



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

Appeal No: EA/2014/0012

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50508647

Dated: 13 January 2014

Appellant: Jonathan Corke

Respondent: The Information Commissioner

Heard on the papers: Ashford Tribunal Hearing Centre

Date of Hearing: 15 May 2014

Before

Chris Hughes

Judge

and

Mike Jones and David Wilkinson

Tribunal Members

Date of Decision: 3 June 2014

Subject matter:

Freedom of Information Act 2000

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 13 January 2014.

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

Appeal No: EA/2014/0012

SUBSTITUTED DECISION NOTICE

Dated: 3 June 2014

Public authority: CROWN PROSECUTION SERVICE

Address of Public Authority: 5th Floor, Rose Court, 2 Southwark Bridge, London SE1
9HS

Name of Complainant: Jonathan Corke

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 13 January 2014.

Action Required

Subject to the redaction of all names of individuals appearing within the bodies of the Minutes which form the disputed material;

Page 2 paragraph 7 delete the dates on the second and third lines and the ten words that end the third sentence. In the penultimate sentence of the paragraph, delete the final two words.

The deletion of sentence 5, paragraph 4 (page 6),

The first clause of sentence 2 paragraph 5

The final 8 words of paragraph 6 page 7, of the Minute dated 21 May 1999

and all names of police and CPS staff appearing in the Minutes,

The Tribunal directs that the public authority disclose the disputed material within 28 days of the date of this decision.

Dated this 3rd day of June 2014

Judge Chris Hughes

[Signed on original]

REASONS FOR DECISION

Introduction

1. On 2 November 2012 the Appellant in these proceedings, Mr Corke (a journalist), wrote to the Crown Prosecution Service asking for disclosure of information relating to decisions made over time not to prosecute Sir Cyril Smith (an MP who died in 2010) for offences against children.
2. The CPS responded on 26 April 2013 refusing to provide some information and maintained that position on review on 17 July, relying on section 30(1)(c) (information held for the purpose of criminal proceedings), section 40(2) (unfair disclosure of personal data) and section 42(1) (legal professional privilege).
3. Mr Corke complained to the Respondent, the Information Commissioner (“ICO”) who on 13 January 2014 upheld the CPS position. In weighing the arguments for and against disclosure under section 30(1)(c) he noted the importance of the protection of witnesses, the maintenance of the independence of the judicial and prosecution process and the unique role of the criminal court in determining guilt.
4. In favour of disclosure he noted that disclosure would enhance public understanding of the decision-making, (however noting that the CPS had already explained the thinking and explained that decisions taken in 1970 would not now be taken), that there was a greater interest in disclosure where justice was not seen to have been done, as was impossible given the death of Sir Cyril Smith, and noting that more information was available in the similar case of Sir James Savile.
5. In favour of maintaining the exemption the ICO noted the significance of maintaining the well-established safe space for the police and CPS to consider issues around prosecution and the danger that if such information was routinely disclosed the communication would be less full and CPS decision-making less well-informed, and that there was already considerable information available which meant that the public interest in disclosure was lessened.
6. The ICO concluded that the issue was finely balanced, noting the public concern about abuse of power and the apparent historic failure to prosecute high profile

figures. However he concluded that the public interest lay in protecting the decision-making of the CPS and concluded that “*disclosure could well serve as a deterrent to [the CPS] documenting honest and frank views in the future.*” He also noted that disclosure would breach the rights of the victims by releasing personal information with respect to some parts of the information. Having made these decisions he did not consider the issue of legal professional privilege.

7. Mr Corke appealed on 14 January 2014 disputing the balance. In particular, he argued that there was simply no evidence that it would be the case that disclosure would deter the honest and frank documentation of such decisions.
8. In responding to the appeal the ICO reaffirmed his position and argued that there is “*a credible causal link between routine disclosure of this kind of information and the reduction of record-keeping of candid views and conclusions in the future. The Appellant has not sought to set out any reasons he may have about why such an event is not credible or causally linked.*” He further noted that the CPS had put out much information and explained the differences between the historic decision making and the situation today.
9. Mr Corke responded by pointing out that poor record keeping as a result of FOIA would be bad practice and that the ICO had given guidance to public authorities discouraging them from relying on the argument that disclosure would lead to poor record keeping.
10. The disputed material consists of two Minutes prepared by a CPS lawyer in 1998 and 1999. The first reviewed case papers considered in 1970 and looked at the weight of the evidence, reflected on the changing approach to the investigation and prosecution of such crimes between 1970 and 1998 and considers bars to a prosecution being launched in 1998. The second considered two more allegations. The material contains the names of individuals concerned in the case in particular the youths who made allegations against Sir Cyril.

The questions for the Tribunal

11. The over-arching issue for the Tribunal is how to strike the balance of public interest between the benefit of a full disclosure and the need to protect the deliberations of the CPS and Police as well as the personal data of the young people concerned.

12. The ICO has set out clearly the arguments on either side and Mr Corke has provided a succinct critique of the ICO's reasoning. The ICO considered the issue finely balanced and recognised the significance of the public interest in disclosure of this complex matter. The Tribunal agrees. On this occasion the Tribunal is satisfied that the ICO has struck the balance the wrong way for two substantive reasons.
13. It seemed to the Tribunal that the ICO undervalued the professionalism and rigour of CPS lawyers in approaching the question of providing advice on the decision whether or not to prosecute – a task which goes to the heart of their professional duty. The Tribunal considered that this professionalism was a major protection against any such deviation into what Mr Corke referred to as “bad practice”. While it may be that there would be damage to the safe-space and the full and informed deliberation of difficult issues between CPS and police by the routine release of material of this nature; this release is anything but routine. It relates to events many years ago, and the disclosure of these Minutes illuminates the crimes and the police understanding of them in their historical context. They are in themselves significant historical documents which cast light on changes in the law as it has responded to the evolution of understanding of these crimes and changing social attitudes to them. They are further significant in the way they illuminate the character and actions of a significant public figure.
14. The Tribunal is therefore satisfied that the balance of public interests with respect to section 30 should be struck in favour of disclosure.
15. The Tribunal also considered the impact of disclosure on the very important public interests protected by S42. The Tribunal considered that in this case very similar considerations applied as with respect to S30. There was a need to ensure legal professional privilege was protected and the Tribunal considered the possible damage to legal professional privilege and the rights it protects by disclosure. In the light of the very unusual circumstances of this case the Tribunal concluded that the balance should be struck in the same way as for section 30 – the balance of public interest lay in disclosure since in the circumstances of the case there would be no significant harm either to the principle or the specific interest protected by S42.
16. The primary subject of these Minutes is now dead. The Tribunal noted that there is some material already in the public domain about cases concerning Sir Cyril Smith.

In order to protect the identities of all the young persons involved we have considered that redactions need to go beyond the usual identifiers. We consider that with the redactions indicated the identities and personal data of living individuals is protected and accordingly no objection to disclosure under section 40 arises.

Conclusion and remedy

17. The Tribunal therefore finds that the decision of the ICO is not in accordance with the law and substitutes this decision.
18. Our decision is unanimous

Judge Chris Hughes
[Signed on original]

Date: 3 June 2014