



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2010/0071

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50225815
Dated: 23 March 2010**

Appellant: MICHAEL COLE

Respondent: INFORMATION COMMISSIONER

Determined on the papers on 16 July 2010 at Holborn Bars, London

Before

Robin Callender Smith

Tribunal Judge

and

**Elizabeth Hodder
Andrew Whetnall**

Tribunal Members

For the Appellant: Mr Michael Cole in person
For the Respondent: Mr Richard Bailey, Solicitor for the Information Commissioner

Subject matter:

Freedom of Information Act 2000

Qualified exemptions

- Law enforcement s.31

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 23 March 2010 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. Mr Michael Cole ("the Appellant") asked the Cumbria Constabulary (the "Public Authority") for the number of prosecutions for speeding offences on the M6 during 2007. He broke his request into a series of 5 mph speed bands ranging through from 70 mph to 90+ mph.
2. Initially Cumbria Constabulary refused to provide a breakdown of the numbers of prosecutions although it did provide a total figure. Subsequently it went on to provide the majority of the information but it declined to provide a breakdown of the two lowest speed thresholds, namely 70-75 mph and 76-80 mph. The Public Authority stated this was withheld under exemptions at Section 31 of the Freedom Information Act 2000 ("FOIA") in relation to law enforcement and Section 38 in relation to health and safety.
3. Mr Cole's position in this appeal – which relates only to the section 31 FOIA exemption – is that releasing data in relation to prosecutions of the two bands between 70-75 mph and 76-80 mph would not encourage speeding because of existing publicity about the tolerance levels in relation to excess speed and actual prosecutions.

The request for information

4. The Appellant wrote on 20 November 2008 to the Camera Safety Camera Unit based at the Public Authority's police headquarters asking for information in relation to the M 6 motorway running through the Cumbria region and the number of prosecutions for speeding offences over the last 12 months (or the latest 12 months data are available) the speeds between:
 - 70-75 mph
 - 76-80 mph
 - 81-85 mph
 - 86-90 mph.

5. The Public Authority responded and provided the Appellant with the total number of prosecutions but maintained that the further breakdown requested it would breach Sections 31 and 38 of FOIA.

The complaint to the Information Commissioner

6. The Appellant complained to the Information Commissioner ("IC") on 3 December 2008, challenging the Public Authority's decision to withhold the information requested.
7. During the course of the IC's investigation the Public Authority provided the majority of the information to the Appellant but it declined to provide a breakdown of the two lower speed thresholds (70-75 mph and 76-80 mph).
8. Further information was withheld under Section 12 FOIA relating to 570 records which included two kinds of information. The first concerned cases where it was not appropriate to make a Conditional Offer or issue an Endorsable Fixed Penalty Notice and the matter had been dealt with by way of summons. The second covered cases involving speeding offences detected by a police officer where an Endorsable Fixed Penalty Notice was issued to a driver at the time of the offence.
9. The IC served his decision notice on 23 March 2010 and concluded that Section 31 (the law enforcement exemption) was engaged and that the public interest in maintaining the exemption outweighed the public interest in disclosure

The appeal to the Tribunal

10. The Appellant appealed on the basis of that the IC's decision that Section 31 (a) and (b) FOIA applied was wrong.

The questions for the Tribunal

11. The Tribunal had to consider the balance of the public interest in relation to the law enforcement exemption embodied in Section 31 FOIA.

Evidence

12. The Tribunal considered the full information in an un-redacted form – provided as Closed Information to the Tribunal – sought by the Appellant, but redacted in documents and letters provided to him.
13. Although that information was provided to the Tribunal to permit the detail and context of the issues under appeal it has not, as a matter of fact, played any part in the Tribunal's decision.

Conclusion and remedy

14. The Appellant contests the IC's conclusion that if motorists were aware of precise speed thresholds, or the likelihood of being caught when travelling at a speed within the 70-80 mph speed band, that would give them the latitude to travel at what they perceive to be the highest speed at which they were likely to be able to evade detection. The Appellant submits that this argument *"is not substantiated and no evidence is provided to support it"*.
15. The Appellant also argues that *"the fact that there is a declared policy and approach which allows +10% +2 mph, the 'tolerance level', over a prescribed limit is made by the police/public authority and known to the public defeats the argument that [disclosure of] further bands of data will undermine their ability to prosecute"*.
16. Finally the Appellant argues that the IC was wrong to conclude that knowledge of the likelihood of being called within the lowest speeding threshold at 70-75 mph would be likely to impact on the prevention and detection of crime and the apprehension or prosecution of offenders when the tolerance level up to 79 mph (above the lowest speeding

threshold) was already in the public domain. Those tolerance levels for speeding are contained within the speed enforcement guidelines issued by the Association of Chief Police Officers ("ACPO").

17. The Appellant argues that Section 31 FOIA does not apply to the prosecution or detection of crime, the apprehension or prosecution of offenders or the administration of justice *"as this section was not intended to be applied for information released of this nature in general is that it does not specifically relate to a case or individuals and by nature is past as any judicial process has been completed"*.

18. The Tribunal disagrees with the Appellant.

19. The information requested does not have to relate to a specific case or a specific individual for the exemption to be engaged. The question (as correctly identified by the IC) is whether the information is likely to prejudice things like the prevention or detection of crime generally, not in relation to a particular individual.

20. The disclosure of the requested information would demonstrate a policy that would have continued to have been applied at the date of the request in November 2008 and is likely to have been prejudicial to the prevention or detection of crime at this time.

21. It is established Tribunal practice that the date for the assessment of the issues before the Tribunal is the date of the original request.

22. It is also clear to the Tribunal that the ACPO guidelines are exactly that: guidelines and nothing more. Prosecutions can and do take place at the police's discretion on occasions that merit it when the speed limit has been breached only fractionally.

23. This is not the same as the kind of discretion used by the police and the Crown Prosecution Service in terms of drivers and blood alcohol levels where the legal limit is 35 µg/mL but where prosecutions do not take place until the 40 µg/mL threshold is reached to ensure that any faulty tolerance levels within the equipment and machinery are not factored in adversely against drivers.

24. The Tribunal is not persuaded by the Appellant's argument that there is evidence to show that people "*do adapt their behaviour for better performance, e.g. smoking, eating etc when the facts and information is made known to them*".

25. It agrees with the IC's contention that simply because people adapt their behaviour in other parts of life when information is known it does not necessarily follow that this applies to driving habits. There is no evidence provided by the Appellant to support this assertion.

26. The Tribunal is satisfied to the required evidential standard (the balance of probabilities) that the disclosure of the disputed information would be likely to prejudice the prevention of crime as it could encourage drivers to make judgements of the probabilities of enforcement at speeds within a certain margin above the speed limit.

27. Our decision is unanimous.

28. The Tribunal makes no order as to costs in relation to this appeal.

29. Under section 11 of the Tribunals, Courts and Enforcement Act 2007 and the new rules of procedure an appeal against a decision of the First-tier Tribunal on a point of law may be submitted to the Upper Tribunal. A person wishing to appeal must make a written application to the First –

tier Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify any error of law relied on and state the result the party is seeking. Relevant forms and guidance can be found on the Tribunal's website at www.informationtribunal.gov.uk.

Robin Callender Smith

Judge

29 August 2010



**IN THE FIRST TIER TRIBUNAL
(INFORMATION RIGHTS)**

**RULING on an APPLICATION for PERMISSION to APPEAL
By**

Robin Callender Smith
Information Rights Judge

1. This is an application dated 15 September 2010 by Mr Michal J Cole for permission to appeal part of the decision of the First Tier Tribunal (Information Rights) (“FTT”) dated 31 August 2010. That decision dismissed the appeal of Mr Cole and upheld the Information Commissioner’s (IC) Decision Notice Decision Notice FS50225815 dated 23 March 2010.
2. The right to appeal against a decision of the FTT is restricted to those cases which raise a point of law. The FTT accepts that this is a valid application for permission to appeal under rule 42 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as amended (“the Rules”).
3. The FTT has considered whether to review its decision under rule 43(1) of the Rules, taking into account the overriding objective in rule 2, and has decided not to review its decision because the grounds of the application do not raise an error of law for the reasons stated below.
4. The grounds of appeal rest on the basis that the FTT misinterpreted Section 31 of the Freedom of Information Act 2000.
 - Mr Cole asserts that the judgement wrongly interprets the release of the required information claiming it would cause the prevention of or detection of crime.
 - He asserts that conclusion is wrong as the judgement suggests drivers would increase their speeds to the limit of "unlikely prosecution" if they knew the data of prosecutions at certain speed bands.
 - Mr Cole states that the detection of crime (i.e. a speeding offence) is down to the law enforcement authority to choose the detection method and location etc. They also make the choice to prosecute or not if a driver exceeds the legal limit.
 - He concludes that the driver has no influence on the detection or prosecution of crime.
 - He states that there are further inconsistencies in the FTT’s decision because, at Paragraph 19, a similarly flawed argument as that set out above had been used. Also that at Paragraph 22 the circumstances of the guidelines did not change even if the data requested was released because the police discretion to prosecute remained absolute and still applied. At Paragraph 25 he states that the judgement argues against his view but that such an argument applied equally the other way and did not support the conclusion which was without evidence.
 - Finally, at Paragraph 26, the use by the FTT of the Balance of Probability arguments was out of place as the ACPO guidelines already put 79 mph as a "tolerance level"

which was greater than the speed bands information requested. That guideline outweighed any arguments of driver behaviour adjustment at speeds below this level as this would encourage drivers to push their speed to this level if the argument used in the judgement was to be considered consistent.

- Mr Cole believed that the FTT's decision had been unfairly applied to favour the IC with unbalanced allowance to the IC's argument and – incorrect logic – applied with a misinterpretation of Section 31.

5. The FTT reminded itself of the statutory wording of Section 31 of FOIA before arriving at its original decision and reviewed it, along with the original decision, in considering this request for an appeal to the Upper Tribunal. For the avoidance of doubt, the wording of that Section is set out below:

31 Law enforcement.

(1) 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,

(d) the assessment or collection of any tax or duty or of any imposition of a similar nature,

(e) the operation of the immigration controls,

(f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

(h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or

(i) any inquiry held under the MIFatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

(2) The purposes referred to in subsection (1)(g) to (i) are—

(a) the purpose of ascertaining whether any person has failed to comply with the law,

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,

(d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,

(e) the purpose of ascertaining the cause of an accident,

(f)the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,

(g)the purpose of protecting the property of charities from loss or misapplication,

(h)the purpose of recovering the property of charities,

(i)the purpose of securing the health, safety and welfare of persons at work, and

(j)the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

(3)The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

6. The Appellant's original appeal was on the basis that the IC's decision in respect of Section 31 (a) and (b) FOIA was wrong. The FTT considered the balance of the public interest in relation to the law enforcement exemption set out above. It also had the benefit of considering the full information sought by the Appellant, provided in an un-redacted form by Cumbria Constabulary, and noted that while the un-redacted information allowed the FTT to see the detail in the context of the issues under appeal, that information had not as a matter of fact played any part in the FTT's final decision.
7. The Appellant takes issue with the fact (stated Paragraph 19 of the original decision) that the FTT concluded that the information requested did not have to relate to a specific case for specific individual for the Section 31 exemption to be engaged. The question – as correctly identified by the IC – was whether the information was likely to prejudice things like the prevention or detection of crime generally, not in relation to a particular individual. It further noted (at Paragraph 20) that the disclosure of the requested information would demonstrate a policy that would have continued to have been applied at the date of the request in November 2008 and would have been likely to have been prejudicial to the prevention or detection of crime at that time. The FTT noted (at Paragraph 22) that it was clear that the ACPO guidelines were exactly that: guidelines and nothing more. Prosecutions could and did take place at the police's discretion on occasions that merited it when the speed limit was only breached fractionally.
8. The FTT notes that, in relation to the Appellant's complaint about its decision as expressed in Paragraph 25, no further evidence has been provided by the Appellant. For the avoidance of doubt the FTT stated:
"It [the FTT] agrees with the IC's contention that simply because people adapt their behaviour in other parts of life when information is known it does not necessarily follow that this applies to driving habits. There is no evidence provided by the Appellant to support this assertion."
9. The Appellant complains that the FTT has incorrectly applied the balance of probabilities test in deciding that the disclosure of the disputed information would be likely to prejudice the prevention of crime as it could encourage drivers to make judgements about probabilities of enforcement at speeds within a certain margin above the speed limit.
10. In essence the Appellant in this appeal against the FTT's decision has done no more than say he disagrees with the conclusions but has provided no specific additional evidence or points of law to indicate the FTT made an error or arrived at an unsustainable conclusion.

11. It follows that the appeal has no prospect of success and that permission to appeal is refused.

12. Under rule 21(3) the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended Mr Cole has one month from the date this Ruling was sent to it to lodge the appeal with the Upper Tribunal (Administrative Appeals Chamber).

Robin Callender Smith

Judge
First-tier Tribunal (Information Rights)

27 September 2010