



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0186

**Determined, by consent, on written evidence and submissions
Considered on the papers on 4 March 2019**

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Mr Andrew Whetnall
and
Mr Nigel Watson

Between

Neil Wilby

Appellant

-and-

The Information Commissioner

First Respondent

-and-

Police and Crime Commissioner for North Yorkshire

Second Respondent

DECISION AND REASONS

BACKGROUND

1. The 2nd Respondent (the PCC) requested Lancashire Constabulary to carry out an investigation into certain allegations of the then chief constable of West Yorkshire police. The investigation was given the code name 'Operation Barium'.
2. The Appellant made a request for information on 21 September 2016 to the 2nd Respondent (the PCC) in the following terms:-

"Please provide:

1. A copy of the Operation Barium investigation report.
2. Copies of emails between Lancashire Police and WYOPCC where the subject was either:
 - (a) [name redacted]
 - (b) Operation Barium".

3. The PCC failed to respond substantively until 11 May 2017 when, following intervention by the Commissioner, it confirmed that it held information within the scope of the request. The PCC said that the requested information was exempt from disclosure by virtue of the exemptions at section 31(1) (law enforcement), section 40(2) (personal information), section 30(2) (investigations and proceedings conducted by public authorities) and section 42(1) (legal professional privilege) FOIA. This decision was confirmed upon review.
4. The Appellant complained to the Commissioner about the way his request had been handled. The Commissioner, in her investigation, considered the representations received from the complainant and the PCC in relation to the section 31(1)(c) FOIA exemption. She also

considered the PCC's compliance with the procedure for dealing with requests as set out in FOIA. The decision notice is dated 22 August 2017.

5. Section 31(1)(c) FOIA provides an exemption if the disclosure under FOIA would, or would be likely to, prejudice the administration of justice. Thus, for the exemption to be engaged, disclosure must be at least likely to prejudice the administration of justice. The exemption is also qualified by the public interest which means that, if the public interest in maintaining the exemption does not outweigh the public interest in disclosure, the information must be disclosed.
6. The PCC said that prejudice *would* result through disclosure. This means that it is more likely than not. In explaining its position that prejudice would occur, the PCC told the Commissioner that a judicial review application brought by a third party against the PCC had been given permission to proceed, that the application was due to be heard in an oral hearing on 1 and 2 November 2017, and that a stay on the publication of the report that is the subject matter of the current request was one of the remedies sought in the judicial review. The argument of the PCC was that if the report were disclosed prior to the court hearing then that would undermine the jurisdiction of the court on the issue. The Commissioner noted that the judicial review application had been filed in April 2017 which was well after the Appellant had made his request but before the PCC had issued a valid refusal notice, and that the judicial review proceedings were still pending at the time of the PCC's review on 16 June 2017. The Commissioner concluded at paragraph 22 that:-

The Commissioner has had regard for the complainant's arguments that publication of the report at the relevant dates of 11 May and 16 June 2017 would not interfere with the administration of justice. However, she has also noted the PCC's concerns that premature publication would fetter the discretion of the Court hearing the Judicial Review application by restricting the remedies available to it. She accepted that premature publication of the report would

interfere with the administration of justice and so decided that the section 31(1)(c) FOIA exemption was engaged.

7. The Commissioner's approach to the balance of the public interest test can be summarised as follows:-

- (a) The chief constable had retired from the force shortly after the report was finalised (putting him beyond the scope of misconduct proceedings), which heightened the public interest as there was a plausible suspicion of wrongdoing;
- (b) The PCC said it intended to publish the report (redacted if necessary) when it was proper to do so, but that was not during the current judicial review proceedings.
- (c) There was a strong public interest in not constraining the remedies available to the court by premature publication.
- (d) Having taken these factors into account, and the PCC's commitment to publish when the judicial review proceedings had been completed, the balance of the public interest was in favour of maintaining the section 31(1)(c) FOIA exemption.

THE APPEAL

8. The Appellant's Notice of Appeal is dated 29 August 2017 and can be summarised as follows:-

- (a) As no interlocutory relief had been sought in the judicial review proceedings and the PCC has described the proceedings (in pleadings) as misconceived and that publication was postponed as a 'courtesy to the court', the Commissioner was wrong to conclude that disclosure would prejudice the administration of justice;

- (b) When considering the applicability of the tests in s31(1) FOIA, the Commissioner should have done so on the basis of the position at the time the request was made or at the end of the compliance period of 20 working days;
 - (c) When considering the public interest balance, the Commissioner should have taken into account the fact that information about the report was already in the public domain. He refers specifically to the pleadings in the judicial review case which he has obtained (as any member of the public could do) and which are included in our bundle;
 - (d) The Commissioner should have had regard to the European Court of Human Rights case of *Magyar Helsinki Bizottsag v Hungary* (Appn No: 19030/11);
 - (e) The Commissioner had failed to consider whether the internal review complied with the Commissioner's Code of Practice.
9. For completeness, it is now possible to see in the law reports that the judicial review application in question was heard on 31 October and 1 November 2017 and that judgment was given on 14 November 2017. The case is reported as *R (Gilmore) v Police and Crime Commissioner for West Yorkshire* [2018] PTSR 1108. From the judgment it can be seen that reference is made to FOIA requests in relation to the report (which would appear to encompass the current request) and the Commissioner's decision in this case of 22 August 2017 (see paragraph 34 of the judgment).
10. The details of the challenge are not important for our purposes, but the court records that part of the relief sought was an order that the PCC be restrained from publishing the investigating officer's report until such time as the PCC had performed certain statutory functions which were said to be outstanding, and there was a claim that publication of the report

would be unlawful before those statutory functions were performed. Suffice to say that all challenges were dismissed by the court.

DECISION

11. It is clear that an objective of the judicial review proceedings was to prevent the publication of the investigation report for at least a period of time, and this can be seen from the pleadings that the Appellant has obtained and which are in the bundle. One of the grounds of challenge can be seen to be that publication would in fact be unlawful.
12. Although the Appellant cites the PCC's arguments in the judicial review proceedings that the case was 'misconceived' and that the investigation report had not been published as a 'courtesy to the court', if in fact the report had been disclosed then the court would have been denied an opportunity to have ruled on the issue of publication.
13. Therefore, it seems to us incontrovertible that that disclosure would have been detrimental to the administration of justice, when it was known at all points of the decision-making process that the question of publication was before the High Court. The fact that interlocutory relief was not sought is not at all important, especially in a procedure where permission to proceed with a ground of challenge is required, where the issue of publication is before the court. In fact, we now know (from the documents obtained by the Appellant and contained in the bundle) that a High Court judge specifically found in July 2017 that all the grounds (including that publication would be unlawful) were 'arguable' and that a full oral hearing should take place.
14. We note that the request also asked for copies of emails between Lancashire police and the PCC where the subject was the chief constable

or Operation Barium. We have been provided with a closed bundle of such emails which we have read. In our view, as all the emails are closely linked with the investigation process, and indeed would reveal important aspects of the investigation, the same approach under section 31(1)(c) FOIA should be taken in relation to those emails as to the investigation report itself.

15. In relation to the time when the Commissioner should have considered the application it is clear from the case law that the time to consider the application of the exemption and the public interest is at the date of the refusal or the internal review: *R (Evans) v AG* [2015] AC 1787 and *APPGER v IC & FCO* [2015] UKUT 377 (ACC). At both these times the judicial review proceedings were known to have been commenced. The fact that the PCC failed to comply with the statutory time limits is an issue which is dealt with elsewhere in the decision notice.

16. In relation to the argument that the public interest balance is affected by the fact that information about the investigation report was already in the public domain, it is true that some description of the report and its outcomes is contained in the judicial review proceedings, but this description does not constitute the report itself, the publication of which, of course, was a central issue in the judicial review. The view of the Tribunal, in agreement with the reasons put forward by the Commissioner in the decision notice (as summarised at paragraph 7 above), is that the public interest in preventing a detriment to the administration of justice, is overwhelmingly greater than the public interest in publication at the time when live judicial review proceedings were afoot, even if some information about the report is publicly available.

17. In relation to the *Magyar* case, it appears that the important passage states that:-

“... the Court further considers that Article 10 does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual. However, as is seen from the above analysis, such a right or obligation may arise, ... in circumstances where access to the information is instrumental for the individual’s exercise of his or her right to freedom of expression, in particular “the freedom to receive and impart information” and where its denial constitutes an interference with that right.”

(*Magyar*, para. 156. Emphasis added.)

18. Article 10 ECHR reads as follows:-

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

19. We agree with the Commissioner in her Response to the appeal that any argument that a journalist has enhanced rights to information by way of article 10 ECHR does not need to be pursued through the FOIA regime. This was the essential conclusion to be drawn from the case of *Kennedy v Charity Commission* [2015] AC 455.

20. We note that this was the conclusion reached by the FTT in the case of *Moss v IC EA/2016/0250* where the Tribunal after considering the cases of *Magyar* and *Kennedy*, said at paragraph 28:-

...it is not clear to us why the general common law duties of openness and transparency on public authorities pursued through the judicial review process would not similarly apply to this case. In our view, whilst the *Magyar* case may indeed be framing a regime to access information that had not been previously revealed under Article 10, it does not affect the *Kennedy* judgment or the requirement upon us to follow it. This seems to us to require us to keep to the integrity of the FOIA regime, which under s.58 FOIA is the limit of our remit.

21. We would agree with that analysis. We would add that even if the Appellant, as a journalist, has an enhanced right to receive information under Article 10 ECHR which deserves some recognition when considering the statutory scheme under FOIA, we would still note that this would be a qualified right and not an absolute right. Article 10(2) materially for this case reads:-

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society...for maintaining the authority and impartiality of the judiciary.

22. It would be possible, if needs be, to consider Article 10 rights as an aspect of the public interest test. But even if we take into account the particular public interest in journalists having access to information pursuant to Article 10(1), this would not alter the balance in this case as we would find that the restriction on the Article 10(1) right would be necessary in a democratic society for maintaining the authority of the judiciary. This is because disclosure would have denied the court the opportunity to have decided on a live issue before it (as explained above).

23. Finally, we agree with the Commissioner that we have no jurisdiction to review the Commissioner's approach to whether the PCC has complied with the Code of Practice issued under section 45 FOIA in relation to carrying out an internal review. We note that there is no statutory requirement for the PCC to carry out an internal review under FOIA.

24. The PCC relied on other exemptions which were not considered by the Commissioner. In *Information Commissioner v Malnick and ACOBA* [2018] UKUT 72 (AAC) the Upper Tribunal stated that:-

109. We summarise the effect of our analysis on the role of the FTT where a public authority has relied on two exemptions ('E1' and 'E2') and the Commissioner decides that E1 applies and does not consider E2. If the FTT agrees with the Commissioner's conclusion regarding E1, it need not also consider whether E2 applies...

25. That is the approach we have taken in this case.

26. For all these reasons, we dismiss the Appellant's appeal.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date of Decision: 8 April 2019