IN THE FIRST-TIER TRIBUNAL Case No. EA/2013/52 & 153

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

Appellant: Paul Breeze

Respondent: Information Commissionner

Second Respondent: Crown Prosecution Service

Before
Melanie Carter
(Judge)

and

Paul Taylor
Gareth Jones

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismissed the appeal in relation to EA/2013/152.

The Tribunal upheld the appeal in relation to EA/2013/53 and substituted a Decision Notice as set out at the beginning of the decision. In brief, it decided that the CPS Review should be disclosed other than in relation to certain personal data and legally privileged information.

Thus, it ordered that the following Decision Notice be substituted for the original Decision Notice.

Information Tribunal **Appeal Number: EA/2013/053**

SUBSTITUTED DECISION NOTICE

Dated 3rd June 2014

Public authority:

Crown Prosecution Service

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Decision Notice FS50462770 is substituted by the following.

1. Save as set out in paragraph 2, the disputed information, that is Ms Bailey's Review into the criminal proceedings against Mr A Breeze and one other, should be disclosed within 28 days of the date of this Order.

2. The disputed information should be redacted to remove the personal data and legally privileged information indicated in the Information Commissioner's submissions to this Tribunal dated 6 May 2014. The relevant parts of those submissions indicating the necessary redactions are attached as a Confidential Annex to this Substituted Decision Notice.

Dated this 3rd day of June 2014

Signed

Judge Carter

Reasons for Decision

Background

1. This Tribunal has considered two appeals brought by the Appellant, Mr Paul Breeze against the decisions of the Information Commissioner under the Freedom of Information Act 2000 ("FOIA"). These appeals were heard together and this Decision sets out our conclusions on both appeals. The Appellant had sought information from the Crown Prosecution Service ("CPS") under FOIA and been refused. A complaint to the Information Commissioner ("Commissioner") resulted in Decision Notices upholding the CPS' decisions. The Tribunal has to decide whether these decisions were in accordance with the law.

2. Briefly, the Appellant's brother, Mr Andrew Breeze, had been the Chief Executive Officer of a privately run mental health hospital, Cawston Park at a time when a whistle-blowing report was made by a disaffected employee to the NHS alleging major fraud. Mr Andrew Breeze and one other senior office were investigated by first the NHS, then the Norfolk Constabulary and subsequently charged by the CPS. Three years after the investigation began, the trial eventually collapsed at the end of the prosecution evidence, the Judge directing the jury to acquit the defendants on the basis of there being no case to answer.

3. All parties have acknowledged the sequence of events which led to the collapse of the trial, disastrous both in terms of the effect on the two individuals, the closing down of the hospital and the very large amount of public funds spent pursuing the matter.

4. The background to these appeals has been fully set out in previous Tribunal decisions namely EA/2011/0057 and EA/2013/0128 (the former concerning the requested disclosure of the Norfolk Constabulary Case Summary sent on to the Crown Prosecution Service and the latter a summary document written by NHS Business Services Authority ("NHS BSA") outlining the allegations of fraud).

5. Subsequent efforts to seek to discover what had gone so wrong led to internal reviews, an Independent Police Complaints Commission ("IPCC") investigation and ultimately a

statement in the House of Commons by the Solicitor General, apologising to the two accused on behalf of the CPS. In that statement he referred to comments made at the conclusion of the case when the Judge said to Mr Breeze and his co-accused:

> *"You leave vindicated with your good name intact and your heads held high".*

The Solicitor General went on to say:

> *"I wish to make it clear beyond doubt that acquittal means that Mr Breeze was, and remains, not guilty of the criminal charges brought against him. On behalf of the CPS, and as Solicitor-General, I associate myself without reservation with the words of the judge, but I go further and say that in so far as Mr Breeze was prosecuted as a consequence of what the CPS did or did not do, I want to place on record for all to see my apologies to him. It has become clear that regardless of whether it was proper to investigate the affairs of Cawston Park in the first place, the prosecution should never have got as far as it did."*

6. The Appellant argues that there is an extremely strong public interest in seeking to go beyond this public apology and the information disclosed in the Solicitor General's statement, to adequately address the actions of the various entities involved along the way (NHS BSA, Norfolk Constabulary and finally the CPS) and also to seek to dispel the impression of dishonest conduct which has, he says, been left hanging in light of the qualified way in which the matter has been publically presented.

7. It is important to clarify at the outset of this decision, that it is not the role of the Tribunal to make findings as to the causes of the failed prosecution, to apportion any blame for what happened or indeed to form any view as to the treatment of Mr Breeze or his co-accused. The narrow jurisdiction of this Tribunal is to decide whether the Decision Notices in the two appeals were in accordance with the law, that is, whether the Commissioner had been correct under FOIA in his decisions to uphold the CPS' refusal to disclose the disputed information.

8. The disputed information in appeal EA/2013/152 was a range of material held by the CPS in the analysis of whether or not to charge, the review process before trial and analysis in

the immediate aftermath. This disputed information also included the Case Summary prepared by the Norfolk Constabulary and provided to the CPS for the purposes of its decision whether or not to charge the relevant individuals.

9. The disputed information in EA/2013/53 consists solely of the CPS' own Review into the prosecution, conducted some considerable time after the trial ended, by a senior lawyer, Ms Elizabeth Bailey ("the Review").

10. Both requests were refused under section 30(1) FOIA. It having been accepted by the Appellant that section 30(1) was engaged the sole issue, at the outset of these appeals, was the application of the public interest balancing test for the purposes of section 30. As the Tribunal indicated after the two days of oral hearings that it had decided that disputed information for EA/2013/0053 was not exempt under section 30, the parties then had the opportunity by way of written submission to address the alternative exemptions claimed by the CPS, sections 40(2) and 42 FOIA.

Section 30: criminal proceedings exemption

11. Section 30(1)(c) FOIA provides:

> *"(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—*
>
> ...
>
> *(c)any criminal proceedings which the authority has power to conduct."*

12. The Tribunal took the view that section 30 did apply to all of the disputed information in EA/2013/0152 but did not, as asserted by the Commissioner and the CPS apply to all of the disputed information (the Review) in appeal EA/2013/53. This was on the basis that, having been compiled at some point after completion of the criminal proceedings, not all of the information could be seen as *"for the purposes of any criminal proceedings"*. The wording *"at any time"* in section 30(1)(c) did not assist as the information was not, in the Tribunal's view, held for the purposes of the criminal proceedings in question, rather the purposes of assessing what had gone wrong and potential lessons to be learned some

years later. There was no question of the outcome of the Review having any bearing whatsoever on the particular proceedings; any learning points would apply to the future.

13. In the event, the Tribunal accepted that section 30(2)(a)(ii) applied :

> *"(2)Information held by a public authority is exempt information if—*
>
> *(a)it was obtained or recorded by the authority for the purposes of its functions relating to—*
>
> *...*
>
> *(ii)criminal proceedings which the authority has power to conduct,*
>
> *..."*

14. The Tribunal was of the opinion that the Review would fall within this wider net of *"functions relating to……criminal proceedings"*. The Tribunal accepted that reviewing what may have led to a failed prosecution and in this case what had gone wrong was one of the CPS' functions relating to criminal proceedings.

15. It was accepted by the parties and the Tribunal that section 30 was engaged in relation to the disputed information in this appeal. Sections 30 and 31 FOIA are mutually exclusive: section 31 provides that "*Information which is not exempt information by virtue of section 30 is exempt information if...*". Thus, section 31 did not apply and the appeals in relation to this exemption came down to the application of the public interest balancing test in relation to the section 30 exemption.

Factors for and against disclosure

16. These paragraphs set out the common factors in the Tribunal's view in relation to the public interest issues arising under section 30, in both appeals.

17. The Tribunal considered carefully the factors in favour of maintaining the exemption in this case. It was not in dispute, that there was a strong public interest in the CPS being able to consider and to conduct prosecutions safe in the knowledge that its information

would not subsequently be disclosed outside of the trial context. The Tribunal took into account the public interest inherent in the section 30(1) exemption. This is understood to be the strong public interest in effective investigation and prosecution of crime, which inherently requires, in particular:

- The protection of witnesses and informers to ensure people are not deterred from making statements or reports by fear it might be publicised;
- The maintenance of independence of the judicial and prosecution processes;
- Preservation of the criminal court as the sole forum for determining guilt.

18. The importance of these factors is as the Tribunals described them in both the case of Digby-Cameron v Information Commissioner EA/2008/0023 and the previous Tribunal Breeze v Information Commissioner & Norfolk Police Constabulary EA/2011/057. These were weighty public interests, which absent particular compelling reasons otherwise, would in the Tribunal's view nearly always come down against disclosure of information subject to section 30(1).

19. This however was a finely balanced case. The Tribunal was of the view that there were, in these appeals, particularly strong reasons in favour of disclosure. The Tribunal's approach to the factors favouring disclosure was informed by its view that the matters giving rise to these requests for information were highly unusual and that this called for a heightened degree of transparency on the part of the CPS. Ms Bailey told the Tribunal that, of the fraud cases of which she was aware in her region, this was without parallel in that the Solicitor General had apologised in the House of Commons. Ms Bailey confirmed that it was fair to describe this case as "unusual".

20. The Tribunal did not consider it necessary to repeat here the disastrous sequence of events or consequences for the two defendants involved, as these were matters of public record. As mentioned above, the failed prosecution had had grave consequences for the individuals, had caused the closure of what appeared to be a highly regarded and valuable health resource for the mentally ill and had cost a great deal of public money. Suffice to say that, short of section 30 FOIA being an absolute exemption, the Tribunal could not

readily imagine other circumstances such as these, weighing so heavily in favour of disclosure.

EA/2013/0152

21. The disputed information in appeal EA/2013/0152 consisted, as set out above, of documents compiled during and shortly after the prosecution itself. It included the Case Summary sent to the CPS by the Norfolk Constabulary. Given their use directly for the purposes of the criminal proceedings, there were self-evidently important public interest factors against disclosure.

22. The Appellant's essential arguments in favour of disclosure were the heightened need for transparency and accountability, given the consequences of the failed prosecution. It was argued that the Solicitor General's statement (set out in part below), did not explain adequately how it was that the CPS had taken its decision to charge, in light of what was now publicly known about the prosecution evidence. Thus, both the Norfolk Constabulary and the CPS had not been rendered sufficiently accountable such that there was, it was said, a strong public interest in the disputed information being disclosed.

23. The Appellant argued, in his Skeleton argument, that there is public interest in deterring individuals from giving false evidence for malicious reasons. The Tribunal was of the view however, that having reviewed the disputed information, that it contains information on a number of witnesses and is not confined to the whistle-blower in this case. There is a strong public interest in not deterring witnesses from giving evidence in criminal investigations, and disclosing this information would, the Tribunal accepted, act as a significant deterrent.

24. The Appellant pointed to information emanating from Norfolk Constabulary and individual police officers which, he said, undermined the practical effect of the acquittal. The Tribunal took the view however that these were insufficiently cogent in terms of proving any misconduct by the police, as to raise the factors in favour of disclosure any higher than already determined.

25. In particular, the Appellant argued there was a strong interest in favour of disclosure of the Case Summary, such that the public could be better informed on the unanswered

questions as to the role of the Norfolk Constabulary. The Tribunal considered carefully whether the Case Summary prepared by Norfolk Constabulary, sent to the CPS and considered by the them in its charging decision should be disclosed. This had in fact been the subject matter of the earlier Tribunal case Breeze v Information Commissioner & Norfolk Police Constabulary EA/2011/057, in which it had been decided that the Norfolk Constabulary had been entitled to withhold this under section 30(1) FOIA. The Upper Tribunal had refused permission to appeal. This Tribunal did not however see itself as bound by that particular decision of the Upper Tribunal as it had been considering the question of permission to appeal, that being judged on the narrower question of whether the earlier Tribunal had made an error of law. Obviously however the views of the earlier Tribunal and the view on the question of permission to appeal were to be taken into account and given considerable weight, if not strictly binding. The approach taken by this Tribunal therefore was to ask itself whether there had been any new information that had come to light since the earlier decisions of the Tribunals which could cause this Tribunal to come to a different view.

26. Mr Breeze asked the Tribunal to take into account two new pieces of information : first the final decision of the Independent Police Complaints Commission (IPCC) in relation to complaints made by Mr Breeze against members of Norfolk Constabulary arising from its investigation into the alleged criminal matters (in particular the finding that Norfolk Constabulary failed to accurately prepare a witness statement when measured against the tape of that witness' interview); second a statement from former Chief Superintendent Adcock. The Tribunal considered that the former, as it did not pre-date the date of refusal of the request in this appeal, could not be taken into account in the public interest balancing test The latter, albeit relating to the views of a member of the police force which could have been ascertained at the relevant time, were insufficiently directly related to the disputed information to warrant overturning the conclusion that the Case Summary did not need to be disclosed.

27. The Tribunal had carefully read the Case Summary. Its conclusion was the same as the previous Tribunal, that the public interest factors in maintaining the exemption outweighed the public interest factors in disclosure. There was nothing on the face of the contents of the Case Summary which might be said to further any explanation as to why the investigation had got as far as it did, the charging decision was made or why the trial

collapsed. It was a summary of the witness statements which, at least insofar as material to the decision to charge and then the trial, had been shared with the defence and made public during the trial. The Tribunal hoped that the Appellant would be encouraged to accept, a second Tribunal having considered the Case Summary, that its disclosure would not materially build upon the public's understanding of what had happened.

28. The Tribunal was of the view that, in relation to the disputed information in this particular appeal, that is documents which were compiled during and shortly after the investigation and criminal proceedings, the strong public interests against disclosure in order to maintain the integrity of the criminal justice system just outweighed the pubic interests calling for disclosure. Thus, the disputed information in this appeal was exempt from disclosure under section 30(1) FOIA.

EA/2013/53

29. The Tribunal considered on the other hand, that the Review, the disputed information in the second appeal, EA/2013/53, was not exempt under section 30. The essential reason why the balance tipped the other way in this appeal, was down to the confusion created by the public exposition of the Review's conclusions.

30. Ms Bailey had written to Mr Breeze on 26 July 2012 in the following terms:

> *"Having reviewed the available evidence, I have concluded that there are some factors that indicate dishonesty by both you and Mr Wilson. These factors include: a body of witness evidence to show a lack of understanding or knowledge of extra care by staff that one would expect to be involved in administering that type of care; evidence of low staffing levels to give enhanced care; no clear audit trail to show what a patient received to justify the extra charges made; and in particular there do not appear to be file notes on the patient's files to cover the extra care aspect of their treatment. In addition, some patients were charged extra care premiums whilst away from Cawston Park and some were charged in advance.*
>
> *However, there were also issues that undermined the evidence test namely whether there was a realistic prospect of conviction. These included your open dealings with*

the Primary Care Trusts (PCTs) exhibiting no evidence that you misled them as to what they were receiving for the payments made; no secret was made of the details of those patients who were attracting extra care charges; and missed opportunities to maximise profit, as there were some difficult patients that were not on extra care but could have been.

The collapse of the trial in June 2009 was attributed to the key witness changing his evidence. On balance this witness's evidence was neither compelling nor convincing. Following your charge in February 2008, the case should have been kept under continuous review in order to ensure that the evidential limb of the Code was still satisfied. If, as is my view, there was not a realistic prospect of conviction following charge, the case should not have proceeded to the stage that it did.

I apologise for any distress that was caused to you as a result of the way that the case was handled".

31. Mr Breeze had written back to her on 9 August 2012 setting out in full his rebuttal of the so-called indicators of dishonesty, referring to the matters which had been effectively dispelled in the actual court hearing (eg: the assertion that there had been low staffing at the hospital). He was clearly bewildered as to how the CPS on review could have been seen to have exonerated him and yet write to him referring to evidence which it was said indicated dishonesty on his part.

32. In fact, during the open part of the hearing, Ms Bailey had clarified her intentions in writing the Review as follows: what she had been doing was listing evidence, which taken effectively in isolation and at face value at the time the review was written, could be construed as "indicators of dishonesty". However, when "taken in the round" (her words in oral testimony) in the light of all the other evidence and given the fundamental misunderstanding by the CPS as to the nature of Extra Care, it was her view at the time of writing the report and indeed since, that those factors did not demonstrate dishonest conduct. Thus, it was clearly stated that in her view, the accused's conduct was not dishonest and should not have been seen so, at point of charge.

33. This however was only clarified during the hearing. Prior to that, the CPS had effectively confused the position by coining an opaque phrase, "indicators of dishonesty" in the letter from Ms Bailey to Mr Breeze, without clearly stating that these could only be seen as such, if taken in isolation and not considered alongside other evidence. This letter was read out by Mr Breeze's MP in the House of Commons. The Solicitor General, who spoke next, and had clearly anticipated the MP's statement, responded, insofar as relevant, as follows.

> "*[Ms Bailey] concluded that, in her view, the case should not have resulted in criminal charges. I endorse her conclusions. She found that there was material available in the evidence that could be seen as pointing towards dishonesty, but equally that there were issues, which were known about at the point of charge, that undermined the strength of the case. I will come to those in a moment. Different lawyers can quite properly take different views on the merits of any given case. Elizabeth Bailey in this case believed that, even if the charging decision could be seen as appropriate at the outset, the case should none the less not have been allowed to proceed to trial. She apologised to Mr Breeze by letter dated 26 July 2010 on behalf of the CPS both for the prosecution and for the lack of response to Mr Breeze's complaint"*.

34. The Solicitor General's statement set out, he said, to dispel "*any doubt about Mr Breeze's reputation"*, pointing out that the letter from Ms Bailey to Mr Breeze had been private and therefore not intended to "*have had any public effect*". Whatever the cause of the letter being made public and thereby parts of the Review being made public, the fact remained, in the Tribunal's view, that it was all very much in the public eye by this stage. FOIA in this case was after all concerned not with Mr Breeze's personal position, but the public interests arising from that and what the public knew about it.

35. As was apparent from the Solicitor's General statement, whilst Ms Bailey had taken the view that the case should not have proceeded to trial, it was, on the face of it, left open that the decision to prosecute was a reasonable one in light of the 'indicators of dishonesty'. This underpinned the confusion that the Tribunal perceived in the CPS' position. This confusion was essentially that albeit Mr Breeze should, in Ms Bailey's opinion as stated in the Review and reported to the Tribunal in oral evidence, never have

been charged with the offences, she was of the view that the charging decision was nevertheless one which a reasonable lawyer could have made. In light of all the evidence before the Tribunal, the majority of which was in the public domain, this was a profoundly confusing position for the CPS to have taken.

36. The Tribunal acknowledged that there had already been a large degree of transparency: the public authority has acknowledged it had made errors in public. The Tribunal further acknowledged that the First Tier Tribunal in EA/2011/57 had already considered whether the public authority's acknowledgement of its errors was sufficient to meet the public interest in understanding the role played by the CPS. Again, although that judgment is not binding on this Tribunal, it is a highly relevant factor to be taken into account that a previous Tribunal has considered essentially the same factual matrix as arises in this case, and has heard evidence from Ms Bailey on behalf of the CPS, and concluded that the Solicitor General's statement *"said all that could reasonably be said about the shortcomings of the CPS performance"* (paragraph 33). That issue however was not the subject of that Tribunal decision (the disputed information was the Case Summary as previously discussed, not the Review and the Respondent was the Norfolk Constabulary, not the Crown Prosecution Service). The Tribunal could not therefore be satisfied that the Review itself had received the degree of scrutiny, which it would have done had it been within that earlier Tribunal's jurisdiction. It would be unfair to the Appellant to treat the previous Tribunal's obiter wording as a ruling on the question of disclosure of the Review. Thus, it was a long way from being an "abuse of process" that the Appellant had sought to appeal the Commissioner's decision in this regard. Indeed the Appellant told the Tribunal that had he better understood the FOIA process at the outset, he would have sought to ensure that all requests, all decisions and all appeals were heard together.

37. Thus this Tribunal took a different view, not being bound by the previous Tribunal, that there is information in the Review, as yet not disclosed in any other way, which would in a material, albeit not extensive, way aid transparency and add to the sum of the public's knowledge in understanding what had happened and the CPS' role in this. There was information in the Review which more fully explained why Ms Bailey might say now that, taken in the round, it was her view that there had not been dishonesty ie: a clearer exposition of the positive aspects of Mr Breeze's defence. There was new information

not already public, moreover as to why the CPS lawyer might have taken the decision he did.

38. The factors against disclosure are in part set out above. More particularly in this appeal, Ms Bailey confirmed that she would have written her review differently if she had known that it (or parts of it) could be disclosed under FOIA and that the future reviews might be conducted differently if disclosure were to be made. The Tribunal accepted that there is a clear public interest in ensuring that those tasked with investigating complaints within the CPS should be able to set out their conclusions in free and frank terms, in order to ensure that problems are identified and appropriate lessons are learned. It took the view however from Ms Bailey's oral evidence that, in this case, what this in part amounted to was a regret that the way in which the Review had been written and then made public, had given risen to a significant degree of confusion. This seemed to the Tribunal to be a different type of potential prejudice and did not necessarily mean that disclosure would have a "chilling effect" on the way in which such reports were written. The Tribunal was of the view moreover that the asserted "chilling effect" would not necessarily follow in circumstances where the case, as here, was truly exceptional. The CPS would be reassured that absent such compelling and unusual factors, disclosure would not normally be required.

39. It is accepted by the Tribunal that the criminal court should be the sole forum for determining guilt. It did not consider however that the information in the Review would undermine that, rather it went to explaining how it was that such a high profile and expensive prosecution had failed.

40. It was asserted that disclosure of the Review would deter future whistle-blowers and witnesses from coming forward. The Tribunal took into account however that the names and identities of individuals would be redacted from the Review, being subject to section 40(2) FOIA (see below), such that this did not apply. The Tribunal explains below that at no point has it been suggested that individuals could be identified publicly by reason of other pieces of information available in the public domain. In these circumstances, in its view, the anonymisation of the Review would effectively counter this factor.

41. In conclusion on section 30(2) and the Review, the Tribunal took into account all of the above factors and concluded that there should be disclosure of the Review. This was, as above, a finely balanced case. In light of the reasoning above however, it was of the view that, in this most exceptional of cases, the public interests in disclosure at least equalled, if not outweighed the considerable public interests in maintaining the section 30 exemption. It was not that the Review would fundamentally alter the confusion created, rather it dispelled the impression that the Review contained further information potentially damaging to either the CPS or the two accused men, thereby explaining how it was that they could have been so resoundingly exonerated by the court, yet the Solicitor General stated that the decision to charge had been a reasonable one and that there had been indicators of dishonesty present. In fact, the conclusions in the Review maintain this line (ie: the underlying confusion), such that it might be said that disclosure of the detailed content added little to the public interest. However, in this case a heightened degree of transparency was required. It is not always the case that there is no value in disclosure of a document which reveals only a small amount of information that is new. Its value is based in dispelling suspicion where significant confusion on a matter of high public interest has been created, this being in certain cases, as here, an essential part of transparency and accountability.

Section 40(2): personal data exemption

42. The CPS and the Commissioner, to varying degrees, argued that the Review should not be disclosed on the basis that it was subject to the absolute exemption at section 40(2) FOIA.

43. The CPS argued that the whole of the Review was Ms Bailey's personal data and that disclosure would be unfair on the basis that she would have had an expectation that it would not be made public. The Tribunal thought it unlikely that all of the contents of the document consisted of her personal data, particularly the parts which simply repeated the sequence of events which had led upto the collapse of the trial. It accepted however, at the very least, that her name, designation of position and expressions of opinion would be her personal data. In any event, whatever the position on the extent of this being her personal data (which it was accepted would be wider than previously thought to be the case on a strict application of the *Durant* case), the Tribunal took the view that in writing the letter of 26 July 2010 to Mr Breeze, disclosing a large part of the contents of the

Review in circumstances which must have included an expectation that he would himself go on to make this public, undermined the assertion that disclosure would be unfair. The Tribunal took the view moreover that paragraph 6 of Schedule 2 of the Data Protection Act 1998 ("DPA") would apply given the legitimate interests of the public identified above and that there did not appear to be any material or indeed identifiable prejudice to Ms Bailey in disclosure of the Review. Thus, disclosure would not, in the Tribunal's view, be in breach of the First Data Protection Principle, such that section 40(2) on the case advanced by the CPS, did not apply.

44. The CPS further argued that the Review was essentially the personal data of the co-accused and that as there was no evidence as to his expectations at the time of the refusal of the request, it should be assumed that he would not have expected the Review to be made public alternatively the conclusion reached that he had not given his consent. The CPS further argued that as the Review concerns allegations of criminal offences, this therefore amounted to the co-accused's sensitive personal data, in relation to which only explicit consent actually obtained at the relevant time would satisfy Schedule 3 of the DPA, (as well as Schedule 2).

45. This seemed an unusual submission for the CPS to have made as there were two statements from the co-accused to the Tribunal, albeit provided during the FOIA proceedings, indicating his support for the appeals and therefore, without any real doubt, his consent to the contents being made public (disclosure under FOIA being to the public, not the requester). Whilst these post-dated the requests for information and their refusal, they were in the Tribunal's view, powerful evidence as to what his position would have been at the time, had the CPS asked him. It seemed perverse that even though it was apparent what his answer would have been, had he been asked, the failure of the CPS to rely upon section 40(2) at the relevant date and therefore not to have asked for his consent, could now effectively defeat a request for information which he supported. The Tribunal did not accept that the consent subsequently given was not informed and therefore not explicit. This was particularly so given that were the co-accused to request the Review now, providing therefore explicit consent dated at the time of request, this point would fall away. In these circumstances, the Tribunal took the view, in accordance with that of the Commissioner, that the co-accused had provided his consent and that this was sufficient for both schedules 2 and 3 DPA.

46. The Commissioner argued, in line with the CPS, that certain parts of the Review consisted of the personal data of other third parties, including various of the witnesses and the CPS lawyer responsible for the decision to charge. The Tribunal accepted that some of this was sensitive personal data, which unquestionably did not fall for disclosure. None of the conditions in Schedule 3 of the DPA were met.

47. The CPS' submissions for non-disclosure went beyond the redactions suggested by the Commissioner, whose effect was simply to anonymise the information. The Commissioner suggested simply removing names (in all but one circumstance) whereas the CPS argued that whole paragraphs surrounding the names should come out as being that individual's personal data. The Tribunal took the view that provided the names were redacted, the remaining data in the paragraphs in question ceased to be the individual's personal data, as he or she was not and could not be identified. The Tribunal was not at any point addressed as to the ability of the public to identify the individuals, were just their names to be removed, on the basis of publicly available information. Whilst there had of course been a public trial the Tribunal had seen very limited information as to its reporting and noted that the Solicitor General's statement had not named anyone involved other than Ms Bailey and of course Mr Breeze.

48. Thus the personal data that consisted of names, was in the Tribunal's view subject to the absolute exemption on the basis that disclosure would be in breach of the First Data Protection Principle. The Appellant argued that the individuals concerned, insofar as witnesses at the trial, or even potential witnesses at the trial, would have expected their data to be disclosed as they had been prepared and/or given evidence publicly at trial. The Tribunal took into account that simply because information was made public once, did not necessarily amount to an expectation that it would be public for all times and for all purposes. The Tribunal concluded that the redactions proposed by the Commissioner for this exemption were appropriate such that the substituted Decision Notice adopts these proposed redactions.

Section 42: Legal Professional Privilege exemption

49. Both the Commissioner and the CPS argued that certain parts of the Review were subject to legal professional privilege and that the public interest was firmly in favour of maintaining the exemption. The Tribunal accepted that certain parts did consist of privileged material such that section 42 was engaged.

50. It is well established that the public interest in withholding information covered by legal professional privilege is significant. The Upper Tribunal in *DCLG v IC and Robinson* [2012] UKUT 103 (AAC) [2012] 2 Info LR 43 considered the development of the doctrine of legal advice privilege, and the public interest rationale for protecting the confidentiality of legal advice:

> *37. The development of the doctrine of legal advice privilege, and of the rationale for it, is traced in detail in the speech of Lord Taylor of Gosforth CJ in R v Derby Magistrates Court, Ex parte B, [1996] AC 487, and then summarised by him as follows 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."*

51. The High Court in *DBERR v O'Brien and Information Commissioner* [2009] EWHC 164 (QB) confirmed the approach adopted by a long line of Tribunal authority (from *Bellamy v Information Commissioner and DTI* (EA/2005/0023) onwards) on the proper approach to considering the public interest balancing under section 42 FOIA:

> **"[53]** *...The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight. Accordingly, the proper approach for the tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any*

event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least."

52. The Tribunal acknowledged the strong in-built public interest in maintaining this exemption, as upheld by Upper Tribunal and the High Court. It concluded that in the absence of some particularly compelling reason equal to or outweighing this in-built interest, it would not decide that the particular information be disclosed. Whilst, the Tribunal had found this to be a most exceptional case for the purposes of the public interests in section 30, it could not identify in relation to the particular paragraphs containing legally professionally privileged information any particularly compelling reason why it should be disclosed. The particular information did not have any bearing on the confusion mentioned above.

53. There had been public acknowledgement of the fact that the CPS lawyer and the two barristers involved in the trial had supported the prosecution and also the fact that the collapse of the trial had been attributed to a change in witnesses' testimony. The disclosure of the particular privileged information would not greatly assist the public's understanding of what had happened in this case, but would risk significant prejudice to the constitutionally important right to receive legal advice in confidence.

54. In light of this conclusion, the Tribunal found that the section 42 exemption did apply insofar as indicated by the Commissioner in his submissions and reproduced in the Confidential Annex.

Conclusion

55. The Tribunal noted that this was the last in the series of the appeals brought by the Appellant in relation to his requests for information to the public authorities involved in the failed prosecution against Mr Breeze and his co-accused. Whilst not all information sought during these appeals had, by any means, been disclosed, it was the Tribunal's hope that the various reassurances given by the different Tribunals involved as to the contents of the disputed information not disclosed, would be of some comfort to the Appellant

(who has been the requester in relation to all the appeals). It is not always the case that withheld information contains information that would be of material interest or value to the general public, given what is already known. The exemptions in FOIA operate in many cases, not to protect the interests of anyone in the particular case, but rather the integrity of the wider public administrative system, be it one of criminal investigation and prosecution or reviewing the steps along the way which have gone wrong and from which lessons may be learned.

56. In appeal EA/2013/53, the Tribunal concluded that the CPS Review should be disclosed other than in relation to certain personal data and legally privileged information. It substituted a Decision Notice as set out at the beginning of the decision.

57. The Tribunal dismissed the appeal in relation to EA/2013/152.

58. The decision of this Tribunal is unanimous.

Judge Carter