IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2014/0001
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50479441
Dated: 12 December 2013

Appellant:	**GANESH SITTAMPALAM**
Ist Respondent:	**INFORMATION COMMISSIONER**
2ND Respondent:	**CROWN PROSECUTION SERVICE**
Heard at: **LONDON**	**TAX TRIBUNAL, BEDFORD SQUARE,**
Date of hearing:	**13 MAY 2014**
Date of decision:	**9 July 2014**

Before

ROBIN CALLENDER SMITH
Judge

and

DAVE SIVERS and NIGEL WATSON
Tribunal Members

Attendances:

Appellant: Mr Ganesh Sittampalam
For the 1st Respondent: Mr Michael Lee, Counsel instructed by the Information Commissioner
For the 2nd Respondent: Mr David Pievsky, Counsel instructed by TSol

Subject matter: FOIA 2000

Absolute exemptions

- Court records s.32
- Personal data s.40
- Confidential information s.41

Qualified exemptions

- Investigations and proceedings conducted by public authorities s.30
- Legal professional privilege s.42

Cases: *Stephens v ICO and CPS* EA/2012/0075, *Breeze v ICO and CC of Norfolk and CPS* [2012] 1 Info LR 320, *Armstrong v ICO and HMRC* EA/2008/0026, *Guardian Newspapers v ICO and CC Avon & Somerset* EA/2006/0017, *Mitchell v ICO* EA/2005/0002, *Department for Business, Enterprise and Regulatory Reform v ICO and Peninsula Business Services Ltd* EA/2008/0087, *Department for Business Enterprise and Regulatory Reform v O'Brien and Information Commissioner* [2011] 1 Info LR 1087 [2009] EWHC 164 (QB), *Szucs v Information Commissioner* EA/2011/0072, *Mersey Tunnel Users Association v Information Commissioner* [2011] 1 Info LR 1066, *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, *Gordon v ICO and Cabinet Office* EA/2010/0115, *Balabel v Air India* [1988] 1 Ch. 317, *Chambers v DPP* [2013] 1 WLR 1833, *Glasgow City Council v Scottish Information Commissioner* [2009] CSIH 73, *R (Purdy) v DPP* [2009] UKHL 45, *Parry v News Group Newspapers* [1990] ADR.L.R 11/16, *Secretary of State for Work and Pensions v Information Commissioner* EA/2006/0040.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal and substitutes the following decision notice in place of the decision notice dated 12 December 2013.

IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2014/0001
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

SUBSTITUTED DECISION NOTICE

Dated **29 June 2014**

Public authority: **Crown Prosecution Service**

Name of Complainant: **Mr Ganesh Sittampalam**

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal dismisses the appeal and substitutes the following decision notice in place of the decision notice dated 12 December 2013.

In addition to the various exemptions found by the Commissioner to be engaged and effective in the appeal to prevent disclosure of the requested information the Tribunal finds – for reasons set out in its decision – that all the requested information was also exempt under the provisions of s.30 (1) (c) of the Freedom of Information Act 2000.

Action Required **None**

Robin Callender Smith

Judge

9 July 2014

IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2014/0001
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

REASONS FOR DECISION

Introduction

1. The Information Request in this appeal relates to a recent *cause celebre*: the prosecution, conviction and subsequently successful appeal of Mr Paul Chambers in respect of a "tweet" about Doncaster Airport. This became known as the "Twitter Joke Trial".

2. Briefly, on discovering problems about flying out of Doncaster's Robin Hood Airport, Mr Chambers' message - read by around 600 of his followers – was:

> Crap! Robin Hood Airport is closed. You've got a week and a bit to get your shit together otherwise I am blowing the airport sky high!!

3. He was prosecuted in respect of that message under section 127 (1) (a) of the Communications Act 2003 for sending a message of a "menacing character". He was convicted at Doncaster Magistrates Court on 10 May 2010. That conviction was upheld by the Crown Court on 11 November 2010 but eventually overturned in the High Court on 27 July 2012 (*Chambers v DPP* [2013] 1 WLR 1833).

4. Mr Sittampalam (the Appellant) wrote to the CPS shortly after that result, on 6 August 2012, with the following request:

> Please could I have a copy of your file(s) on the "Twitter joke trial" (*R v Chambers*) and the associated appeals?

5. The CPS responded on 7 August 2012 claiming that the information in the files – the disputed information – was exempt from disclosure by virtue of the exemptions in s.30 (1) (c) (investigations and proceedings) and s.40 (2) (personal data) of the Freedom of Information Act 2000 (FOIA). It maintained that position after an internal review.

The complaint to the Information Commissioner

6. On 7 January 2013 the Appellant contacted the Commissioner. He acknowledged that some of the material in the files could be exempt but did not believe that exemptions applied to all of the information. He acknowledged that s.30 (1) (c) was considered to be a “strong” exemption requiring significant public interest arguments for it not to apply.

7. He argued, however, that Mr Chambers’ prosecution was an exceptional one which had led to substantial criticisms of the CPS and had had a substantial impact on Mr Chambers even though he was eventually acquitted. The fear of being prosecuted in similar circumstances could have a substantial “chilling effect” on free speech. The CPS had not shown how disclosure in this particular case would harm the prosecution process.

8. While there might be a strong public interest in protecting information privately provided to the police or the CPS for the purposes of investigations and proceedings he considered that it was unlikely that would apply to much of the information in the files, particularly because a large amount of information was already in the public domain about the case. The public interest in maintaining the confidentiality of communications between the police and the CPS was not a blanket one: it depended on the nature of the communications.

9. In terms of s.40 (2) he argued that disclosure would be fair in view of the amount of information in relation to the case that had already been made public. Even where the information constituted sensitive personal data much of it might already have been deliberately made public by the data subject.

10. The Appellant indicated he was particularly interested in any material that related to the public interest test that the CPS had to conduct before any prosecution after it had concluded that the evidential test in respect of the prosecution had been met.

11. During the course of the Commissioner's investigation the CPS further relied on FOIA exemptions s.21 (information accessible by other means) s.32 (1) (Court records etc), s.41 (information provided in confidence) and s.42 (1) (legal professional privilege).

12. The Commissioner considered the disputed information and the CPS's submissions in relation to s.30 (1) (c). He concluded that the public interest did not favour maintaining that particular exemption. He invited the CPS fully to identify the parts of the disputed information withheld under the remaining exemptions relied on and to provide him with detailed submissions in respect of the application of those exemptions. The CPS provided that response and the Commissioner's decision notice focused on the application of sections 32 (1), 40 (2), 41 (1) and 42 (1) to the disputed information.

13. Section 32 (1) (Court records etc) was an absolute exemption and both that and section 42 (1) had been engaged and correctly applied.

14. The CPS explained that it did not consider information in the file relating to subsequent matters that arose from the trial and associated appeals – such as FOIA requests and Parliamentary questions – as falling within the scope of the request. The request was for information on the trial and associated appeals. The Commissioner accepted the CPS's interpretation of the request noting that the Appellant had focused his request on information which he believed would increase public understanding of the decision to prosecute Paul Chambers and to contest the subsequent appeals. The request related to information pertinent to the trial and the appeals.

The appeal to the Tribunal

15. The Appellant set out his grounds of appeal in six concise headings, noting what he regarded as a general, freestanding ground of procedural unfairness because the Commissioner had made his decisions as a result of his own investigation, without involving the Appellant.

16. He maintained these as issues he addressed at the oral hearing of the appeal.

(1) Out of scope information:

- The plain language of the request asked for a copy of the CPS's files on the trial and associated appeals. The wording used – "copy of files" rather than "all information relating to" - was simply to focus the request on information the CPS had chosen to keep together as directly related to the case, as opposed to requiring an expensive search of the entire organization.

- This interpretation had not been discussed with him and he disagreed with it.

(2) Section 32 incorrectly applied to some information:

- Emails and Letters purporting to serve documents for use in Court

- Emails and Letters created for the purpose of proceedings by way of negotiations with the other side

(3) Section 42 incorrectly applied to some information

- The Commissioner found that s.42 (1) applied to some information that the CPS has not claimed the exemption in relation to.

- Although the Commissioner could invite the CPS to claim an exemption, that did not seem to have happened here. Any findings in relation to this information were outside the powers of the Commissioner.

(4) The public interest lay in the release of at least some of the information covered by s.42

- The Commissioner incorrectly placed emphasis on the fact that the "decision to prosecute was affirmed by [the courts]" and that "decision to prosecute was [not] considered unreasonable". That was a fundamental misunderstanding of the legal position surrounding a decision by the CPS to prosecute and it indicated that the Commissioner had approached the balancing act on an entirely incorrect basis.

- The CPS carried out a two-part test when deciding whether to prosecute: was it likely to get a conviction and was it in the public interest to prosecute? It was not part of the function of the courts to review the second of these considerations, unless the CPS was judicially reviewed on this ground, generally a difficult proposition and one that was not done in this case.

- The offence in question was a very wide one, particularly given the interpretation the CPS and courts put on it at the time of the prosecution, and therefore the exercise of this prosecutorial discretion was of particular importance.

- The CPS chose to prosecute despite everyone involved with the case considering that there was no actual threat involved and that the tweet was not even sent in such a way that the sender would expect it to be automatically seen by the airport or anyone else who might take it seriously. The CPS's decision to prosecute, no matter what the eventual outcome, created a real risk of a serious chilling effect on free speech.

- There was a general strong public interest in understanding how prosecutorial discretion was exercised. It is also a requirement of the European Convention on Human Rights that restrictions on convention rights such as Article 10 (Freedom of Expression) be "in accordance with the law" and in particular that prosecutorial discretion was not applied

arbitrarily or disproportionately. At the time of the request, the CPS had not produced any guidance on how they would approach any future prosecutions under this Act.

- Similar considerations applied to the apparent desire by the CPS to concede the eventual appeal. What caused the change of heart?

- There was a public interest in understanding the legal reasoning as to why the CPS could not concede the case, as that seemed to indicate a serious weakness in the legal system if a prosecutor was unable to later concede that a prosecution had been incorrect.

- Any inherent public interest in litigation privilege in relation to prosecutions was substantially weaker than in civil litigation. Litigation privilege allowed weaknesses in one side's case to be protected from exposure. The prosecution had a duty to disclose relevant evidence to the defence and there should be a moral duty for it to be frank about any legal weaknesses in its own case.

(5) The Commissioner should have found that s.40 (2) did not apply in relation to any "sensitive personal data"

- The exemption was originally claimed by the CPS. It might be necessary to consider it if the other grounds were made out.

(6) Steps ordered

- If any of the grounds he argued were made out then the Commissioner should have ordered the release of any non-exempt information in scope of the request.

<u>The questions for the Tribunal</u>

17. Whether the Commissioner had correctly applied the appropriate exemptions in the light of the information requested and the CPS's claimed exemptions or whether, in the light of the Appellant's request and his Grounds of Appeal, the exemptions had been applied incorrectly.

Evidence

18. The Tribunal had two sources of evidence.

19. There was both the open and closed documentary evidence provided to it. The closed, confidential material was contained in two ring-bound A4 folders.

20. There was also open and closed oral evidence provided by Mr Malcolm McHaffie, Deputy Head of the Special Crime and Counter Terrorism Division of the CPS with responsibility for "Special Crime" including negligent homicide, serious police misconduct and suspected offending by MPs. Mr McHaffie had held that role since July 2011.

21. In his open oral evidence he explained that, in 2010, Mr Chambers had become aware of adverse weather conditions at Robin Hood Airport in Doncaster from which he was due to travel nine days later. He had tweeted the message described at Paragraph 2 of this decision.

22. The CPS had considered the case for prosecution under section 127 of the Communications Act 2003 which provided that

> (1) A person is guilty of an offence if he –
>
> (a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or an indecent, obscene or menacing character; or
>
> (b) causes any such message or matter to be sent.

23. In the criminal proceedings it became clear that the key issue was whether the tweet was "menacing in character" within the meaning of section 127 of the Act.

24. Mr McHaffie outlined the two stages that had to be considered before there could be any prosecution. Those stages were set out in the Code for Crown Prosecutors, statutory guidance issued by the Director of Public Prosecutions under the provisions of section 10 of the Prosecution of Offences Act 1985.

25. At the first stage, prosecutors had to be satisfied there was sufficient evidence to provide a realistic prospect of conviction. Consideration had to be given to what the defence case might be and how that was likely to affect the prospects of conviction. If a case did not pass the evidential stage it could not proceed, no matter how serious or sensitive it might be. The finding that there was a "realistic prospect of conviction" was based on the prosecutors' objective assessment of the evidence – including the impact of any defence – and any other information that the suspect had put forward or on which reliance might be placed. It meant that an objective, impartial and reasonable jury bench of magistrates or judge hearing the case alone, properly directed and acting in accordance with the law, was more likely than not to convict the defendant of the charge. That was a different test from the one criminal courts themselves had to apply: a court could only convict if it was sure that the defendant was guilty.

26. At the second stage – providing there was sufficient evidence to justify prosecution - prosecutors went on to consider whether the prosecution was required in the public interest.

27. Mr Chambers, when charged, had pleaded guilty on 19 February 2010. He was later allowed to vacate that plea and was tried in the magistrates' court before a District Judge where he was convicted on 10 May 2010. He was sentenced to a fine of £385, a victim surcharge of £15 and £600 costs. He appealed to the Crown Court as of right and was again convicted on 11 November 2010.

28. He then appealed that result by way of case stated to the Divisional Court. (In fact there were two hearings at the Divisional Court: at the first hearing the two judges could not agree a result and the matter then went to a new panel of three judges including the Lord Chief Justice.)

29. The Divisional Court quashed the conviction by order dated 27 July 2012. All the proceedings had been held in open court and their outcomes were widely reported in the media. The ruling of the Divisional Court was that the Crown Court was wrong to conclude that the tweet was “menacing” within the meaning of section 127 of the Communications Act 2003. The CPS was not criticised for bringing the prosecution either in relation to the first or the second limb of the tests set out in the Code for Crown Prosecutors.

30. In broad terms the file for the Paul Chambers case contained the following material:

(a) Evidential Content

- Served witness statements
- Served exhibits
- Served unused material
- Unused material schedules

(b) Material Generated by the Conduct of the Case

- Forms completed as part of the criminal litigation process and served on all parties, such as: case summaries, plea and case management forms, agreed admissions, the jury bundle and witness orders
- CPS correspondence/emails/telephone messages with defence solicitors, courts, police and counsel
- Notes of conferences with counsel and the police
- Advice from counsel

- The internal decision-making documents, such as the review under the Code and including the form known as the MG3.

31. In relation to the absolute exemption at s.32 (1) FOIA Mr McHaffie agreed with the Commissioner that it applied to

- Indices to Court Bundles
- s.10 Admissions
- Orders and Judgements of the Magistrates', Crown and High Courts
- Costs Schedules
- Court Application Notices
- Miscellaneous Documents for use in Court
- Witness Statements
- Skeleton Arguments
- Court Exhibits and Related Documentation
- Correspondence with the Courts
- Emails and Letters serving (or purporting to serve) documents for use in Court
- Emails and Letters created for the purpose of proceedings by way of negotiations with the other side
- Correspondence from the Courts.

32. In relation to the s.42 (1) exemption (legal professional privilege) he believed it had been correctly applied to material generated by conduct of the case, CPS correspondence/e-mails/telephone messages with police and counsel, notes of conferences with counsel and police, and advice from counsel.

33. Mr McHaffie believed that the Commissioner should not have declined to accept the CPS argument that the public interest favoured maintaining the s.30 (1) exemption. The CPS had identified in full, at the Commissioner’s request, the parts of the disputed information

withheld under each of the exemptions relied on together with detailed submissions in relation to its exemption. The task of providing that information had been exceptionally onerous, at public expense and, in his view, disproportionate.

34. The CPS had provided six schedules differentiating between documents which were:

(a) irrelevant to the request (Schedule 1);

(b) available by other means (Schedule 2);

(c) court records, within the meaning of section 32 (Schedule 3);

(d) containing personal information which the CPS did not regard as being of a quality to justify its exemption (Schedule 4 A);

(e) containing personal information caught by s.40 (Schedule 4 B); and

(f) privileged material (Schedule 5).

35. In October 2013 a junior barrister was instructed by the CPS's legal representatives, the Treasury Solicitor, to review the documents and expand the original Schedules from simply giving examples to showing – on a document-by-document basis – every piece of information which the CPS believed fell into one of the categories outlined above.

36. That had been a substantial undertaking. The material comprised approximately 1940 pages of documentation (not including blank pages). Many documents were duplicated but many duplicates were not exact. Care had been needed correctly to identify drafts of written submissions which might be subject to litigation privilege in a way in which final versions would not. The duplicates and near-duplicates were widely spread throughout the file. While 44 documents were followed immediately by duplicates or near-duplicates of the same document, a further 67 documents were duplicated in completely different places within the file. It had been necessary, because the

information request concerned “documents”, to divide the file into “documents”.

37. The file had been divided into 461 separate documents which were then indexed and paginated. Hard copies were then numbered. The junior barrister who did the work spent 47 hours and 30 minutes on it of which all bar one and a half hours was work on the Scheduling.

38. The most time-consuming work related to the material in Schedule 4B because those documents contained sensitive personal information such as the names of the more junior CPS staff who worked on the case. There were also a large number of other small pieces of information which were personal and sensitive such as direct contact details contained in headings and email signatures. 64 of the documents had personal information created simply by their method of production. Despite that extra effort, it did not appear that much in the way of new categories of information which were exempted under FOIA resulted from this exercise. Most of the work appeared to be repetitious.

39. Mr McHaffie believed that s.30 (1) (c) applied to the totality of the information being withheld. There was a clear public interest to protect the evidential contents of any prosecution file, other than the extent to which it was necessary to ensure that an accused received a fair trial. There was a general duty of confidentiality in respect of all material – both used and unused – in a criminal case.

40. Evidence relied on by the prosecution was served on the accused who was subject to a general duty of confidentiality and to an implied undertaking that the material would not be used for any purpose other than the defence. In cases of interest to the media there was a protocol which could allow disclosure to the media of certain material produced in evidence referred to in court. That was to assist in accurate reporting

in transparency in terms of contemporaneous reporting. A balancing exercise took place in order to account for the right of privacy of individuals. That kind of disclosure tended to relate to exhibits such as emails or video footage.

41. Simply because statements were served in criminal proceedings – whether from civilian or police witnesses – that did not automatically place them in the public domain. Some statements might not be relied on at trial and might not be referred to in the criminal process, some witnesses were called to give live evidence and other statements were read out. The evidence contained in statements might not be the same as that given during a criminal trial. The only certain account of what evidence was relied on in the criminal proceedings would be from court transcripts. There were no transcripts in the Magistrates' Court.

42. While public disclosure of prosecution witness statements might be in the public interest on occasion, routine disclosure of such statements would be likely to damage the criminal process. Material not relied on as evidence, known as "unused material", carried a strict limitation on the use that could be made of it and contravention was a contempt of court.

43. Public and unfettered release of that information under FOIA ran contrary to the framework described above. It would be counter-productive – and likely to impair the successful conduct of criminal investigations and trials – if witness statements or any other similar information were generally disclosed under FOIA.

44. Witnesses and other people supplying information had a reasonable expectation that the information would not be used outside the proceedings, particularly in the light of the general duty of confidentiality in respect of used and unused material. They were entitled to expect that their exposure to public scrutiny ended with the

conclusion of the trial. The risk of unfettered disclosure to the public would be likely to deter them from assisting the prosecution in criminal cases and could have a damaging effect on the attitude of potential witnesses in the future who might hear about such public disclosures. Even if the information had been referred to in open court during the course of the trial, witnesses reasonably expected that their public exposure ended when the case ended. That included an expectation that their statement or information would not surface publicly at some later date.

45. Mr McHaffie maintained that the disclosure of evidential material such as that in issue in the case could substantially undermine the confidence of those who might be asked to provide information in the course of a criminal investigation and prosecution. That could have a long-term and erosive effect on the CPS' operating policies and practices in its prosecutorial work and – as a consequence – on public confidence in the criminal justice system.

46. The nature of the Appellant's request ("the files") was broad and voluminous. It was disproportionate to have to consider each piece of paper in its files in order to be in a position to reach the view that this exemption applied to each piece of paper. Balancing the public interest in providing the information sought – against the public interest in withholding it – he maintained that the balance fell on the side of upholding the section 30 (1) (c) exemption.

Conclusion and Remedy

47. There was a preliminary matter, raised just before the appeal hearing, that it is proper to record on the face of this judgement. The Judge assigned to the case, originally, was unable to sit. The matter was re-assigned at short notice to Robin Callender Smith. When he read the

papers, which arrived shortly before the hearing, he saw the written witness statement of Malcolm McHaffie.

48. The Judge disclosed to all the parties that, from 1991 - 1999 he worked for the CPS as a Principal Crown Prosecutor and latterly (1998/1999) as the Branch Crown Prosecutor for the CPS Inner London Youth Branch. For the period from 1997 to 1999 Malcolm McHaffie had been a colleague at that Branch. They had not met during the course of the subsequent 14 years. Having considered the nature of Mr McHaffie's evidence - and the issues in the case generally - the Judge did not consider himself to be facing a conflict of interest so that he had to recuse himself. None of the parties asked him to recuse himself when this information was disclosed to them.

49. There are, within this appeal, two distinct strands. The first strand is the Appellant's proper desire to have as much information within the scope of his request revealed to him.

50. Before the appeal hearing began the specified documents on which closed submissions were to be made were identified to him in broad terms even though he was not present when the closed submissions themselves were made.

51. The second strand is the CPS's reliance – with which the Commissioner did not agree within the public interest balancing test – on the effect of s.30 (1) (c) on all the material which had been withheld.

52. Dealing first with the Appellant's substantive points in this appeal, on the issue of the scope of the request we find that the approach adopted by the Commissioner and the CPS was both correct and proportionate.

53. The Appellant had requested a copy of the CPS's "file(s) on the… trial… and associated appeals". As a Tribunal we have been able to

see all the relevant open and closed information in relation to that request. The idea that some material concerning an unrelated case that had some tenuous connection to the information in the Chambers file should also fall within the scope of the request is neither sensible, proportionate nor tenable.

54. On that basis the documents in Schedule 1 fall outside the scope of the request because they include documents relating to other cases. They also include documents touching on parliamentary questions, articles and freedom of information requests made by others. These were generated after the appeal.

55. This appeal is about the information related to the trial and the appeal process itself.

56. In terms of section 32 (1) – an absolute exemption when engaged - the material relates to indices of court bundles, admissions, court orders and judgements and the like. We find – for the same reasons as did the Commissioner and further particularised in his open skeleton argument from pages 5 – 6 and 8 - 10 – that the material so characterised in this appeal was correctly assessed under this exemption.

57. The same goes for the material on which the section 42 (1) qualified exemption was claimed in relation to legal professional privilege. The public interest balancing test in relation to that exemption falls against disclosure.

58. That is because, although there is a significant public interest in the CPS's' actions being transparent and subject to scrutiny (which is heightened in cases which attract great public interest as did Mr Chambers' prosecution) - there is a strong public interest in the CPS being able to take robust and independent legal advice and to hold full and frank internal discussions in relation to it. If that was not the case,

those giving that advice and making decisions would be placed in an invidious position of not being certain that they could speak and act as freely as they could or should be able to.

59. The Tribunal notes that the request for information was made very shortly after the Divisional Court's decision on the appeal. The result in Mr Chambers' case – in his favour and quashing the conviction – was made before the request was made.

60. There was a very significant amount of information already in the public domain about the trial process. This was not a situation where if information was disclosed it might assist in an unsafe conviction being quashed.

61. Neither was it a situation where it was open to the Crown to "withdraw" the matter after there had been a decision on the facts – and the meaning of "menacing in character" – made first by District Judge in the Magistrates Court and then by the Crown Court judge.

62. Given the earlier findings of fact in the courts below it necessarily had to go to the Administrative Court of the High Court for a ruling on that meaning. It is significant that, in its first iteration in the Administrative Court, the two judges originally empanelled there found they could not agree with each other on that meaning. It had to go before a differently composed Administrative Court of three judges – with the Lord Chief Justice - for final resolution.

63. It follows, therefore, that the Tribunal finds that – where those exemptions above were applied – they were applied correctly. In essence, that leaves the Appellant where he was at the beginning of the appeal in terms of his information request (although some further limited information has been revealed to him in the appeal process by agreement) and his appeal fails.

64. Having reviewed all the material – open and closed - with rigour there is no “smoking gun” that is being concealed within the process that would alter the public interest balance in the exemptions already applied.

65. The Tribunal, additionally, finds that the s.30 (1) (c) exemption claimed by the CPS is engaged throughout the relevant material and that the public interest balance favours the CPS in withholding that material.

66. The Tribunal has been assisted in reaching by hearing the oral evidence of Mr McHaffie. That evidence was comprehensive, credible and cogent and has been set out above in as much detail as an open judgment permits. This was not evidence that the Commissioner had been able to consider – in its totality - at any earlier stage in the Appeal.

67. The Tribunal finds that all the information on the trial and its associated appeals was clearly held for s.30 purposes and, as the CPS has pointed out, the Appellant has not suggested otherwise. That, therefore, puts the focus on whether the public interest in maintaining the exemption is outweighed by the public interest in disclosing it.

68. In finding that the public interest in maintaining the s.30 (1) exemption applies to all the withheld material the Tribunal notes the following points:

(1) The evidential content of a prosecution file is generally confidential and necessarily needs to remain confidential so that people are not deterred from assisting the prosecution in criminal cases.

(2) The progress of any case in itself generates further confidential material between the police, counsel and other associated parties. There is a vital public interest in preserving this confidentiality so

that there can be a full and frank exchange of advice and information between the police and the CPS to ensure that matters are robustly aired and explored and so that conclusions are as well-founded as is possible. Erosion of the protection that affords – or fear of disclosure – is only merited in exceptional cases. One example might be when a Tribunal, looking at material such it has in this case, finds that there has been an attempt to cover up wrongdoing. That is not the situation in this instance.

(3) An earlier Tribunal in *Breeze v IC* EA/2011/2007 emphasised that it was particularly important to ensure that the CPS was able to "communicate frankly and fearlessly, free from any concern that every recommendation or reservation will be routinely exposed to public scrutiny, if the prosecution fails". We agree, and those comments apply equally to this case.

(4) There is nothing to suggest – throughout the history of this case - that it was unreasonable or unlawful for the CPS to have prosecuted Mr Chambers. Initially he pleaded guilty, a plea he was allowed to vacate. A District Judge at the Magistrates' Court and the Crown Court found he was guilty of the offence charged under s.127 of the Communications Act 2003, applying their understanding of the law (which mirrored that of the CPS) and – in addition – the high criminal standard of proof "beyond reasonable doubt". At no stage has the CPS been criticised by any court for bringing the prosecution.

(5) The prosecution and appeal court process actually clarified the law in this area which had previously not been considered in terms of the most modern and instantaneous methods of communication.

(6) At the conclusion of the case the DPP reviewed the prosecution policy in this area as it relates communication laws and social

media, issued draft guidance in December 2012 and then final guidance in June 2013.

69. For these reasons the s.30 (1) exemption is engaged in respect of all the 461 documents the Tribunal has considered in this appeal and the public interest balance falls in favour of maintaining the exemption throughout.

70. Our decision is unanimous.

71. There is no order as to costs.

Robin Callender Smith
Judge
9 July 2014