IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Appeal No. EA/2012/0214

BETWEEN:

JOHN RITCHINGS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

BEFORE

DAVID MARKS QC
TRIBUNAL JUDGE

Determined on the papers alone

RULING

The Tribunal acting by a single Tribunal Judge of its own motion strikes out the Appellant's Notice of Appeal under the terms of and pursuant to rule 8(3)(c) of the Tribunal's Rules, namely the Tribunal Procedure (First-Tier Tribunal) GRC Rules 2009 (the Rules).

Reasons for Ruling

1. The Rules provide by rule 8(3)(c) and 8(4) as follows, namely:

> "(3) The Tribunal may strike out the whole or part of the proceedings if
>
> ***
>
> (c) The Tribunal considers there is no reasonable prospect of the appellant's case or part of it, succeeding
>
> (4) The Tribunal may not strike out the whole or part of the proceedings … without first giving the appellant an opportunity to make representations in relation to the proposed striking out."

2. The Appellant was given an opportunity to make representations as to a proposed striking out. He did so and reference will be made to those representations more fully below.

3. The background requires some explanation. It is, however, sufficient to refer for those purposes to the terms of the relevant Decision Notice issued by the Information Commissioner (the Commissioner) dated 18 September 2012 bearing the reference FS50442276.

4. The Notice notes that the Appellant had a longstanding dispute with the relevant public authority, namely the Chief Constable of Devon and Cornwall Police. It is a dispute which goes back to the 1990s. At that time, the Appellant wanted the public authority to take action against the BBC in relation to a story which attracted much media attention. His various complaints and the request which leads to this appeal stem from that original dispute.

5. The relevant request was preceded by a formal statement issued by the Devon and Cornwall Police Authority (the Police Authority) dated 29 November 2011. That letter referred to the fact that a review of the Appellant's complaints file had considered all previous correspondence sent by the Appellant to and with the said Authority. It confirmed that the "main complaint file" that was reviewed was that owned by in effect

the public authority rather than the Police Authority. The Police Authority therefore confirmed that it was not obliged, or indeed allowed, to disclose that file to the Appellant.

6. The Appellant then made a subsequent request to the public authority in question and also made direct reference to the Police Authority's letter of 29 November 2011. According to the Decision Notice he also referred to what he called a "faked report about me" and a review of records that had been taken in earlier in 2011. The Commissioner claimed to be unaware of any such report but did admit to being aware of the review which was undertaken in mid-April 2011.

7. The outcome of that review which according to the Decision Notice was written up by a member of the Police Authority staff was provided in full to the Appellant merely in an effort to assist him and not under the terms of the Freedom of Information Act, i.e. FOIA. That review sought to clarify that all the documentation within the Appellant's so-called "police complaints file" was examined in order to understand amongst other things any involvement by the Independent Police Complaints Commission (IPCC). That review ended with a comment to the effect that the length of time during which the Appellant had been corresponding was also regarded as being "of relevance when considering processes". The letter also said as part of the review that a separate authority, namely the Police Complaints Authority had been replaced by the IPCC in April 2004. The review ended with the statement that both parties had considered the Appellant's complaint on different occasions and neither had found "any grounds for action".

8. In due course the Appellant made the request which founds the basis of his present appeal. He did so in a letter dated 3 December 2011. There is no need to recite the terms of this request in full which are set out in express terms in paragraph 10 of the Decision Notice. In this request, the Appellant repeats the fact that the Police Authority had previously "faked a report" about him. He alleged that the said Authority was assisted in its review by certain individuals. In essence, the Appellant sought copies of documents that were shown to the said Authority in the following terms, namely "copies of the documents that [the Police Authority's Chairman] insists were shown to authority staff on 11 April 2011 from you."

9. In its response the public authority claimed that it was treating the Appellant's request as vexatious. It also claimed that information that related to a specified individual, namely the Appellant himself, could not be provided or even be confirmed as being held under FOIA. The public authority upheld its own decision not to disclose information pursuant to the Appellant's request following upon its own internal review.

10. In due course, on the matter being referred to the Commissioner, the Commissioner treated the relevant request by the Appellant as referring to any information held by the

public authority and, in particular, with the appropriate police complaint file relating to the Appellant and which was relayed to the IPCC.

11. In the Decision Notice at paragraphs 19 and 20 the Commissioner refers to section 40(1) of FOIA. That subsection provides that:

> "(1) Any information to which a request for information relates is exempt information if it constitutes personal data which the applicant is the data subject."

12. At paragraph 19 it was also stated that the exemption under section 40(1) is an absolute one. It requires no public interest test to be conducted. In addition, in relation to such information, public authorities are not obliged to comply with the obligation to confirm or deny whether they hold the requested information by virtue of section 40(5)(a). That subsection provides as follows, namely:

> "(5) The duty to confirm or deny –
>
> (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) …"

13. In other words, in relation to information caught by section 40(1), a public authority is not obliged to comply with the obligation to confirm or deny whether it holds the requested information.

14. In paragraph 20 of the Notice, the Commissioner stated that he was satisfied after having carefully considered the wording of the request and following upon further enquiries with the public authority that the Appellant is, or would be, the subject of all the information requested. As it is put in paragraph 20:

> "This is because the information he has requested consists only of correspondence concerning complaints he has raised (this is evidenced in the letter to him from Devon and Cornwall Police Authority referred to in paragraph 3 above [i.e. the letter of 29 November 2011]). Therefore the information would identify him, be linked to him and would relate to issues involving his interaction with the Police. The Information Commissioner considered that he is a "data subject" within the meaning of the section 40(1) exemption and therefore this information would be his personal data. Further, since confirming that the information was held would disclose to the world at large that he as a named individual had made a complaint, the public authority should have refused to confirm or deny holding the information by reference to section 40(5)(a) of the FOIA."

15. The remainder of the Decision Notice deals at some length with the question of whether, and if so to what extent, the request made by the Appellant was vexatious. This had regard to section 14(1) of FOIA which states that section 1(1) does not oblige a public authority to comply with a request if the request is vexatious. In the event, and at paragraph 48 of the Decision Notice, the Commissioner found that the "number and strength of the factors in favour of applying section 14(1) are of sufficient weight to make the request vexatious."

16. This ruling does not deal with matters concerning section 14(1) or the question of vexatious requests in any way. The ruling is concerned solely with whether there is any realistic prospect of the Appellant succeeding on his appeal with regard to the ruling and determination made by the Commissioner with regard to section 40(1) and section 40(5)(a).

17. The Notice of Appeal is dated 5 October 2011. The Grounds are set out in the 13 page typed appendix. As the Commissioner's subsequent written response points out, much of the material set out in the Appellant's Grounds relates to the history of the Appellant's ongoing disputes with the public authority which have been dealt with briefly above in connection with the matters set out in the earlier part of the Decision Notice.

18. At paragraph 77 of his Grounds of Appeal, the Appellant provides details about his request in a far more precise way than the request set out in his letter of request of 3 December 2011, summarised above and set out in full in the Decision Notice. At paragraph 77 he states that his request is for "two pieces of information concerning the PCA/IPCC and the CPS". The Tribunal interprets these abbreviations referring in turn to the Police Complaints Authority, the IPCC and in the case of the CPS, the Crown Prosecution Service. In his written response the Commissioner interprets the above quoted passage as referring to two items of information, namely, first, correspondence between the public authority and the CPS regarding the referral to the CPS, and secondly, correspondence between the public authority and the Police Complaints Authority and more recently, with the IPCC regarding the complaint referred to it.

19. The Tribunal has seen nothing which can be said in any way to detract from that characterisation. The Appellant has not sought to allege otherwise, and indeed, there is no reason to think that he could.

20. Nor has the Tribunal seen anything which suggests that in relation to those two items of requested information the Appellant was contending anything other than that the Commissioner was mistaken and/or erred in law in contending that section 40(5) and in particular section 40(5)(a), or section 40(5)(b)(i) of FOIA was engaged in relation to the requested information. Nor has the Tribunal seen anything to suggest that in relation to those two items of information the Appellant was contending anything other than that the

Commissioner was mistaken and/or erred in law in concluding that the Appellant's request was vexatious even though that issue is not before the Tribunal with regard to this ruling.

21. Section 40(5)(b)(i) of FOIA provides that the duty to confirm or deny "does not arise in relation to other information" [i.e. information which would be exempt information by virtue of section 40(1)] if or to the extent that either the giving to a member of the public or the confirmation or denial that would have to be given to comply with section 1(1)(a) would apart from FOIA contravene any of the data protection principles. Reference is made to section 40(5)(b)(i) in the Commissioner's written response. The fact remains, as indicated above in the Decision Notice, that the Commissioner concluded in paragraph 20 that the information requested would have held or been related to the Appellant's personal data. Much more importantly, at paragraph 41 of his Grounds of Appeal, the Appellant states in terms that "In principle, I do not disagree with the view expressed in paragraph 20 by the Information Commissioner".

22. This ruling therefore proceeds on the basis that section 40(5)(a) of the Act is engaged, being the only relevant part of section 40 cited expressly in the body of the Decision Notice.

23. At paragraphs 41 to 43 inclusive of his Grounds of Appeal, the Appellant goes on to claim that the view expressed in paragraph 20 of the Decision Notice by the Commissioner is not supported by virtue of the fact that requests made under the Data Protection Act in 2006 and again in 2012 have not resulted in the information requested. Moreover, he claims that given that the Police Authority continues to claim that these documents exists and have agreed in a letter, it seems, of 5 March 2011 to supply the documents following upon a FOIA request, the documents can now only be disclosed on the basis of there being a FOIA request.

24. Moreover, in paragraph 10 of the Grounds of Appeal, the Appellant also claims he pursued an internal review of the public authority's decision under FOIA, because no information had been received as a result of previous requests under the Data Protection Act and that the Police Authority were insisting that the information existed.

25. The letter of 29 November 2011 sent by the Police Authority as referred to in terms in paragraph 3 of the Decision Notice has been referred to above. In paragraph 1 of that letter, as recited in paragraph 3 of the Decision Notice, the following is set out, namely:

> "The review of your complaints file considered all the correspondence with the [police] Authority which you have already received from us or you were the author of the correspondence."

26. The Tribunal agrees with the Commissioner that the above quoted paragraph clearly suggests that the Appellant may have already received some information falling within the scope of this present request now founding the basis of this appeal. Nonetheless, the Tribunal would also agree with the Commissioner that regardless of the previous responses that the Appellant may have received or had received from either the Police Authority or the public authority itself in relation to his previous request under the Data Protection Act, the Commissioner was nonetheless bound to consider independently in his Decision Notice whether confirming or denying that the requested information was held would disclose to the world at large that the Appellant had made a complaint.

27. The Tribunal has no hesitation in agreeing with the Commissioner that the Commissioner was correct to conclude on the facts of this case that confirming or denying that the disputed information was held would disclose that the Appellant, as a data subject, had made a complaint and therefore that the exemption under section 40(5), and more particularly under section 40(5)(a) was engaged.

28. In accordance with the provisions of the Rules referred to above, the Appellant was afforded the opportunity to respond to the contention made by the Tribunal that of its own motion it was of the view that there was no realistic prospect of the appeal succeeding. The Appellant lodged a response in that respect dated 9 December 2012. There are four matters which are itemised in this response. In the Tribunal's view and judgment, the first two are not in any way material to the present application. They deal first with the alleged manner in which the Decision Notice was compiled, said to be in breach of the European Convention on Human Rights, and secondly the contention that the claims made by the Commissioner within the Decision Notice are not true.

29. The third contention deals with a number of matters that the Appellant wishes to draw attention to based on what he says is "further evidence received from the Commissioner" in a letter of 5 December 2012. It is claimed that as at 5 December 2012 the public authority had failed to provide any evidence arising from the provisions of the Data Protection Act and had also "failed to provide any evidence in investigation by either or both of the [PCA/IPCC]". Issue is also taken with particular submissions made by the Acting Chief Constable of the public authority but only with regard to certain sections of the Decision Notice dealing with the finding that the Appellant had made a vexatious claim. At paragraph 5 of this latest response by the Appellant, the following appears, namely:

> "The constabulary has previously agreed to provide the requested information arising from the provisions of [FOIA]".

30. In the Tribunal's judgment this paragraph can take the matter no further. The fact remains that the Commissioner was under a statutory duty and obligation to consider

whether and, if so to what extent, the information now sought to be disclosed fell within section 40 as indicated above.

31. The fourth and final contention made in the latest response by the Appellant is put in the following way, namely:

> "… the [Commissioner] has made an assumption that the evidence that I seek via [FOIA] identifies me, but has provided no evidence to support that assumption and, given that both the constabulary and the Information Commissioner have failed to substantiate their respective claims in respect of the CPS and PCA/IPCC by means of the [Data Protection Act], the Information Commissioner thereby was wrong to find that the exemption under section 40(5)(a) of [FOIA] applies."

32. The short answer to this contention is found in the terms of paragraph 20 of the Decision Notice which have been recited in full above. When viewed together with paragraph 3 of the Decision Notice, the Tribunal again has no hesitation in finding that there is no reason to question the Commissioner's decision that the subject matter of the request concerns the Appellant's own personal data. In the Tribunal's judgment, these materials unequivocally confirm that the Appellant is the subject of the information requested.

33. In the Tribunal's judgment and in all the circumstances of this case, it is clear that there is no realistic prospect of the Appellant succeeding in challenging the Commissioner's conclusion that the information requested is subject to the exemption prescribed by section 40(5)(a) of FOIA.

34. It also follows in the Tribunal's judgment, as indicated above, there is no need to consider the Appellant's Grounds of Appeal relating to the Commissioner's separate conclusion regarding section 14.

Signed: On the original

(David Marks QC)

Judge

Dated: 10th January 2013