First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50900997

Appeal Reference: EA/2020/0255

Heard on CVP 30 March 2021

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

ROSALIND TATAM & PIETER DE WAAL

Between

MINISTRY OF JUSTICE

Appellant

and

INFORMATION COMMISSIONER

First Respondent

Appearances: -

Appellant: Celia Ivimy
First Respondent: Will Perry

DECISION

The appeal is allowed.

REASONS

The background

1. Vanessa George was sentenced to an indeterminate sentence of Imprisonment for Public Protection on 17 December 2009 for a number of sexual assaults on young children in her care. The sentence was intended to ensure that after she had served the minimum period for which she was sentenced (in her case seven years) she should not be released until such time as she no longer presented a risk to the public and she would continue to be imprisoned until the Parole Board was satisfied that this was the case. The Parole Board considered her case in 2017 and again on 21 May and 2 July 2019 (when victim statements were heard). On 11 July 2019 the Board directed her release once the risk management plan for her was in place and published a summary of its decision which explained the decision process, the evidence considered, how the views of families had been taken into account, as well as a detailed risk assessment which concluded that her risk had been reduced and could be managed with a robust risk management plan, together with details of that plan - the steps being taken to ensure that the offender would be adequately monitored and supervised.

2. Members of Parliament were concerned and on 23 July 2019 Mr Pollard MP for the area where the crimes occurred obtained a Westminster Hall debate to which the relevant Minister of State for the Ministry of Justice ("MoJ") replied. In that debate the Minister gave details of the process by which the decision had been made and confirmed that there did not seem to be a prospect of over-turning the decision by judicial review.

3. On 23 August 2019 the Minister of State wrote to Mr Pollard giving further details of the conditions of release, confirming the steps which had been taken to support victims and their families and the steps the Chief Probation Officer was taking to engage with the local media around victim support. He confirmed that Ms George would be released in September. The Chief Probation Officer wrote an open letter to the people of Plymouth which was published in the Plymouth Herald on 12 September. Vanessa George was released from prison on 18 September 2019.

The request for information

4. On 26 September 2019 a request for disclosure of the correspondence of the Chief Executive of the MoJ's HM Prison and Probation Service was received: -

   I write with a request for information under the FOIA as follows:

   Please provide copies of all emails sent and received by Jo Farrar between (and including) September 13, 2019, and September 20, 2019, which relate to Vanessa George.

5. The MoJ responded to the request on 19 November 2019, supplying press cuttings but refusing to provide the substance of the requested information on the basis of FOIA sections 35(1)(a) (formulation of government policy) and 36(2) (prejudice to effective conduct of public affairs). In seeking an internal review, the requester argued forcefully for disclosure: -

   The response fails to consider the compelling public interest in disclosure of the requested information. As is clear, the information relates to the release of a woman described as "Britain's worst female paedophile". The families of the victims argued that George should never be released from prison, but she is now a free woman and vast amounts of public money are now being spent to monitor her.

   It follows there is a compelling public interest in disclosure of information showing how Jo Farrar dealt with this case and what options were discussed. Disclosure is capable to showing how thoroughly, or otherwise, senior officials dealt with George's release and the options considered to ensure public safety. Disclosure is capable of improving public confidence in the MoJ and its agencies in how they deal with the release of such serious criminals.

6. The MoJ upheld its position on review on 19 December. In that review it acknowledged that in the circumstances there was a strong interest in disclosure: -

   "There is a clear public interest in being assured that the Government is taking appropriate steps to manage offenders who are released on licence, and most especially where, as in this case, the offender has committed horrific crimes. The reasons for withholding relevant information must therefore be strong ones."

   However, it considered that the arguments in favour of exempting the information from disclosure under s36 were more substantial: -

   Disclosure of this information would restrict the flow of advice or the depth or relevance of advice concerning high-profile offenders, for fear that the arrangements for supervising them in the community are released by the press.

   This in turn would inhibit the department's function by undermining our ability to put effective measures in place to protect against likely further offences. Such a disclosure could lead to a loss of frankness and candour in the advice given, which would inhibit senior managers' – and possibly Ministers' – decision-making abilities in the future.

   The effective conduct of public affairs would be prejudiced not only by the provision of incomplete advice, or oral advice only, but also by not recording correctly and completely any decisions made, which in turn may lead to future decisions being made based on incomplete recorded information, which in cases such as this, could have dangerous implications for public protection.

The case in relation to which information is sought is a very sensitive one: it therefore requires sensitive handling. That would be extremely difficult, if not impossible, if there were to be an expectation that discussions about the most appropriate means of giving effect to a Parole Board decision that a high-profile offender should be released were to be subject to minute public examination, for example by the Press. A concern would be created that matters impacting on the safety of the public generally, or the personal safety of individuals, would have to be placed in the public domain, with negative consequences for public safety.

I am satisfied that the public interest in the effectiveness of measures to ensure public safety and personal protection outweighs the interest in making the requested information public, and that the public interest test in relation to the section 36 information was therefore correctly applied.

7. The requester complained to the Information Commissioner (IC) on 7 January 2020. During the course of the investigation the MoJ also relied on FOIA s21 (information reasonably available by other means). In her decision notice the IC accepted that one e-mail could be withheld under s35, a number of emails could be withheld relying on s36(2) and one email could be partly disclosed subject to withholding certain specified information under s36(2). She found: -

42. The Commissioner considered the arguments for disclosure and for maintaining the exemption. She accepted that both sets of issues had merit and needed to be accorded some weight. Accordingly she decided that, while much of the information had been correctly withheld, the balance of the public interest favoured disclosure now of information that MOJ had already put into the public domain in the past but was not necessarily all readily available now to an interested member of the public. She found that doing so would not prejudice the effective conduct of public affairs.

The relevant provisions

8. The FOIA exemptions relevant to this appeal are (so far as is relevant); -

21 Information accessible to applicant by other means.

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

36 Prejudice to effective conduct of public affairs.

(1) This section applies to—
(a)information which is held by a government department … and is not exempt information by virtue of section 35, and
(b)information which is held by any other public authority.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—
…
(b) would, or would be likely to, inhibit—
(i) the free and frank provision of advice, or
(ii) the free and frank exchange of views for the purposes of deliberation, or
(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

9. S21 is an absolute exemption, however information to which s36 applies is subject to a public interest test.

The appeal

10. The MoJ appealed against partial disclosure arguing that the IC had erred in her assessment of the public interest in disclosure of the information. It argued that it was possible and necessary to distinguish between two distinct public interests - the interest in accountability and transparency about the release of high profile prisoners who were Critical Public Protection Cases (CPPC) such as this offender and the interest in the specific information about this offender.

11. Al Reid, a senior official in the National Probation Service responsible for the CPPC MP notification scheme (under which MPs can receive information about offenders who are being released to addresses in their constituencies) gave written and oral evidence about the roles of various agencies (including the Parole Board) in the release and subsequent management in the community of such offenders through Multi Agency Public Protection Arrangements (MAPPA). These offenders are usually placed in Approved Premises and subject to detailed restrictions. He emphasised the possible risks of disclosure of information. The press was likely to seek to identify where the offender was placed in order to obtain the material for a news story. He indicated that the need to protect this sensitive information was acute around the time of release.

"… release of information exchanged in confidence between officials could create a risk not only to the offender, but also to other residents of the Approved Premises and to people who live, or happen to be, nearby. Such disclosure can also lead to the identification of victims whose identity had been protected; and to personal information about the offender or others (for example, victims, or members of the offender's or a victim's family) being made public.

11. Media intrusion can have a significant impact when high-profile offenders are released from custody. If their presence in the local community is made known, the initial phase of resettlement, which is likely to be very challenging in any case, becomes even more so. Press involvement has the potential to increase the risk posed by the

offender, by disrupting the NPS's efforts towards successful resettlement. The early days of release can be the time when an offender is at greatest risk of re-offending: media intrusion increases the challenges for the management teams involved.

12. Most high-profile offenders will be released to Approved Premises: other residents may not be aware of the individual's profile, but media intrusion will highlight this. There have been cases where media representatives have remained outside Approved Premises for a period of weeks, following offenders whenever they left the premises. There are also examples of media representatives offering money to other residents of Approved Premises to secure a photograph or report a story about the high-profile offender."

12. He gave details of a number of news stories which appeared in the press where journalists claimed to have located the person who is the subject of the information request and described her appearance in the months following the release. Mr Reid also raised concerns about the possibility of errors in redaction inadvertently disclosing information or the putting together of information from disparate sources to disclose sensitive information.

13. In her submissions the IC argued the strong interest in transparency and accountability and the particular factors favouring disclosure including the particular nature and circumstances of the offences and the conduct of the offender, poor communication with families at the time of release (relying on comments from the Westminster Hall debate shortly after the Parole Board decision and still 6 weeks before the release), and claimed that Vanessa George still posed a high risk at the time of release and that *there was particular concern at the time of release for the Licensee's own safety; and therefore greater need for transparency and accountability of the arrangements put in place for her release*.

14. The IC also pointed to a tension between the MoJ's arguments based on s36 (that disclosure would prejudice the effective conduct of public affairs) and the argument that s21 applied because the information was already in the public domain.

Consideration

15. The parties agree that the exemption in s36(2) is engaged. The primary issue for the tribunal therefore is where the balance of public interest lies. The request for information was made a few days after release for the correspondence of the Chief Executive of the Prison and Probation Service for the few days prior to the release of the prisoner.

16. The requester's arguments (paragraph 5 above) for disclosure were that many people opposed the release, supervision in the community would be expensive and there was a public interest in knowing how the Chief Executive and others dealt with the case and the options considered to ensure public safety as an example to illustrate *how they deal with the release of such serious criminals*. It

seems to the tribunal that this is a flawed approach to obtaining an understanding of how the release of serious criminals is handled. Preparing for the discharge of a prisoner begins far earlier than a week before the discharge – the publicly available summary of the Parole Board's reasoning gives an indication of the work done in prison, and the conditions the prisoner has to abide by (also available) are concrete examples of available material. It would be bizarre indeed if the mailbox of Jo Farrar over a seven-day period - five days before and two days after the release - would illuminate in any meaningful way either the general process or the particular issues in a specific case. Furthermore, those arguments relate to the overall contents of the mailbox as he envisaged it.

17. In her decision notice *The Commissioner found the information request to have been focused and had been targeted within a very specific and significant timeframe relating directly to the planned release of the licensee* and on that basis rejected the suggestion that the request was a fishing trip hoping to expose an interesting story. Whether or not that is so, it would be unlikely to achieve the public benefits sought.

18. The IC only ordered the disclosure of parts of one communication which of necessity diminished the substance of the arguments in favour of and against disclosure. However, in arguing that certain parts of the communication be disclosed she asserted that the disclosure of this material would shed light on working arrangements between senior figures in managing the discharge. Since the arrangements for discharge of prisoners such as this are developed over time and the effective decision taken by the Parole Board is made two months before the release, the public interest in this is scant.

19. The MoJ has provided significant information about the release of Vanessa George (some of which is summarised at paragraphs 1-3 above). Much information is readily available, whether in relation to the specific case or more generally with respect to the rehabilitation and release of offenders, or the accountability and managerial arrangements of the Prison and Probation service. The MoJ properly identified that one redaction proposed by the IC would not have had the full effect desired and therefore there was some potential risk. The kernel of its case however was the risk that disclosure of information would lead to further news coverage during the period after release from prison. The evidence of Mr Reid was persuasive as to both the likelihood of such coverage resulting from a disclosure after the initial coverage around the release and as to the risks of such coverage in destabilising the environment of a recently released prisoner and making the task of ensuring public safety harder.

20. The tribunal is satisfied that the value of the information disclosed is slight but that there would be real effects of the disclosure and some significant risk to effective management of this and other recently released prisoners.

21. The tribunal is satisfied that the IC ought to have exercised her discretion differently in relation to the public interest test and allows the appeal.

Signed Hughes

Judge of the First-tier Tribunal
Date: 28 June 2021
Promulgated Date: 7 July 2021