



IN THE FIRST-TIER TRIBUNAL

Appeal No: EA/2016/0230

**GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

MR JULIAN NETTLEFOLD

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

And

THE CHIEF CONSTABLE OF SUSSEX POLICE

Second Respondent

Hearing

Held on 16 February 2016 at Employment Appeals Tribunal, London

Decision

I dismiss the appeal for the reasons set out below. There are no further steps to be taken by The Chief Constable of Sussex Police.

Reasons For The Decision

Background

1. On 27 August 2011, the Appellant's son tragically died. The Coroner concluded that this was as a result of suicide. The Appellant was not satisfied by that decision.
2. The Appellant made various requests of the Chief Constable of Sussex Police ('Sussex Police') under the Freedom of Information Act 2000 ('FOIA'). This appeal solely concerns the request made on 15 July 2013 which asked for:

"Full details of the calls made from Harry Nettlefold's telephone 07734996452 on August 27th 2011. Where was the call made from and where was it received by [name redacted]."

3. That request ultimately resulted in the First-Tier Tribunal's decision of 23 August 2014.¹ It found that a case had not been made out for the request being vexatious under s.14 FOIA. The Tribunal required Sussex Police to either disclose the information requested or provide a detailed statement of any exemption that it relied on in refusing disclosure.
4. On 14 October 2014, Sussex Police refused disclosure, relying on section 30 FOIA². In its response, it assessed the factors in favour of and against confirming whether the information was held. (See page 124 of the Bundle.) During the Commissioner's subsequent investigation, Sussex Police altered its stance, relying instead on the position that it did not hold the requested information. It explained that whilst the information requested had at one point been held, it had passed the file on to the Coroner in June 2012.
5. The Commissioner found that Sussex Police did not hold the requested information at the time of the request. As explained in the Commissioner's Decision Notice³:
 - a. *"15. The police said that in an effort to resolve the matter fresh representations had been made to the Coroner on 27 June 2016 but he had declined to provide the relevant documentation. The police said that the telephone records that were asked for in request three had consisted of a hard copy record which had originally been provided to the police by the telecommunications service provider. This document had not been digitally copied and the original had been passed to the Coroner with their investigative file. The police said that the Coroner was not holding the information on their behalf; they had passed the information on and had relinquished responsibility for ownership of it. The police confirmed to the Commissioner that they do not hold this information now and had not held it in 2013. The police said that, with the benefit of hindsight, they should have decided that the information was 'not held'. The police also confirmed to the Commissioner that they no longer relied on the section 30 FOIA exemption ..."*
 - b. *17. On 2 August 2016 the complainant told the Commissioner that a police report dated 6 January 2012 had said:*

¹ See appeal ref. EA/2014/0116, made by a differently constituted panel to the present case.

² (Section 30(1) concerns investigations and proceedings conducted by public authorities.)

³ See Decision Notice Ref. FS50619406, para.s 15 to 25.

“Telecommunications data (in and out calls and cell site locations) has been obtained evidentially in respect of [names redacted] mobile telephones (6 for the) Evidential Statement provided by Communications Service provider and held by Sussex Police, copy to be submitted to Coroner” [ICO emphasis]

- c. 18. *In the light of this reference to a ‘copy’ of the telephone information, the Commissioner asked the police to make further enquiries. The police confirmed that they did not possess the telephone records and had not done so at 15 July 2013, as the case file had been passed to HM Coroner for the inquest in June 2012. The police confirmed to the Commissioner that the telephone records had been received from the telecommunications service provider by post in hard copy form; those records had not been received or retained by them in any other format, physical or electronic.*
- d. 19. *The police said that further physical searches have been carried out within the relevant departments, during the Commissioner’s investigation, along with searches of the relevant police recording systems. They had located a total of 32 records of relevant entries covering the period 30 May 2011 to 26 May 2014 and, having examined all 32, had found no reference to, or details or copies of, the relevant telephone calls. A further file, which concerned a related matter, had also been identified. This contained a copy of a summary of the investigation into the death of H prepared for the Coroner by the Senior Investigation Officer but that file too did not contain the requested information.*
- e. 20. *Having considered the further evidence she has received from the complainant and the police, the Commissioner decided, on a balance of probabilities that, on 15 July 2013 the date of the request, the police no longer held the information specified in request three...*
- f. 21. *Coroners are not designated as public authorities under FOIA. Therefore their records are not subject to the FOIA information access regime. There is a separate information access regime for such records over which the Information Commissioner has no jurisdiction...*
- g. 23. *In this matter the police told the Commissioner that their investigation file, including the information from the telecommunication service provider, had been passed to the Coroner in June 2012. The matter had not been “crimed”, ie treated as a criminal matter, by the police. A crime number had not been applied to it and the file had not been retained by the police as they had no further need of it. Once passed to the Coroner, the file came within the Coroner’s sole remit and was not held by him on behalf of the police.*
- h. 24. *The Commissioner is satisfied that, when the police passed the information to the Coroner in June 2012, they did not retain a copy of it for their own purposes and, once it had been passed over, that the Coroner was not holding it on their behalf. The police did not retain any right of access or control over the information and had no business need to access it.*
- i. 25. *The Commissioner therefore decided that the information requested in request three was not held by the police at the date of the request and was not held by the Coroner on their behalf.”*

5. The Appellant now appeals this decision.

The Task of the Tribunal

6. The Tribunal's remit is governed by s.58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where it involved exercising discretion, whether she should have exercised it differently. This is the extent of the Tribunal's remit. The discrete matter before me concerns whether Sussex Police held the requested information at the time of the Appellant's request. It is not the Tribunal's role to consider other matters such as material or arguments presented by the Appellant concerning the events leading to his son's tragic death, or any complaints about Sussex Police that are unrelated to this discrete matter. The Tribunal is independent of the Commissioner, and considers afresh the Appellant's complaint. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact.
7. I have had the benefit of hearing from the Appellant and Sussex Police. The Commissioner did not attend the hearing, but advanced written submissions (I have not found it necessary to summarise these below, having set out in detail her reasoning in her Decision Notice). I have also received a Hearing Bundle; a further bundle, entitled "Additional documents sent to the Panel"; and various emails. The material before me includes documents sent by the Appellant after the hearing. I have carefully considered all of the points made even if not specifically referred to below. During the hearing, I ordered a short adjournment whilst Sussex Police were able to provide further detail on the searches they had made.⁴ I also gave directions permitting the Appellant to provide further information on a discrete matter within a stated timeframe.

Law

8. So far as is relevant to this appeal, section 1(1) FOIA provides:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him."

9. Section 3(2) states that:

*"(2) For the purposes of this Act, information is held by a public authority if –
(a) it is held by the authority, otherwise than on behalf of another person, or
(b) it is held by another person on behalf of the authority."*□

10. In considering whether the police holds any information covered by the Appellant's request, the standard of proof to be applied is the normal standard in cases under civil law, namely, what is called 'the balance of probabilities'.⁵

Evidence and Submissions

11. The evidence provided included:

⁴ See paragraph 13(j) below.

⁵ See *Miller v Minister of Pensions* [1947] 2 All ER 372) Denning J: "If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not."

- a. At page 140 of the Bundle: An extract written by Nicola Walker for Sussex Police contained in a Bundle prepared for the Inquest. This included text stating:

“Telecommunication data (in and out calls and cell site locations) has been obtained evidentially in respect of Harry, Sophie and Peter's mobile telephones⁶ ...”

Footnote 6 stated: “Evidential statement provided by Communications Service Provider (CSP) and held by Sussex Police, copy to be submitted to Coroner.”

- b. At page 153 of the Bundle, an email from Sussex Police to the Commissioner. This stated:

“I will attempt to provide a comprehensive summary of the actions we have taken in an effort to bring this matter to a conclusion from our perspective. Our application of S.30 (Investigations and Proceedings) was generically applied to protect information obtained for investigative purposes and followed all four requests initially being refused as vexatious. The ICO may conclude this was incorrectly applied. We no longer rely on that exemption but maintain our subsequent stance that information was not held by this force in 2013 and 2014 and is not held at this time. We have adapted our processes in light of lessons learnt in this case so that in any case coming to IR all papers subject of the request will be located and reviewed to ensure that such an error does not occur in future and to improve the Force response to an IR request...”

The investigation file, including the Vodafone telephone statement, into the death of Harry Nettlefold was passed to HM Coroner consistent with the judicial process for the inquest in June 2012. The matter was not 'crimed' by Sussex Police and therefore a crime number would not have been applied and the file not retained or held within the Crime Management Unit (CMU). Once passed to HM Coroner, the file falls within the Coroner's remit and not held for the purposes of Freedom of Information Act 2000 (Coroners Rules 2013) nor on behalf of Sussex Police...

However in an attempt to fully satisfy your concerns and consistent with a more comprehensive Internal Review process implemented ... Using a word search facility for 'Nettlefold' we have located a total of 32 logs (incident/contact records) of related incidents and having examined all 32, none make reference to, or contain details of, or copies of the telephone statement...

In addition we have located a crime file held in CMU relating to [name redacted] ... which concerns a related matter. Within this file is a copy of a summary of the investigation into Harry Nettlefold death prepared for HM Coroner by the Senior Investigation Officer (now retired). This file does not contain a copy of the Vodafone telephone statement.

Finally we have made representation to HM Coroner who is not prepared to disclose further documents in this matter.”

12. The Appellant's submissions include the following:

- a. The requested information either proves or disproves that his son was murdered.
- b. The information was held, and the police were required to hold records for 10 years. The police had previously stated that disclosure would prejudice an on-going investigation.
- c. If the matter was accepted as suicide, it is questionable why there was an on-going investigation. The police would need to retain the file to enable an on-going investigation.
- d. The police were "baulking at handing over the information" as it would prove an officer committed perjury at the inquest.
- e. He had asked for the information before the inquest. He had been told that the police had not procured the information because it would be too expensive. He had subsequently found out they had procured it. The police had blocked his emails, such that he had had to communicate with them through the police commissioner.
- f. The Coroner had 'flatly refused' to engage with him.
- g. At the hearing, the Appellant questioned whether there had been an on-going investigation at the time of the request. He stated that Sussex Police had tried to section him. The Metropolitan Police had told them to leave him alone as he was a grieving father. His General Practitioner had confirmed that there had been no recorded concerns about his mental state.

13. The submissions from Sussex Police include the following:

- a. The tragic circumstances of this incident first became known to the police on 27 August 2011 when Mr Nettlefold's son was reported missing. The deceased's body was located on 28 August 2011. Sussex Police wholeheartedly sympathise with Mr Nettlefold's loss.
- b. The matter was brought to the attention of the Coroner's Office on 29 August 2011. The investigating officer, who has now retired, made the decision on 6 September 2011 not to 'crime' the matter.
- c. An investigation file was prepared in order to assist HM Coroner with the inquisition. The investigation file, which included a hard copy of a document obtained from a telephone provider was hand delivered to Coroner Office in advance of the inquest in June 2012.
- d. As the matter was not 'crimed' by Sussex Police, no crime number would have been applied and the file was not retained or held within the Crime Management Unit.
- e. Once passed to HM Coroner, the file falls within the Coroner's remit under the Coroners Rules 2013 and is not held for the purposes of the FOIA nor on behalf of Sussex Police.
- f. The police had originally relied on section 30 without looking for the information. They considered this to be a serious oversight.
- g. The Second Respondent carried out further searches, both physically and electronically, to satisfy any concerns that there may be additional copies of the documents sought. No such documents were found.
- h. The police deny that there was a campaign to cover up details or any form of collusion as alleged by the Appellant. There was also no vendetta against the Appellant. The whole purpose of the investigation was to assist the Coroner.

- i. At the hearing, the police stated in response to points made by the Appellant, that Sussex Police do refer people to the mental health agencies when they consider it appropriate and that an individual might need help.
- j. During an adjournment of the hearing, the representative from Sussex Police asked the public authority's Freedom of Information officer further details of the searches made. The representative then explained that the officer had confirmed that:
 - a. He had coordinated the searches and contacted various departments. He gave details of the searches undertaken. These included a search within the crime recording system; contacting the CMU; the Professional Standards Department; and Eastern Division CID. Whilst the police still held some documents, the requested information had not been found and was not held by Sussex Police.
 - b. When he had read the request, he looked into the circumstances of the matter and based on his experience and judgment decided that the requirements under section 31 were met as any material held would be gained for the purpose of an investigation or proceedings within the meaning of the FOIA. He had not at the time looked for the information. His decision was put to the Commissioner who asked him to reconsider whether any other exemptions applied. At that point the key question was whether the information was held at the time of the request. In order to produce a comprehensive response, he had explained that the relevant material was not held at the time as it had been passed on to the Coroner. Had the document been held, he would be relying on s.30(1)(a)FOIA.

Finding

14. Applying the standard of the balance of probabilities, I find that the requested information was not held at the time of the request and agree with the decision made by the Commissioner.
15. From the information before me, I do not find the Appellant's submissions persuasive. I am not compelled by his argument that the information requested is held, but that the police are seeking not to disclose it because it would expose either them or any individual connected with them. I am far more persuaded by the arguments advanced by Sussex Police that are set out in paragraph 13 above.
16. The Appellant raised the matter of the footnote. (This stated: "*Evidential statement provided by Communications Service Provider (CSP) and held by Sussex Police, copy to be submitted to Coroner.*" – See paragraph 11a above.) It is not clear to me that the 'Evidential statement' that is referred to would necessarily have included the requested information, as seems to have been assumed by the Appellant. Even if it did, Sussex Police have stated that in fact the requested material was passed on to the Coroner before the date of the request and that they never retained a copy.
17. The Appellant has argued that records should have been kept for 10 years. Sussex Police has explained that the matter was not treated as criminal such that there was no such requirement. I accept this. However, in the absence of further argument, I would have thought it would have been far preferable when sending papers to the Coroner, to have kept a copy file. That said, even if Sussex Police should have kept a copy, I accept

that factually they did not do so. This is because, I found their arguments persuasive and it seems to me they have conducted a thorough search in the circumstances.

18. I do not consider that the fact that the police originally relied on section 30 FOIA indicates that the material was held at the time of the request. The response of 14 October 2014 clearly stated that the police had assessed both the factors in favour and against confirming whether the information was held. The police did not seem to be stating that the material was held. Therefore, subsequently stating that it was not held does not seem to be a contradiction. As noted at the hearing, under section 30(3) the authority is not required to inform the requester whether the material is actually held. (However, in my view, if relying on that subsection 30(3), then Sussex Police should have made this clear in its response. The point is not material to the decision as section 30 is not now relied on.)
19. The police explained the circumstances in which the relevant officer amended its position to rely instead on the requested material not being held. That explanation of what occurred seems to me a highly plausible. (*See, for instance, paragraphs 11(b) and 13(j) above.*)
20. The Appellant raised concerns with the approach taken by police including (but not limited to) in association with questions of mental wellbeing and the police blocking his emails. I have carefully considered the arguments and the material before me.⁶ In essence, the Appellant's argument seems to be that the police have generally not treated him at all well, and this substantiates his case that the material was actually held at the time of the request and that the police have chosen to say that it was not. I do not think that the material and his arguments assists his case on the discrete matter of whether the information requested was held by Sussex Police at the time of the request. It seems to me that Sussex Police did make genuine efforts and reasonable searches to find the information and, although not required to, asked the Coroner's Office if they were prepared to provide the information. Based on the information before me, it seems considerably more probable than not that the police are not adopting some sort of cover up.
21. The Appellant additionally raised other arguments, but I find that none of them alter my decision. For instance, he said that the police had said that they would need to retain the file to enable an on-going investigation. The implication seems to be that there was an ongoing investigation at the time of the request or at least after the time the information was handed to the Coroner. However, the police satisfactorily explained that the investigation happened prior to handing the file to the Coroner. (The original reliance on section 30 does not contradict this. Section 30 sets out an exemption for information that has been held 'at any time' for the purposes of an investigation. Therefore, the police need not have been conducting an investigation at the time of the request to rely on the section.)
22. I note that the Appellant did not challenge the finding that to the extent the Coroner held the requested information it did not do so on behalf of Sussex Police. In any event, I have not seen anything compelling that would suggest otherwise.
23. For the reasons above, I dismiss the appeal.

⁶ This includes those contained in the bundle entitled "Additional documents sent to Panel" and emails sent after the hearing.

Other

24. Whilst not material to the outcome of this appeal, Sussex Police has acknowledged that it would have been more appropriate to have ascertained from the outset whether the information was held before deciding whether to rely on section 30. I agree with this. It does not seem preferable for a public authority to use a 'blanket' approach to applying the exemptions set out in the Act without ascertaining the facts of the case before them. If they find they are able to confirm whether they hold information, it would seem that they ought to do so. However, this is not material to the outcome of this appeal, as by the time it was before me, Sussex Police were no longer relying on section 30 and had confirmed that the material was not held. Clearly, it would have been better to do so at an earlier stage.

Judge Taylor

24 April 2017