



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

Appeal No: EA/2017/0236

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50673467

Dated: 5 October 2017

Appellant: Lloyd Anderson

Respondent: The Information Commissioner

Considered on the papers: 13 March 2018

Before

Chris Hughes

Judge

Anne Chafer & Henry Fitzhugh

Tribunal Members

Date of Decision: 22 March 2018

Subject matter:

Sections 31 and 40 Freedom of Information Act 2000

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 5 October 2017 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. Former Inspector Lloyd Anderson (who retired in 2010) started raising concerns about the conduct of some police officers and certain practices within a unit of the Staffordshire Police – the Sensitive Policing Unit - from 2006. This led to a management review by Superintendent Costello which reported in 2007, a grievance in 2008/9 and further correspondence with Staffordshire Constabulary and the Independent Police Complaints Commission (IPCC) in 2009. The IPCC launched Operation Kalmia to inquire into the conduct of police officers leading up to a trial which resulted in convictions for murder in 2008 and Mr Anderson gave evidence to that inquiry. The case was referred to the Court of Appeal which, in 2012, overturned the convictions for murder of five men because of those shortcomings in police practice. The court praised Mr Anderson and were critical of the conduct of certain police officers.
2. Mr Anderson was concerned that Operation Kalmia was not sufficiently broad in its scope and made representations to the IPCC concerning Operation Pendeford, which led to a trial and conviction for manslaughter in 2003 and Operation Sanctio, which led to convictions in 2007. As a result of his intervention the IPCC referred the issues he raised to Staffordshire Police (SP). Superintendent Armstrong of the Professional Standards Department of Cheshire Constabulary was commissioned to carry out a scoping inquiry to determine whether grounds existed upon which either investigation should be considered for re-examination.
3. His report, entitled “Independent assessment of matters raised by former Inspector L Anderson of Staffordshire Police that fall outside of the terms of reference of Operation Kalmia” was delivered to the Chief Constable of Staffordshire Police in April 2013. He concluded:-

“175. Nonetheless I am satisfied that there is sufficient evidence to conclude that there are no grounds to consider either Operation Pendeford or sanction to have led to any miscarriage of justice; there is no evidence of any criminal conduct on the part of any officer, nor is there any prospect of a case to answer for any breach of standard of professional behaviour on the part of any officer involved in either investigation.

....

177. I am satisfied my review has produced reasonable grounds for Staffordshire Police to conclude there has been a sufficiently proportionate examination of Mr Anderson's concerns over Operation Pendeford and Operation Sanctio to satisfy any interested party there is no evidence of material impropriety in the handling or management of a protected witness in either investigation."

4. On 6 December 2016 Mr Anderson requested information from SP:-

"Operation Sanctio and Operation Pendeford

On the 29th November 2016, the Express and Star ran a story about concerns raised in connection with the above two criminal investigations.

<http://www.expressandstar.com/news/crime/2016/11/29/kevinnunes-investigation-whistleblowers-call-over-murder-and-raid/>

In the article Deputy Chief Constable Nick Baker is quoted regarding an independent assessment of the concerns carried out by a senior investigator from a neighbouring force. Following that assessment, it would appear that no further action was taken by Staffordshire Police. The way in which individual police officers behave themselves and the manner in which police forces conduct major investigations is of great interest to the public. It is very important that any concerns regarding wrongdoing are thoroughly investigated in a professional and transparent way. Dealing with any such concerns in an open manner can only reinforce public confidence in the police. The report that details the findings of the 'independent assessment' of the concerns raised about possible wrongdoing is therefore very important in enabling to the public to reach an informed decision about how Staffordshire Police dealt with the issue. Under the FIO Act [sic] I would like to request:-

- 1. A copy of the report compiled following 'Independent Assessment [sic].*
 - 2. Copies of any minutes appended to the report at (1) above.*
 - 3. Any letters, emails or other correspondence in which the 'independent Assessment' referred to at (1) above is mentioned or commented on"*
5. A redacted version of the Independent Assessment report was released on 6 February. On internal review SP relied on exemptions contained in section 31(1)(g) (law

enforcement) and 40(2) (personal information). It failed to properly address parts 2 and 3 of the request.

6. Mr Anderson complained to the Information Commissioner (ICO). The ICO investigated, during the investigation SP confirmed that it also relied on section 31(1)(a) and (b).
7. In her decision notice the ICO required SP to comply with its duties under FOIA with respect to parts 2 and 3 of the request. With respect to part 1 she upheld the position of SP in relying on exemptions in sections 31 and 40 to redact information from the report.
8. She found that the majority of the requested information had been disclosed and concluded that redaction of the names did not, contrary to Mr Anderson's view, "*deny the public an understanding of important issues*". She concluded (DN paragraph 58) that "*SP has therefore provided sufficient information to meet the legitimate interest of the public without infringing the rights of the parties connected to this sensitive matter.*" And she concluded, that in the light of the nature of the information and the reasonable expectations of the relevant individuals, disclosure of the names would be an intrusion, could cause unjustified distress and these outweighed any legitimate interest in disclosure and therefore the exemption in s40(2) was properly applied.
9. The ICO then considered the application of the law enforcement information to those matters not falling within s40. Section 31 provides (so far as is relevant):-
"(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—
(a) the prevention or detection of crime,
(b) the apprehension or prosecution of offenders, ...
(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—...
(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper".
10. She considered the redaction of certain information concerning the Sensitive Policing Unit noting that disclosure would reveal "*tactics used by the force in relation to the*

use of protected witnesses ...By disclosing the requested information it would impact on the force's operational and tactical capabilities and any potential vulnerability."

It could be used to contribute to building a picture of how protected witnesses are managed which would be of use to someone wishing to intimidate such a witness. She concluded that real prejudice would flow from the disclosure, while there was a public interest in disclosure in increasing public understanding of and confidence in the police the disclosure would undermine police effectiveness and compromise the safety of individuals.

11. The ICO concluded that the practical consequences of disclosure would be to the detriment of law enforcement and the public interest of disclosing the remaining information (given the scale of material already in the public domain) was minimal and upheld the SP's decision to withhold the information.
12. In his appeal and subsequent reply to the ICO's response Mr Anderson explained the background to his request and his significant experience of "covert" policing in SP. He criticised the decision notice raising five substantive issues:-
 - SP had failed to comply with statutory time limits and the ICO had taken no action. SP had belatedly responded with respect to parts 2 and 3 of the request claiming that no information was held. He did not accept this and asked the tribunal to investigate.
 - The ICO had not instructed SP to follow best practice in specifying which exemptions applied to which information
 - The redacted names should have been identified as "individual one" etc
 - He was disadvantaged in dealing with s31 redactions because he did not know when the exemption had been applied
 - There was greater public attention to the issue than the ICO acknowledged; he subsequently argued that allegations of potential misconduct were in the public interest and the tribunal should investigate the conduct of the ICO's investigation.
13. In responding the ICO addressed the issues raised in the appeal:-
 - The ICO had identified the failure of SP to respond in a timely, if it failed to provide a response Mr Anderson should raise that with the ICO.

- “Best practice” was not a statutory right and therefore not enforceable by the ICO
- The ICO had not used “individual one” etc since, given Mr Anderson’s knowledge of the issue reidentification would have been possible
- The pages where s31 redactions had been made were identified, this was not in any event a ground of appeal
- The unspecified assertion of “media interest” did not address the question of public interest

The questions for the Tribunal

14. The issue for the tribunal is whether the ICO’s decision is correct in law. Although Mr Anderson has raised many issues only some are matters which this tribunal has jurisdiction to address.
15. The original decision notice found that SP had not responded in time, the tribunal cannot do more. In addressing parts 2 and 3 the ICO required SP to consider the requests and respond properly. While Mr Anderson states that the response was delayed and he does not accept that the response reflects the real position, that is a matter which this tribunal cannot consider except following a fresh complaint to and decision by the ICO.
16. The second ground is also not a matter for this tribunal, best practice is not enforceable through the tribunal.
17. In considering the way the redaction of names is carried out the concern of the ICO is to protect the identities of the individuals; in that context the ability of any member of the public (including the requester) using information he already has to reidentify an individual is highly relevant to the question of how the redaction is carried out and whether redaction of a name is sufficient to prevent such re-identification. This ground of appeal is without merit.
18. In considering the places where redactions under s31 were made it was apparent to the tribunal that significant information as to how operational policing was carried out would be disclosed and the harm envisaged by SP was a real and substantial possibility. The exemptions is engaged and has real weight.

19. Although Mr Anderson claims that there is a public interest in disclosure due to the similarities between these operations and the matters which resulted in an overturning of the convictions for murder by the Court of Appeal; the tribunal is not satisfied by the analysis. In respect of those cases there were no appeals and the Independent Assessment came to the conclusion set out at paragraph 3 above. There is thus no evidence of a miscarriage of justice and the report found concluded this after reviewing Mr Anderson's complaints and setting out its conclusions; these conclusions have been disclosed. There are no grounds to identify the names redacted in the Independent Review. While Mr Anderson has given consent to the release of his name and feels that it should not be redacted; s40(1) FOIA provides that the personal data of an individual making a request under FOIA is exempt from disclosure under FOIA – this exemption is unqualified. The disclosure of the matters redacted under s31 would cause significant harm.
20. The tribunal is satisfied that the ICO's decision is correct in law and dismisses the appeal.

Judge Hughes

Judge of the First-tier Tribunal

Date of Decision: 22 March 2018

Date Promulgated: 22 March 2018