Appeal number: EA/2017/0167

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

CHRISTOPHER CLARK **Appellant**

- and -

THE INFORMATION COMMISSIONER **Respondents**

THE COMMISSIONER OF POLICE FOR THE METROPOLIS

TRIBUNAL: JUDGE ALISON MCKENNA
ANNE CHAFER
ANDREW WHETNALL

The Tribunal sat in public at HMCTS Kings Court, Leicester on 22 August 2018

Robert Cohen, counsel, for the Metropolitan Police Commissioner
Andrew Gardiner, lay representative, for the Appellant
The Information Commissioner did not appear

DECISION

1. The appeal is dismissed.

REASONS

Background to Appeal

2. The Appellant made a request to The National Archives ("TNA") for information contained in files transferred from the Metropolitan Police regarding its investigations into the murders of eight women, thought to have been sex workers, in London between 1959 and 1965. The offences, which are widely thought to have been perpetrated by the same person, have come to be known as "The Nude Murders". No one has been convicted of these crimes.

3. The murders were reported in the press at the time, and the Tribunal saw some of the contemporaneous press reports obtained from local libraries. There were public inquests into the deaths, and a criminal trial at which the accused was acquitted. A book has been published about the crimes[1].

4. The Appellant is a journalist with an interest in the case. He has published articles about the murders based on his own research. He is in contact with some of the victims' relatives, who supported his information request.

5. Although TNA was the relevant public authority[2] for the purposes of the Appellant's request under the Freedom of Information Act 2000 ("FOIA), the Commissioner of Police for the Metropolis ("the Met") was joined as a party to the appeal. The files are held at TNA subject to a 100 year "closure" under the Code of Practice for Archivists and Records Managers issued pursuant to s. 51(4) of the Data Protection Act 1998, designed to ensure that they are not made public whilst any of the persons mentioned in them are still alive.

6. The request (originally made on 25 April 2016, refined on 11 May 2016) was revised to encompass the information contained in nine files[3]. The Tribunal heard that the Met, during its investigations, contacted 120,000 people. The Tribunal received the withheld material (some 10,000 pages) at its administrative offices in Leicester and spent a day reading it before the hearing. For the hearing itself, the Met helpfully produced a "sample" closed bundle for the Tribunal.

7. TNA considered the information request in batches and decided to withhold disclosure in reliance upon sections 31, 38 and 40 (2) of FOIA. Successive internal reviews upheld the decisions to withhold the information, finally completing the

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[1] "*Jack of Jumps*" by David Seabrook, published by Granta in 2006.

[2] See s. 15 FOIA

[3] Listed at page 40 of the open bundle

process in January 2017. The Appellant complained to the Information Commissioner.

8. The Information Commissioner issued Decision Notice FS50650734 on 20 July 2017, upholding TNA's reliance upon s. 31 (1) (a) to (c) of FOIA and not considering it necessary to determine the engagement of the other exemptions relied upon. The Information Commissioner found that disclosure of the requested information would be "likely to" prejudice law enforcement because the perpetrator(s) may still be alive and may yet be investigated and brought to trial. As to the public interest, the Information Commissioner acknowledged the public interest in understanding how thoroughly the police had investigated the murders but concluded that the public interest in possibly bringing a perpetrator to justice outweighed that interest and so favoured maintaining the exemption.

Appeal to the Tribunal

9. The Appellant's Notice of Appeal dated 1 August and letter of 22 August 2017 referred to the substantial amount of information about these cases which is already in the public domain, including the access to the files given to the author of the book. He also referred to the availability of the criminal prosecution file, which was "open" at TNA. He submitted that the Decision Notice was wrong to conclude that a future criminal prosecution would be likely to be prejudiced by the disclosure of information which was already in the public domain. He maintained that, in any event, there is no on-going investigation.

10. The Information Commissioner's Response dated 3 November 2017 maintained the analysis set out in the Decision Notice. The Met's Response dated 19 October 2017 supported the Decision Notice but sought additionally to rely on sections 38 and 40(2) of FOIA to resist disclosure.

11. The Tribunal convened an oral hearing, at which the Appellant was represented by lay representative and fellow-journalist Andrew Gardiner and the Met was represented by Robert Cohen, counsel. We are grateful to them both for their clear oral submissions. The Information Commissioner did not appear.

12. The Tribunal considered an agreed open bundle of evidence comprising some 200 pages, including submissions made by both parties. As noted above, the Tribunal pre-read the extensive withheld material and considered at the hearing a closed bundle containing a sample of it. This was not disclosed to the Appellant or his representative, but it was not necessary to hear any evidence or submissions in closed session.

13. The Appellant had obtained, in the course of his research, information from the criminal prosecution file held at TNA. The Met considered that this file ought not to have been publicly available. The Tribunal heard that its status is currently under review by TNA. TNA sent the criminal prosecution file to the Tribunal as closed material, but the Met accepted that it fell outside the scope of the information request with which we are concerned. The Tribunal noted that the Appellant had obtained it

perfectly legitimately and has already published an article about it. In the circumstances, the Tribunal discharged the rule 14 direction which the Registrar had made in relation to that file. The Tribunal also explained that, as the file had been placed before the Tribunal and referred to in the hearing, any third-party application for access to it would have to be considered judicially and in accordance with the Court of Appeal's guidance in *Cape Intermediate Holdings v Dring* [2018] EWCA Civ 1795.

The Law

14. The duty of a public authority to disclose requested information is set out in s.1 (1) of FOIA. The exemptions to this duty are referred to in section 2 (2) as follows:

> *"In respect of any information which is exempt information by virtue of any provision of Part II, section 1 (1) (b) does not apply if or to the extent that –*
>
> *(a) the information is exempt information by virtue of a provision conferring absolute exemption, or*
> *(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."*

15. The principal exemptions relied upon in this case are to be found at s. 31 (1)(a), (b) and (c) of FOIA which provide as follows:

> "*Law Enforcement*
>
> *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*
>
> *(c) the administration of justice".*

16. These are so-called qualified exemptions, giving rise to the public interest balancing exercise required by s. 2 (2) (b) of FOIA. The public interest falls to be assessed as at the date of the public authority's decision i.e. in this case, the date of its final internal review.

17. As TNA held the files pursuant to s. 15 FOIA but was not the body which conducted the investigation, the Met relied on s. 31 rather than s. 30 FOIA. As the Information Commissioner submitted, the two sections are complementary.

18. Exemptions also relied on by the Met were s. 38 FOIA, which is a qualified exemption concerning the endangerment of the health and safety (including the mental health) of any individual, and s. 40 FOIA which is an absolute exemption concerning data protection rights.

19. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

> *"If on an appeal under section 57 the Tribunal considers -*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
>
> *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*
>
> *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."*

20. The burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

Evidence

21. The Appellant produced no witness evidence. He did not require any of the Met's witnesses to attend for cross examination, and as the Tribunal had no questions for the witnesses, we accepted their written statements. The evidence of Mr Capus and Ms Man had been available to the Information Commissioner, but the witness statement of Acting Detective Inspector ("ADI") Stansfield was sworn after the Decision Notice.

22. The Met relied on the witness statements sworn by David Capus, its Legislative Compliance and Change Manager, which explained that the access to the files which had been afforded by officers to the author David Seabrook (before the enactment of FOIA) had been unauthorised and in direct breach of Met policy.

23. A witness statement from Helen Louise Man, Head of FOI Centre at TNA, explained the system of open and closed records at TNA and the Code of Practice for Archivists and Records Managers. She explained that the criminal prosecution file which had been accessed by the Appellant differed from the police investigation files, in that it was designed to capture papers relating to the criminal trial only. She concluded that the criminal prosecution file contained some information which overlapped with the information held in the investigation files but that there were significant differences in the information contained in each file.

24. The witness statement from ADI Susan Stansfield, from the Met's Special Casework Investigation Team in the Homicide and Major Crime Command, explained how the disclosure of the requested information could jeopardise any

potential court case. Her evidence was that cold cases can sometimes become live investigations, and she gave examples of active enquiries into murders committed as long ago as the 1970s. She explained that, if witnesses or suspects gained access to the information in the police investigation files through a FOIA disclosure, this could affect their evidence and lead to difficulty in securing a fair trial and/or safe conviction. She referred to the Met's duty of care to the relatives of the victims in securing a conviction if possible and to the public interest in seeing justice served even at this late stage. She commented that these crimes were committed before the days of Family Liaison Officers and accepted that the families of these victims may not have received much information about the crimes from the police. Nevertheless, she feared that it would be very distressing for them to read all the details in media reports and she referred the Tribunal to the Met's experience in handling sensitively the transmission of such information to victims' families.

Submissions

25. Mr Cohen, on behalf of the Met, submitted that none of the Appellant's arguments addressed the likely prejudice to law enforcement which the Met's unchallenged evidence described as likely to arise from disclosure. He submitted that it was impossible to discern in advance the significance of any one page to a future investigation. He drew a distinction between the "aberrant disclosure" of information to Mr Seabrook and disclosure "to the world" under FOIA, pointing out that Mr Seabrook's book was only 400 pages long compared with the 10,000 pages of withheld material, so it could not be suggested that the publication of the book meant that the withheld material was in its entirety already in the public domain. In short, the Met's case was that Mr Seabrook's access to the files could not be said to nullify the risk described by ADI Stansfield.

26. Similarly, Mr Cohen submitted that the information in the criminal prosecution file could not on the evidence before the Tribunal be found to be identical in nature to the withheld information, as it was much more limited and had a completely different focus. Again, in his submission, the Appellant's access to some overlapping information via this file did not nullify the clear risk that ADI Stansfield's evidence had identified.

27. Mr Cohen submitted that, notwithstanding these earlier disclosures, such as they were, there was clear evidence before the Tribunal of the potential for the criminal investigation to be re-opened even now, and the likelihood that such an investigation would be compromised by disclosure. He asked the Tribunal to accept that it has become more common to investigate historic offences.

28. Mr Cohen submitted that the Information Commissioner had been right to conclude that s. 31 FOIA was engaged by all the withheld information and that the public interest balancing exercise had been correctly weighted in favour of preserving the possibility of a future prosecution. He invited the Tribunal to view the withheld material as a coherent whole, permitting cross-referencing of evidential threads over the 10,000 pages, so that the prior disclosure of any particular thread was irrelevant to the public interest in preserving the integrity of the whole.

29. As to s.40 (2) FOIA, Mr Cohen asked the Tribunal to accept that the files requested were full of sensitive personal data about a wide range of people. In his submission, the Appellant had not dealt adequately with the data protection objections to disclosure of this information. With regard to the Appellant's reliance on letters of support from some of the victims' family members, Mr Cohen commented that this form of consent did not cover all the relatives potentially impacted by disclosure. He reminded the Tribunal that sensitive information about other people who might still be alive was the basis for the, entirely appropriate in his submission, 100-year closure by TNA in accordance with the Code of Practice for Archivists and Records Keepers.

30. As to s.38 FOIA, the Met's submission was that the mental health of victims' families would be endangered by disclosure of the information requested. The Appellant's case was that they already know much of the detail but wanted more information. This wish was acknowledged by the Met in view of the relatives' letters produced by the Appellant. However, Mr Cohen submitted that the relatives could not already know many of the most distressing details in the expansive files and that they were not in a position to assess the impact of disclosure of such information under FOIA to themselves or to others. Whilst acknowledging the public interest in knowing that these crimes had been properly investigated, the Met's case was that there was no public interest in causing distress to the victims' families.

31. Following the conclusion of Mr Cohen's submissions, the Tribunal adjourned briefly to allow Mr Gardiner to ask Mr Cohen some questions before commencing his own submissions.

32. Mr Gardiner, on behalf of the Appellant, explained that he is a journalist and not a lawyer and so asked to be corrected if he had misunderstood the law. He described s. 31 FOIA as a "catch-all" provision, so that if there was the remotest possibility of a future investigation and/or prosecution the information requested would be withheld. He asked the Tribunal to find that the chances of these cold case cases being re-opened were "fanciful" given that, in his submission, no exhibits had been retained so no DNA testing was possible. The Tribunal expressed some surprise at this argument, which had not featured in the Appellant's submissions or been addressed in any witness evidence. Mr Cohen told the Tribunal he had no instructions on Mr Gardiner's submission given that the Met had not been fore-warned of it. Mr Gardiner then asked if the Tribunal could adjourn so that he could ask the Appellant for a witness statement or if ADI Stansfield could attend to be questioned, but the Tribunal refused these applications as they were made mid-hearing and after the Appellant had had plenty of opportunity to raise this aspect of his case in advance. Mr Gardiner asked the Tribunal to find that there was no realistic possibility of these cold cases being re-investigated in view of the passage of time as, even when the cases were live there were no credible suspects. He submitted that murder investigations were now forensics-led and that it was fanciful to suggest that there could be a conviction based on the information in these elderly files.

33. With regard to Mr Seabrook's book, Mr Gardiner submitted that the length of the book was immaterial as Mr Seabrook had been given access to all the files from which he had extracted the key elements. Mr Gardiner asked the Tribunal to consider

that the Met took no legal steps against Mr Seabrook for unauthorised access to files and that the only type of re-investigation considered had been a review of the files in 2006 in response to Mr Seabrook's naming of the person he thought responsible for the murders. Mr Gardiner submitted that there had been eight murders of which no one had been convicted, so the public interest favoured giving the Appellant and himself, as skilled investigators, access to the files rather than allowing them to gather dust because of a theoretically possible re-investigation. He submitted that other unsolved murder files are open at TNA so that the Met's case for resisting disclosure was undermined.

34. In respect of s. 38 FOIA, Mr Gardiner's submission was that many family members of the victims had written to support disclosure. He submitted that their best, perhaps their only, chance of finding out what had happened to their relative lay in working with the Appellant, because they had been refused information from the Met's files in the past. He said that obtaining "closure" for them was not his primary motive but that it should be considered as a factor. Asked by the Tribunal about the risks to the mental health of people other than the victims' relatives, he said that the relatives were his main concern. He produced for the Tribunal copies of contemporaneous newspaper reports which contained details which one might consider distressing and pointed out that these were already available to the relatives in local libraries on microfiche. He said a documentary was being made about these murders in which some of the children of the victims had agreed to be interviewed.

35. With regard to s. 40 (2) FOIA, Mr Gardiner submitted that the Appellant had already found out witnesses' names and addresses. Some of the details had been printed in "True Crime" magazine. He thought that it was no longer possible to protect this personal data and that, where these details were not already in the public domain, they could be redacted. In response to a question from the Tribunal about whether it would constitute fair processing of data to publish information disclosing that someone had been the client of a sex worker, Mr Gardiner said that he did not consider that a relevant detail. The Tribunal advised him that as such information fell clearly within the terms of the information request, it must approach this case on the basis that such information must be disclosed to the world at large if it is not exempt.

Conclusion

36. We begin our conclusions by noting that the s. 31 exemptions are said by the Met to be engaged in relation to the entirety of the withheld information but that the s. 38 and s. 40 (2) exemptions are said to be engaged by parts of the withheld information only.

37. The only evidence before us about the likelihood of these cold cases being re-investigated is from ADI Stansfield, whose testimony was un-challenged by the Appellant. Her evidence was that *"if new evidential information became available the cases could easily turn into live investigations"* so that it was of the *"utmost importance"* that the contents of the files are not disseminated due to the risk that *"…if any suspect were arrested, with this available information he/she could have plenty of opportunity to concoct a story for their defence".* We note that the Appellant

believes that no exhibits have been retained so the chances of DNA testing are remote, but this assertion was not placed into evidence or even pleaded at the appropriate time. He did not ask for ADI Stansfield to attend the hearing to comment on this assertion. In the circumstances we consider that it would be unfair to take it into account in reaching our conclusions.

38. On the evidence before us, we are satisfied that the Information Commissioner was correct to conclude that s. 31 (1) (a) to (c) of FOIA was engaged by the circumstances of this case. We are satisfied that the potential for re-investigation of the eight murders engages (a) the detection of crime, (b) the apprehension or prosecution of offenders and (c) the administration of justice. We are satisfied on the basis of ADI Stansfield's evidence that there is a realistic likelihood of prejudice to these aspects of law enforcement if the information requested were disclosed to the "world at large" under the auspices of FOIA. We agree with the Information Commissioner that, whilst there is a legitimate public interest in scrutinising the adequacy of the police investigation into the murders of these vulnerable women in circumstances where there has been no conviction, the public interest favours protecting the integrity of any possible re-investigation and in promoting the highest possibility of there being due process and a safe conviction while this is still possible.

39. We are not persuaded that any of the previous partial disclosures of the withheld information negates the risk to law enforcement that we have accepted above. We understand the value of the files to any future investigation to lie in their use as a coherent whole, and this understanding distinguishes them from the information contained in Mr Seabrook's book, the criminal prosecution file, and the information contained in contemporaneous newspaper reports or more recent magazine articles.

40. For these reasons, we now uphold the Information Commissioner's Decision Notice and dismiss the appeal.

Post Script

41. Our conclusions above mean that it is not necessary for us formally to determine the remaining claimed exemptions. However, we would like to comment as follows.

42. Firstly, we have not determined the engagement of s. 40 (2) FOIA but note here that the withheld information we have read contains the personal data (including sensitive personal data) not only of the victims but also of a significant number of the many thousands of people who were contacted by the police at the time of the murders. Such people may have been sex workers and their clients, they may have been connected to one of the victims for a variety of other reasons, they may have been users of sites where it is thought that a body had been concealed, or the keeper or driver of the many vehicles followed up in police enquiries. They might even have been considered a suspect, however briefly. It is probable that some of these named people are still alive and their legal rights in relation to their personal data must be considered. For this reason, we would suggest that the Appellant's strategy of approaching the relatives of murder victims for their consent to disclosure under

FOIA is unlikely, in the long term, to assist him in overcoming the significant data protection difficulties involved in this case.

43. Secondly, whilst we have not reached any view about the engagement of s. 38 FOIA, we have no doubt that the files we have read contains information which would be distressing for the relatives of the victims, and the relatives of some other persons named in the files, to read. It must be remembered that disclosure under FOIA would reveal such information for the first time to the world at large. At our request, the Met's counsel confirmed orally (and arranged for this to be followed up in writing) that the Special Casework Investigation Team is willing to meet with relatives of historical murder victims and to help them find answers to their questions.

(Signed)

ALISON MCKENNA **DATE: 2 October 2018**

CHAMBER PRESIDENT **PROMULGATION DATE: 4 October 2018**