



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

EA/2012/0113

**B E T W E E N:-**

**JEFFREY DUDGEON**

**Appellant**

**-and-**

**THE INFORMATION COMMISSIONER**

**First Respondent**

**-and-**

**THE POLICE SERVICE OF NORTHERN IRELAND**

**Second Respondent**

**Tribunal**

**Judge Kennedy QC  
Suzanne Cosgrove  
Marion Saunders**

**Hearing at Central London Civil Justice Centre on Thursday 13th and  
Friday 14th December 2012.**

Appearances:

Austen Morgan of Counsel for the Appellant.

Laura Elizabeth John of Counsel for the First Respondent.

Peter Coll of counsel for the Second Respondent.

**Subject matter:** Freedom of Information Act 2000 & Section 30 exemption.

## **DECISION OF THE FIRST-TIER TRIBUNAL:**

The tribunal wish to acknowledge the considerable assistance of counsel for all parties engaged in the conduct of the hearing of this appeal. **The tribunal refuses this appeal and the Decision Notice dated 15th May 2012 stands.**

### **REASONS**

#### **Introduction**

1. At the outset this tribunal were addressed by counsel on a preliminary point and asked to decide whether or not it is lawful to conduct part of the hearing of this matter in closed session. We heard detailed and persuasive arguments from counsel for the appellant and equally competent and persuasive arguments from counsel for the respondents. However we do not propose to set out the arguments herewith as we are agreed that this argument is a matter that has come before the First Tier Tribunal on many occasions before and without exception the precedent has been to allow closed sessions where it is appropriate to do so. We are of the opinion that with the political sensitivity and security implications engaged in this case, it is a case where in the normal course of events the First Tier Tribunal would agree it is an appropriate case for a closed session. If for no other reason than to have the hearing in open session would divulge the information which the public authority claims is exempt and/or it is not in the public interest to disclose. This would nullify the effect of the exemption, albeit to a more limited extent in a private hearing, as has also been suggested by counsel for the appellant. Given the long established practice, in this tribunal, of hearing part of such cases in closed session, we do not propose to depart from that precedent.
2. That said, we acknowledge the sincere and persuasive arguments put on the appellant's behalf and would not want to dissuade him from exercising his right to appeal on this point.

3. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (**“the FOIA”**).
4. The appeal is against the decision of the Information Commissioner (**“the Commissioner”**) contained in a Decision Notice (**“the Decision Notice”**) dated 15 May 2012 (reference FS50394912).

**Factual Background to this appeal:**

***Initial request by Mr Dudgeon (appellant herein)***

5. This appeal concerns a request made by the appellant to the second respondent. Full details of the background to this appeal, the appellant’s request for information, the respondent’s and the commissioner’s decision are set out in the Decision Notice and not repeated herein, other than to state that, in brief, the request concerned the appointment of panel members by the PSNI. The panel members were appointed to oversee an investigation into murders and other serious crimes committed by the UVF in North Belfast. The request specifically concerned “the terms of reference for [the panel members appointed] their powers, and any public statement by the PSNI [second named respondent] at the time of the appointment of this panel”.

***Refusal of request by PSNI (second named respondent herein)***

6. The second named respondent refused the appellant’s request to disclose information on grounds that exemptions applied. The second respondent cited that exemptions at sections 30, 31, 38, 40 and 41 of the FOIA applied. The second respondent further relied on sections 23(5) and 24(2) to refuse to confirm or deny whether it held any further relevant information.

***Decision of the Information Commissioner (first named respondent herein)***

7. The first named respondent found that the second named respondent was entitled to rely on section 30 of the FOIA to refuse to disclose relevant

information it held and on sections 23(5) and 24(2) to refuse to confirm or deny whether it held any other relevant information.

8. The first named respondent did also highlight its view that the second named respondent's letter to the complainant of 2 March 2011 (following its internal review) was not reflective of an adequate review having been conducted. The first named respondent found, in the Decision Notice, that the second named respondent failed to explain adequately why any of the exemptions cited were applicable, and was therefore in breach of section 17(1) of the FOIA. The Decision Notice states that the second respondent's letter of 2 March 2011 does not address any of the issues raised by the appellant, nor does it acknowledge the procedural failings in the second named respondent's handling of the request. However this does not form part of the Decision Notice, as it is neither the role of the first named respondent nor of the tribunal to make a determination on the manner in which a public authority conducts its own internal affairs, although it was highlighted as a matter of concern.

**Grounds of appeal:**

9. The appellant relies on several grounds of appeal:, summarised thus:
  - i. The commissioner erred, when he failed to consider, properly or at all, that Baroness O'Loan [first of two selected members for panel in question] had been the police ombudsman between 1999 and 2007.
  - ii. The commissioner erred, when he failed to consider, properly or at all, evidence adduced by the appellant concerning Richard Harvey [second of two selected members for the panel in question].
  - iii. The commissioner erred, when he failed to consider, properly or at all, the nature of the panel announced on 18 November 2010.

- iv. The commissioner erred, when he failed to consider, properly or at all, the role of 'victims and relatives' in the selection of the panel.
- v. The commissioner erred, when he failed to consider, properly or at all, that the PSNI had an institutional motive for establishing the panel.
- vi. The commissioner made an error of law, when he held that the PSNI could rely upon section 30, but not section 31.
- vii. The commissioner made an error of law, when he held that the PSNI could rely upon sections 23(5) and 24(2).

**Issues to be considered by this tribunal:**

- 10. The tribunal must consider whether the exemptions as provided for under sections 30, 31, 38, 40 and 41 of the FOIA apply to the information held by the second named respondent and, whether the second named respondent was correct to refuse to confirm or deny whether it held any further relevant information, pursuant to sections 23(5) and 24(2) of the FOIA and finally if the Section 30 exemption is engaged is it necessary to consider sections 31, 38, 40 and 41.

**The relevant statutory framework:**

- 11. The relevant statutory framework, as set out in the response of the first named respondent is as follows:

*The right to information under the Freedom of Information Act 2000*

- 1. Where an individual makes a request under s. 1(1) of FOIA for information held by a public authority, the public authority is in general required by s. 1(1)(b) of FOIA to communicate that information to the individual in question.

*The FOIA exemptions*

2. Various exemptions to the duty to communicate information in s. 1(1)(b) are set out in Part II of FOIA (ss. 21-44). As regards these exemptions, s. 2 provides in relevant part:

“(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that-

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

...

(3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—

- (a) section 21,
- (b) section 23,

3. In so far as is relevant to this appeal, s. 23 FOIA provides:

*“23: Information supplied by, or relating to, bodies dealing with security matters.*

(1) Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

(2) A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.

(3) The bodies referred to in subsections (1) and (2) are—

- (a) the Security Service,
- (b) the Secret Intelligence Service,
- (c) the Government Communications Headquarters,
- (d) the special forces,
- (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
- (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
- (g) the Tribunal established under section 5 of the Security

Service Act 1989,

(h) the Tribunal established under section 9 of the Intelligence Services Act 1994,

(i) the Security Vetting Appeals Panel,

(j) the Security Commission,

(k) the National Criminal Intelligence Service,

(l) the Service Authority for the National Criminal Intelligence Service.

(m) the Serious Organised Crime Agency.

(4) In subsection (3)(c) “the Government Communications Headquarters” includes any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.

(5) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).”

4. In so far as is relevant to this appeal, s. 24 FOIA provides:

*“24: National security.*

(1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.

(2) The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.

(3) A certificate signed by a Minister of the Crown certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of safeguarding national security shall, subject to section 60, be conclusive evidence of that fact.

(4) A certificate under subsection (3) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect. “

5. In so far as is relevant to this appeal, s. 30 FOIA provides:

*“30: Investigations and proceedings conducted by public authorities.*

(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of—

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained—

(i) whether a person should be charged with an offence,  
or

(ii) whether a person charged with an offence is guilty of  
it,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

(c) any criminal proceedings which the authority has power to conduct.

(2) Information held by a public authority is exempt information if—

(a) it was obtained or recorded by the authority for the purposes of its functions relating to—

(i) investigations falling within subsection (1)(a) or (b).“

*Applications for decisions by the Information Commissioner, and appeals to the Tribunal*

6. By s. 50(1) of FOIA:

“Any person (in this section referred to as ‘the complainant’) may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I [*i.e.* ss. 1-20 of FOIA].”



7. Upon receipt of an application under s. 50, the Commissioner must (save in certain specified circumstances) make a decision on the application and serve notice of his decision on the parties concerned.
8. The complainant may appeal such a decision under s. 57 of FOIA. The Tribunal's jurisdiction on appeal is governed by s. 58 of FOIA, which provides:

“(1) If on an appeal under section 57 the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

### ***Section 30 - Investigations***

12. The second named respondent, by relying on the section 30(1)(a)(i) exemption from providing information, implicitly confirms that it holds relevant information within the scope of the appellant's request.
13. The appellant has stressed that he is not requesting information gathered by the second named respondent as part of the investigation, but merely wishes to understand the remit and powers of the oversight panel. He therefore submits that the exemption at section 30 should not apply to the information he has requested.
14. The second named respondent has submitted that the requested information relates to the oversight panel which was established during the course of the Operation Stafford investigation. Operation Stafford is an investigation by the second respondent into, inter alia, 15 murders carried out between 1993 and 2000 by the Ulster Volunteer Force (UVF) in North

Belfast. This panel was established following discussion with the families of some of the victims of the incidents under investigation.

15. The second named respondent submits that the public interest balance is in favour of the non-disclosure of the requested information on grounds that the release of the information into the public domain :

- a) could undermine the current investigation and hinder the detection of crime and the bringing to justice of offenders,
- b) would impede the building of confidence and trust with the families with resulting detrimental impact upon the relationship with them and cooperation and the provision of information from member of the public relevant to the second named respondent's investigations, thus inhibiting the investigation and reducing the prospects of successful prosecutions,
- c) could open the second named respondent's approach to a live investigation to the public - potentially those under investigation, which could harm the prospects of this investigation into one or more serious crimes,
- d) could create a *chill factor* inhibiting the use and utility of similar panels in separate investigations in the future, whereby potential members of panels of this general nature would be discouraged from participation, given that the confidential nature of the panel and its role was not maintained.

Further it was submitted that

- e) The Association of Chief Police Officer's approach is that normally information relating to an ongoing police investigation would not be released unless such release was expected to result in real benefit to the community in terms of furthering the progress of the investigation or otherwise assisting with the detection of or prevention of crime.
- f) There is a clear public interest in taking all steps necessary to ensure that investigations of this nature are protected.

16. The first named respondent also notes that at the time of issuing the Decision Notice, “a number of prosecutions had been brought, and the investigation is still open”.
17. The tribunal acknowledges, in line with the first named respondent, the importance of maintaining and perhaps increasing public confidence in the investigation and encouraging families to co-operate with the investigation.
18. Further in line with the first named respondent, the tribunal appreciates that the appellant does not wish to see information relating to the investigation. However it seems that given the circumstances of this particular case the operation of the panel is inextricably linked to the investigation. It is a live approach and important to protect the investigative approach of the second named defendant. The tribunal accepts the view of the first named respondent, that the second named respondent cannot separate information relating to the panel without harming its ability to protect a high-profile, sensitive and complex investigation that remains and was live at the time of the Decision Notice. The tribunal will refer to the evidence given at the hearing of this appeal in support of this reasoning.
19. The tribunal notes, and accepts, the finding of the first named respondent, acknowledging that in previous cases it has been shown there is a strong and significant public interest in protecting live investigations and that in this case the exemption at section 30(1)(a)(i) outweighs the public interest in disclosing the requested information. The tribunal goes on below to consider the evidence at the hearing of this appeal in support of this contention to the factual context applicable here in the circumstances of this particular case.

***Section 23: Information provided by or relating to security bodies***

***Section 24: National Security***

20. The second named respondent submits that, pursuant to section 23(5) of the FOIA they are entitled to maintain a position of *Neither confirm nor deny* (“NCND”) as the duty to confirm or deny under section 1(a) of FOIA does

not arise in respect of information directly or indirectly supplied by or relating to any of the bodies named in section 23(3).

21. Section 24 provides that the duty to confirm or deny the holding of information does not arise if exemption from the requirement to inform of the holding of information is required for the purpose of safeguarding national security. The application of NCND under this provision is subject to the public interest test. The tribunal finds, on hearing the evidence in this case, as a fact that it is in the public interest that the public authority are exempt from confirming or denying the holding of further information on the facts and in the circumstances of this case (see evidence below).
22. This tribunal agrees, Sections 23(5) and 24(2) are not mutually exclusive.
23. The Tribunal finds that if the exemption under Section 30 FOIA is engaged it was not necessary for the first respondent to go on to consider whether or not the exemptions under sections 31, 38, 40 & 41 FOIA are engaged.
24. The second named respondent submits that as Operation Stafford was at the time of the request for information, and still is, at the time of this hearing investigating the activities of loyalist paramilitaries, that confirming or denying that any further relevant information was held would, or could, jeopardise national security as terrorists would be able to identify whether their activities had been detected. This tribunal have the advantage of hearing the evidence herein that supports this contention.
25. The second respondent further submits that Operation Stafford contains some discussion of the role of Special Branch in handling informers. The nature of the work of Special Branch involves close working with security bodies and sharing of information and intelligence. Further, the second respondent (and its predecessor, the Royal Ulster Constabulary) had responsibility for national security in Northern Ireland until MI5 took over that area in 2007. It is therefore submitted, as per the Decision Notice, that there is clearly potential for any further relevant information which might be

held by the second respondent to relate to one of the designated security bodies, thus bringing any such information within the scope of section 23 and also section 24.

26. As set out in the Decision Notice, section 23(5) provides an absolute exclusion, but section 24(2) is qualified. Thus it must be considered whether, in all the circumstances, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the second respondent holds relevant information.
27. Section 24(2) contains an inherently strong public interest argument in favour of maintaining the refusal to confirm or deny, given that the exemption is only engaged if it is required to safeguard national security. The tribunal has heard the evidence given at this hearing as discussed below and is of the opinion that it is not in the public interest for the public authority in this instance to confirm or deny they hold other relevant information.
28. The tribunal adopts the view of the first named respondent in finding that there is clearly a very great public interest in safeguarding national security, and no weighty arguments in favour of disclosure and so concludes that in this case the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the second respondent holds any further relevant information.

### **The Evidence**

29. This tribunal has had the advantage of hearing the evidence of witnesses during the Course of this appeal.
  - The Appellant himself took the oath and gave evidence before the tribunal where he adopted his witness statement and identified a few additional documents. He was first cross examined by counsel for the first respondent. In essence his request rose from concern that it was important to know how the two individuals were chosen for the panel in question. He expressed particular concern about one of the panel members whom he indicated had

a history of showing antagonism to the police. The appellant was also cross examined at significant length by counsel for the second named respondent and the evidence of his concerns was given in more depth. The tribunal, conscious of FOIA requests being treated as motive blind do, not now rehearse the detail of the evidence rather than to acknowledge and recognise the genuine and proper nature of the request was to establish transparency and accountability in the appointments made to the panel in question. However the appellant fairly conceded that the selection of the panel was “not of burning public concern” and was more a matter of “General interest”. The appellant also accepted under cross examination that the selection and appointment of the panel relates to the link of confidence between the victims and the investigation. The tribunal find it is an integral part of the investigation and Section 30 is therefore engaged.

- The tribunal then heard at length from Detective Chief Inspector Campbell, of the Serious Crime Branch of the PSNI, the second respondent herein and the officer in charge of the police investigation known as “Operation Stafford”. He adopted his statement of evidence. A number of important issues were addressed by this witness though the course of his evidence inter-alia the most pertinent of which we will summarise as follows:
- Engagement of family and community involvement and their trust and support in this type of investigation is of the utmost importance. A panel of this nature can and does assist ongoing dialogue between the victims families and the investigation.
- The panel is integrated into the investigation and “sits within the tactics I was using in this investigation”. It was not an official panel employed per se by the PSNI, *“although the procedure we used is not unique either and was used in other investigations”*.
- He gave evidence of the considerable amount of information already in the public domain which has been both informative and transparent. The appellant takes no issue with this.
- If released the requested information in the documents would and could be taken advantage of by Criminal elements. His concern is to maintain the public interest in preserving the integrity of the investigation.
- Operation Stafford encompasses a large number of murder investigations.
- There is a room full of documents as a result of this appeal and while some could be redacted the redaction would be such as to render them useless in terms of information. All of them are an integral part of the ongoing investigation.
- The panel play no part in carrying out investigations and their appointment was not a public appointment but private as an integral part of the investigation and for the purpose of assuring the public

- The disclosure of the disputed information could have seriously damaged the working relationship with the families.

**Conclusion:**

30. This tribunal accept that Section 30(1)(a) is engaged as we accept the clear evidence that the disputed information is held as an integral part of , and therefore for the purpose of, the investigation through which a person or persons should or could be charged with a criminal offence.
31. This tribunal find as a fact that the evidence of DCI Campbell (see above) is compelling evidence in favour of not disclosing the disputed information for the purpose of the public interest test which we then must consider. The political sensitivity and security implications of this major criminal investigation, as we have learned in the hearing of the evidence in this appeal, lead us to the inevitable conclusion, on the facts, that it is overwhelmingly in the public interest that the disputed information herein is not disclosed.
32. This tribunal find in support of the decision notice that Sections 23 and 24 are not mutually exclusive and for the reasons given above, on the facts, and for the reasons given by the first respondent, we find that the public authority was entitled to rely on Section 30 of the FOIA to refuse to disclose the disputed information it held and further on sections 23(5) and 24(2) to refuse to confirm or deny whether it held any other relevant information.
33. In light of the foregoing, the tribunal refuses this appeal. The Decision Notice stands.
34. The closed bundle contained more information than was necessary to deal with the request on appeal and much time was wasted on behalf of the public authority in reducing the material in the closed bundle accordingly. This has resulted in inordinate delay in the promulgation of this decision for which we apologise.

35. The Appellant has the right to apply to the Upper Tribunal for permission to appeal. Any such application must be made to the tribunal in writing within 28 days of this decision.

**Brian Kennedy QC**  
Tribunal Chairman

3<sup>rd</sup> May 2013