct in a public office.
5. In January 2016 the IOPC gave its opinion that seven officers had cases to answer for gross misconduct.
6. In March 2016 the jury was discharged without delivering a verdict and in 2017 all officers were acquitted following a six-week retrial. Disciplinary charges were still under consideration and the IOPC was examining corporate decision making.
7. In February 2018 the IOPC directed the force to bring disciplinary hearings for gross misconduct against six officers.
8. In April 2018 the CPS decided to charge the Office of the Chief Constable of Devon and Cornwall Police with offences under the Health and Safety at Work Act 1974, following the IOPC investigation. This resulted in a conviction and a fine after health and safety breaches were admitted in May 2019.
9. After a preliminary hearing in July 2019 an independent panel decided to dismiss the misconduct case against the four of the officers and in October 2019 the IOPC announced its decision to withdraw the decision to direct misconduct hearings for the two remaining officers. The IOPC indicated at the time that there was a

possibility of a future inquest and stated its commitment to make a publication decision on its reports once all associated proceedings had concluded.

10. At some point between August 2021 and July 2022 the Coroner indicated that there would be an inquest into the death. The IOPC anticipated that this would take place in 2023. Following the inquest, there is a possibility that the CPS may conduct a further review of the evidence relating to the death, of which the investigation report would be a part.

Requests, Decision Notice and appeal

The request

11. Mr. Williams made the following request to the IOPC on 26 July 2021:

Disclose the IOPC full report into death of [name redacted], died [date redacted] 2012.

The response

12. The IOPC replied to the request on 23 August 2021, stating that it was withholding the requested information under sections 30(1)(a)(i) and 40(2).
13. Mr. Williams requested an internal review. The IOPC refused to provide one in the absence of any grounds provided by Mr. Williams.
14. Mr. Williams complained to the Commissioner on 24 August 2021.
15. In a decision notice dated 16 August 2022 the Commissioner concluded that the IOPC were entitled to rely on s 30(1)(a)(i) to withhold the requested information. The Commissioner required no steps to be taken.
16. In relation to section 30(1) the Commissioner stated that he considered that information can be exempt if it relates to a specific ongoing, closed or abandoned investigation. The Commissioner set out his guidance on section 30 which states that section 30(1)(a)(i) can only be claimed by public authorities that have a duty to investigate whether someone should be charged with an offence and that although the police are the most obvious users there may be other public authorities who have a duty to investigate offences which may lead to a suspect being charged. The Commissioner was satisfied that the withheld information was held in relation to a specific investigation conducted by the IOPC of the type described in section 30(1)(a)(i).
17. In relation to the public interest balance, the Commissioner held that the purpose of section 30 is to ensure the effective investigation and prosecution of offences. It is not in the public interest to jeopardise the ability of the IOPC to investigate serious complaints and incidents involving police effectively. Set against this the Commissioner recognised the importance of the public having confidence in public

authorities which will be increased by allowing scrutiny of their performance and may involve examining the decisions taken in particular cases. He acknowledged the public interest in promoting transparency, accountability and public understanding with regard to decisions made by public authorities. The Commissioner was mindful of the sensitivity of the matter under consideration and recognised the IOPC's commitment to publish information about this case, if appropriate, in the future.

18. The Commissioner acknowledged that the IOPC stated that despite the length of time that has passed since the death occurred this remains an open case. He took into consideration that at the time of the request further proceedings were being considered by the Coroner. He acknowledged that at the time of writing the decision notice the Coroner had not set a date for the inquest.
19. Taking all the above into account, the Commissioner concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.

Grounds of Appeal

20. The Grounds of Appeal in summary are:
 - 20.1. The exemption is not engaged. The IOPC decide whether to refer to the CPS, which then decides whether to prosecute.
 - 20.2. The public interest balance test was wrongly decided. The person in question died in 2012 and there was no inquest scheduled at the time of the reply to the request.

The Commissioner's response

21. The fact that the CPS takes the decision to prosecute does not disturb the Decision Notice findings. The public authority must have a duty to investigate whether someone should be charged with an offence. The IOPC have demonstrated that they have a duty to carry out an investigation under paragraph 19 of Schedule 3 to the Police Reform Act 2002.
22. Section 10 Part 2 of the Police Reform Act 2002 outlines the statutory duties the IOPC has to uphold confidence in the Police complaints system. One of the ways it must do this is by investigating complaints and referring to the CPS if the IOPC believes the complaint warrants it. It does not matter if the IOPC does not prosecute, the report is caught by the exemption as it was conducted with a view to ascertaining whether a person *should* be charged with an offence. Section 30(1)(c) is the exemption which is reserved for those bodies who have power to conduct criminal proceedings whereas section 30(1)(a)(i) is reserved to public authorities who have the power to simply investigate.
23. The Commissioner maintains that the public interest was correctly balanced in favour of maintaining the exemption.

Mr. Williams' reply

24. The IOPC document 'A guide to IOPC independent investigations' states that 'where an inquest will be held, we provide our report and evidence to the Coroner to be considered at the inquest.' As a matter of law, there will be no decision made by the CPS as to if there should be a prosecution until the inquest is over.
25. Schedule 3 of the Police Reform Act 2002 does not impose any duty on the IOPC to conduct an investigation which the IOPC has a duty to conduct with a view to it being ascertained by the IOPC as to whether or not a person should be charged with an offence. The word 'ascertain' was discussed in DVLA v Information Commissioner and Williams [2020] UKUT 334 (AAC).
26. In DSI (death and serious injury) cases, charging is the sole domain of the CPS. According to its website:
The CPS:
- decides which cases should be prosecuted;
 - determines the appropriate charges in more serious or complex cases, and advises the police during the early stages of investigations;
 - prepares cases and presents them at court; and
 - provides information, assistance and support to victims and prosecution witnesses.
27. In relation to the public interest balance, a man died in 2012 and we are still waiting for the Coroner's inquest. No wonder the public has lost all faith in the police, the IOPC and the justice system in general.

Legal framework

Section 30(1) Investigations and proceedings conducted by public authorities

28. Section 30(1) provides that information is exempt information if it has been held by the authority for the purposes of certain investigations and proceedings. Under s 30(1):
- (1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purpose 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,
 - (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
 - (c) any criminal proceedings which the authority has power to conduct.

29. Section 30(1) is a class-based exemption. There is no requirement for a public authority to demonstrate prejudice for sections 30(1)(a) to (c) to be engaged. They are subject to the public interest test.

The Task of the Tribunal

30. The tribunal's remit is governed by s 58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

31. The issues we have to determine are:
- 31.1. Does the IOPC have a duty to conduct an investigation with a view to it being ascertained whether a person should be charged with an offence?
 - 31.2. Was the information at any time been held by the authority for the purpose of any such investigation?
 - 31.3. In all the circumstances of the case, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

Evidence

32. We have read and taken account of a closed and open bundle of documents.

Discussion and conclusions

Does the IOPC have a duty to conduct an investigation with a view to it being ascertained whether a person should be charged with an offence?

33. Mr. Williams relies on the meaning of 'ascertain' as discussed in **DVLA v Information Commissioner and Williams** [2020] UKUT 334 (AAC) ('**DVLA**'). That decision concerned section 31(1) which provides materially as follows:

31. – Law enforcement

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

...

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

...

(2) The purposes referred to in subsection (1)(g) to (i) are –

(a) the purpose of ascertaining whether any person has failed to comply with the law,

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

...

34. To the extent that the Upper Tribunal in DVLA gave any view on the meaning of the word ascertaining, we think there was at least some approval of the analysis of the First Tier Tribunal in Foreign and Commonwealth Office v Information Commissioner EA/2011/0011, at para 69 DVLA:

Much more persuasive (albeit again not determinative) is the First-tier Tribunal's analysis in *Foreign and Commonwealth Office v Information Commissioner* (EA/2011/0011), where it expressed the view that "the word 'ascertain' connotes some element of determination with regard to non-compliance with the law or responsibility for conduct which is otherwise improper" (at paragraph 33).

35. The wording in section 31(2)(a) and (b) is different to that in section 30(1)(a)(i). Under section 31 the body must be exercising its functions for the purpose of ascertaining something. Under section 30 the investigation must be conducted with a view to it being ascertained whether a person should be charged. The latter formulation lends itself more easily to an interpretation that allows for the ascertaining to be conducted by a body other than the public authority. For those reasons we do not find DVLA of assistance in relation to the interpretation of section 30(1)(a)(i), other than we agree that the word 'ascertain' connotes some element of determination.
36. We do not accept that it is necessary under section 30(1)(a)(i) that the investigation be conducted with a view to it being ascertained by the IOPC whether a person should be charged with an offence.
37. The words 'by the authority' could have been included, as they have been in section 30(1)(b): 'any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings...' Alternatively, the formulation used in section 31 could have been used. Section 30(1)(a) could have read 'Any investigation which the public authority has a duty to conduct for the purpose of ascertaining - (i) whether a person should be charged with an offence'
38. As those words have not been used, in our view there is no requirement under section 30(1)(a)(i) for the IOPC to be the body that will ascertain whether or not a person should be charged with an offence. It is sufficient if the investigation is conducted by the IOPC with a view to it being ascertained by the CPS whether a person should be charged with an offence.
39. Does the IOPC have a duty to conduct such an investigation? Having reviewed the Police Reform Act 2002 (PRA) the tribunal's view of the duties of the IOPC is as follows.
40. Under section 10(4) PRA it is the duty of the Director General of the IOPC to exercise and perform the powers and duties conferred on him in the manner that the Director General considers best calculated for the purpose of securing the proper

carrying out of the Director General's functions under subsections (1) and (3). Under section 10(1) the Director General's functions include:

- (a) to secure the maintenance by the Director General and by local policing bodies and chief officers, of suitable arrangements with respect to the matters mentioned in subsection (2);
- (b) to keep under review all arrangements maintained with respect to those matters;
- (c) to secure that arrangements maintained with respect to those matters comply with the requirements of the following provisions of this Part, are efficient and effective and contain and manifest an appropriate degree of independence;
- (d) to secure that public confidence is established and maintained in the existence of suitable arrangements with respect to those matters and with the operation of the arrangements that are in fact maintained with respect to those matters;
- (e) to make such recommendations, and to give such advice, for the modification of the arrangements maintained with respect to those matters, and also of police practice in relation to other matters, as appear, from the carrying out by the Director General of the Director General's other functions, to be necessary or desirable.

41. The 'matters' in subsection (2) are:

- (a) the handling of complaints (within the meaning given by section 12);
- (b) the recording of matters from which it appears that there may have been conduct by persons serving with the police which constitutes or involves the commission of a criminal offence or behaviour justifying disciplinary proceedings;
- (ba) the recording of matters from which it appears that a person has died or suffered serious injury during, or following, contact with a person serving with the police;
- (c) the manner in which any such complaints or any such matters as are mentioned in paragraph (b) or (ba) are investigated or otherwise handled and dealt with.

42. Under Schedule 3 PRA (Handling of Complaints and Conduct Matters etc.) it is the duty of the Director General to determine whether or not it is necessary for a complaint or matter referred to it to be investigated.

43. If the Director General determines that it is necessary for the complaint or matter to be investigated, it is the duty of the Director General to determine the form which the investigation should take, including determining that the investigation is to take the form of an investigation by the Director General.

44. Where the Director General determines that the Director General should carry out the investigation of a complaint or matter, paragraph 19 applies., under which the Director General designates a person to take charge of the investigation.

45. Under paragraph 20(1), no criminal or disciplinary proceedings shall be brought in relation to any matter which is the subject of an investigation in accordance with Schedule 3 until the conduct to which the investigation relates has been certified under paragraph 20A¹ or, where the Director General has personally carried out the

1. ¹Under paragraph 20A, in the case of an investigation being conducted by the IOPC, where, at any time before the completion of the investigation, the Director General believes or determines that the appropriate authority would, on consideration of the matter, be likely to consider that there is sufficient evidence to establish on the balance of probabilities that conduct to which the investigation relates constitutes gross misconduct and it is in the public interest whose conduct it is to cease to be a member of the police force without delay.

investigation, a report has been completed by the Director General. These restrictions do not apply where it appears to the DPP that there are exceptional circumstances which make it undesirable to delay the bringing of proceedings.

46. Under paragraph 23 on receipt of the report by the IOPC or on its completion by the Director General, the Director General shall determine whether the report indicates that a criminal offence may have been committed and whether it is appropriate for the matters dealt with in the report to be considered by the DPP or that any matters in the report fall within any prescribed category of matters. If so, the Director General shall notify the DPP of the determination and send him a copy of the report. The DPP shall notify the Director General of any decision of his to take or not to take action.
47. Considering those provisions as a whole, including in particular the general duty under paragraph 10(4), the functions under paragraph 10(1) and the matters under paragraph (2), once the Director General has determined that the Director General should carry out the investigation of a complaint or matter, we consider that the IOPC is under a duty to carry out that investigation and was therefore under a duty to carry out the investigation in issue in this appeal.
48. In considering whether there was a duty to conduct the investigation with a view to it being ascertained whether a person should be charged with an offence, we have taken into account the provisions as a whole, including in particular the restriction in paragraph 20 on criminal proceedings until the investigation is completed or the conduct certified and the duty in paragraph 23 to determine whether the report indicates that a criminal offence has been committed and whether it is appropriate for the matters to be considered by the DPP, and if so, to notify the DPP of that determination. We have also considered the specific facts of the case, including the fact that this was a death in custody, and that a file of evidence was ultimately submitted to the CPS for them to determine whether criminal charges would be brought and to the Health and Safety Executive for the consideration of corporate charges.
49. Taking all those matters into account we consider that in this case there was a duty to conduct the investigation with a view to it being ascertained, ultimately by the CPS, whether a person should be charged with an offence.
50. The report consists of information held by the IOPC for the purpose of that investigation. The exemption is therefore engaged.

Does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

51. We accept that there is a very strong public interest in transparency in relation to the handling of matter arising out of a death in Police custody. In our view this public interest in transparency can normally be satisfied by the publication of the

report after the related proceedings are completed. We do accept in this case that there is some public interest in releasing the report before the inquest takes place, because of the extensive period of time that has passed since the incident.

52. However, even though 8 years had passed since the individual's death in police custody, we still take the view that the public interest balance favours maintaining the exemption while proceedings have not been completed. At the date of the request, further proceedings were being considered by the Coroner. Once any inquest has concluded, it is possible that the CPS may conduct a further review of the evidence, of which the investigation report would be a key part. In those circumstances we accept that there is a clear risk of undermining those proceedings by the premature release of the IOPC report. There is a very strong public interest in ensuring that the inquest and any following proceedings can operate properly. In our view this outweighs the public interest in publishing the report before the proceedings have concluded.
53. On this basis we conclude that the IOPC were entitled to withhold the report under s 30(1)(a)(i).
54. For the reasons set out above this appeal is dismissed.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 10 February 2023

Corrected: 23 February 2023