



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

Appeal No: EA/2020/0183/P

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50893588

Dated: 6 April 2020

Appellant: Edward Williams

First Respondent: The Information Commissioner

Second Respondent: Chief Constable of Hampshire Constabulary

Before

HH Judge Shanks

and

Jean Nelson and Mike Jones

On the papers

Panel deliberations by video-conference on 7 October 2020

Subject matter:

Freedom of Information Act 2000 (FOIA)

Section 30(1)(a): investigations and proceedings conducted by public authorities

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the appeal is dismissed.

REASONS FOR DECISION

Factual background

1. On 11 June 2010 Roger Kearney was convicted of a murder committed in October 2008 by a unanimous jury verdict. The conviction was based on circumstantial evidence, which included CCTV footage obtained by the police from various sources which was relevant to his movements on the evening in question and to his alibi defence. As is commonly the case, the prosecution prepared a “compilation disc” containing relevant extracts from the CCTV footage which was presented to the jury at the trial. The compilation disc was extracted from a total of more than 175 hours of footage which is still held by the Hampshire Police.
2. After the trial Mr Kearney applied for permission to appeal the conviction. This application was turned down by a judge on the papers on 18 November 2010 and Mr Kearney did not pursue his right to renew the application at an oral hearing.
3. However, in December 2012 he applied to the Criminal Cases Review Commission (CCRC) to refer his conviction to the Court of Appeal. At some stage he instructed an expert who considered the CCTV compilation disc; the expert expressed a preliminary view which was positive on the question of his alibi but asked to be provided with the original footage because of issues with the quality of the compilation footage. Mr Kearney asked for the original footage from the Hampshire Police in order to support his application to the CCRC; this was the first time it had been requested although his lawyers would clearly have been able to seek the material before the trial if they had considered it necessary to do so. The police said they were willing to supply the original

footage to the CCRC but not to Mr Kearney direct. The CCRC did not take up that offer and stated that they did not intend to instruct their own expert to examine the footage; they said they had given careful consideration to the points being made by Mr Kearney about the CCTV evidence and decided that it was not appropriate for further work to be carried out on it, as there was nothing that might lead to a finding that would undermine the safety of the conviction. By a fully reasoned decision dated 31 October 2017, the CCRC concluded that there were no grounds for referring the conviction to the Court of Appeal and declined to do so. They had by this time undertaken their own enquiries, including DNA testing, but had failed to identify any new evidence or argument that stood a chance of success in the Court of Appeal.

4. Notwithstanding the CCRC's decision, Mr Kearney continued to seek disclosure of the original CCTV footage with the support of a charity called "Inside Justice". The Chief Constable of Hampshire maintained her refusal to disclose it to him, ultimately concluding that it was not required for a legal purpose because of the CCRC's disengagement and that it would be disproportionate to disclose the material in the particular circumstances of the case.

5. By a judicial review claim filed on 18 July 2018, Mr Kearney sought to challenge the Chief Constable's refusal of "post-conviction disclosure" on public law grounds. On 11 October 2018, Andrews J refused him permission to apply for judicial review on the papers and certified the application as being "totally without merit". The judge gave full reasons, concluding that there was no obligation on the Chief Constable in these circumstances to disclose material to assist the Appellant in an attempt to persuade the CCRC to change its mind. She observed that the Chief Constable had fully complied with all her legal post-conviction disclosure obligations: the material requested was not new and it was rational for the Chief Constable to conclude that it was not material which might cast doubt on the safety of the conviction and that its disclosure would entail a disproportionate allocation of police resources.

6. Mr Kearney appealed to the Court of Appeal against Andrews J's decision and the appeal was dismissed by Underhill and Simler LLJ on 31 October 2019 on the grounds that the Court of Appeal had no jurisdiction to entertain the appeal. Simler LJ delivered a full judgment outlining the background; we should acknowledge that the facts set out above are mostly taken from that judgment.
7. Mr Kearney applied to the Supreme Court for permission to appeal against the Court of Appeal's decision on jurisdiction but that application was turned down on 30 July 2020.

FOIA request, Commissioner's decision and this appeal

8. In the meantime, the FOIA request at issue in this appeal was made on 1 November 2019. The request was not made by Mr Kearney but by Edward Williams, the Appellant. We have not been told what the relationship between Mr Williams and Mr Kearney is but Mr Williams's request refers to the Court of Appeal judgment of 31 October 2019, provides a hyperlink to it, quotes from it and simply asks for the "CCTV footage referred to above." This was clearly intended to refer to the original CCTV footage relating to Mr Kearney's case held by the police.
9. The Chief Constable refused the FOIA request relying on sections 30(1)(a) and 40(2) of FOIA. Mr Williams applied to the Information Commissioner under section 50 of FOIA and in a decision notice dated 7 April 2020 the Commissioner upheld the position of the Chief Constable in relation to section 30(1)(a), making no decision on section 40(2).
10. Mr Williams has appealed to this Tribunal against the Commissioner's decision notice. All parties agreed to the matter being determined without a hearing and we are satisfied that we can properly determine it in that way having regard to the written material put before us, and in particular the contents of Mr Williams's notice of appeal.

Section 30(1)(a)

11. Mr Williams rightly accepts that section 30(1)(a) applies to the material he seeks; it was clearly held by the police “... for the purposes of [an] investigation which [the police had] a duty to conduct with a view to it being ascertained whether a person should be charged with an offence, or ... [was] guilty of it ...”. It follows that by virtue of section 2(2) of FOIA the Chief Constable was not obliged to disclose it if in all the circumstances of the case the public interest in maintaining the section 30 exemption outweighed the public interest in disclosure. Mr Williams’s case is that the Commissioner was wrong to decide that the public interest balance favoured maintaining the section 30 exemption and that is the issue we must address on the appeal.

12. The Commissioner has drawn our attention to a passage in the Tribunal’s decision in a case called *Alan Digby-Cameron v the Information Commissioner and Bedfordshire Police and Hertfordshire Police* (EA/2008/0023 and 0025, 26.1.09) which gives useful guidance in relation to the public interest balancing exercise in a section 30(1) case:

In applying section 2(2)(b) it is important to note that the relevant interest in disclosure is the public interest and that the purely private interests of the requester are irrelevant. And when it comes to the other side of the scales it is important to note that the relevant public interest is that in “maintaining the exemption” rather than any general public interest in the non-disclosure of the information; it is therefore necessary to focus on the purpose of the relevant exemption. The general public interest served by the section 30(1) exemption is the effective investigation and prosecution of crime, which itself requires in particular (a) the protection of witnesses and informers to ensure that people are not deterred from making statements or reports by the fear that they may be publicised, (b) the maintenance of the independence of the judicial and prosecution processes and (c) the preservation of the criminal court as the sole forum for determining guilt. In assessing where the public interest balance lies in a section 30(1) case relevant matters are therefore likely to include (a) the stage a particular investigation or prosecution has reached, (b) whether and to what extent the information is already in the public domain, (c) the significance or sensitivity of the information requested

and (d) whether there is any evidence that an investigation or prosecution has not been carried out properly which may be disclosed by the information.

Public interest in disclosure

13. It is hard to see that there is any intrinsic public interest whatever in the disclosure of the material: as we say, it consists of over 175 hours of CCTV recorded on an evening in 2008 at various locations which in themselves have no special significance. Mr Williams says that there is a public interest in disclosure of the footage because it may help to overturn a wrongful conviction (or, on the other side of the coin, assist the public in knowing the conviction was safe). That is of course a valid point in principle but in this case it seems to us that the notion that disclosure will in fact help to overturn a wrongful conviction is highly speculative and, on the material we have, in particular the decision of the CCRC not to pursue the matter, very unlikely. The public interest in disclosure is therefore, in our view, slight.

Public interest in maintaining section 30 exemption

14. Looking at the elements of the public interest in maintaining the section 30 exemption identified in the *Digby-Cameron* case we note the following:

(a) **Protection of witnesses and informers.** It seems most unlikely that disclosure of the CCTV footage in this case would deter any witness or informer in another case. However, we consider that there is a general understanding that CCTV seized and retained by the police will only be used by the police for the purposes for which it was seized, ie to investigate and prosecute an offence, and that it will not be made public unless that purpose would be advanced. That understanding could be undermined by disclosure being required under FOIA in this case, which could make it less likely that CCTV will be freely provided to the police in future when investigating an offence. Mr Williams says that release of the CCTV could not possibly do any harm to any person: he is probably right in this case that no specific harm would be done to any particular individual but there must always be a chance that

something would be revealed by the release of CCTV footage which was unrelated to the crime but which someone did not want to be revealed to the world.

(b) Maintenance of the independence of the judicial and prosecution processes. Mr Williams is right to suggest that it is hard to see how any judge hearing an appeal hereafter by Mr Kearney could be influenced as a consequence of the public disclosure of the CCTV in advance of the appeal. However, Mr Kearney was tried by a jury and his lawyers would have been able to seek the material he now seeks as part of that process; he was subsequently able to mount a legal challenge (which was still live at the time of the request) to the decision of the Chief Constable not to provide material by way of “post-conviction disclosure”. It seems to us that requiring the Chief Constable to disclose the material under FOIA in this case would have undermined the independence of these related judicial and prosecution processes.

(c) The preservation of the criminal court as the sole forum for determining guilt. This is closely related to (b). Disclosure under FOIA is “disclosure to the world” and Mr Williams says in the notice of appeal that “the public can decide what if any significance the video has.” It seems to us that this shows that disclosure under FOIA of the CCTV in this case is likely to undermine the position of the criminal court as the *sole* forum for determining guilt.

Conclusion

15. We are satisfied that, though neither public interest appears particularly weighty, on balance and taking account in particular of our observations in paras 13 and 14 above the public interest in maintaining the section 30 exemption outweighed that in disclosure in this case. Fundamentally this is because the only possible value in disclosure is that it is said that it may assist in a challenge to Mr Kearney’s conviction but there is a separate legal process (which Mr Kearney has been through) which is specifically designed to deal with criminal convictions and appeals therefrom, and which includes the ability to obtain disclosure of relevant material (including post-conviction) if that is appropriate.

16. We are therefore satisfied that the Chief Constable was not obliged to disclose the material under FOIA and that the Commissioner's decision notice was correct in so concluding. We therefore dismiss Mr Williams appeal.

17. Our decision is unanimous.

HH Judge Shanks

(First Tier Tribunal Judge)

Date of Decision: 12 October 2020

Date Promulgated: 13 October 2020