IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2015/0164**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50557557
Dated: 16 July 2015

Appellant: **Julian Norman Rudd**

Respondent: **The Information Commissioner**

[2nd Respondent: **The Chief Constable of the Hampshire Constabulary**

Heard at: Southampton HMCTS

Date of Hearing: **1 December 2015**

Before

Chris Hughes

Judge

and

Suzanne Cosgrave and **Gareth Jones**

Tribunal Members

Date of Decision: **17 December 2015**

Date Promulgated: **21 December 2015**

Attendances:

For the Appellant:	in person
For the Respondent:	did not attend
For the 2nd Respondent:	Mr Savill

Subject matter:

Freedom of Information Act 2000

IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2015/0164**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

SUBSTITUTED DECISION NOTICE

Dated: **17 December 2015**

Public authority: **Chief Constable of Hampshire Constabulary**

Address of Public authority: Police Headquarters, West Hill, Romsey Road, Winchester, Hants, SO22 5DB

Name of Complainant: Julian Norman Rudd

The Substituted Decision

For the reasons set out in the decision the Tribunal upholds the reasoning in the decision notice dated 16 July, however it directs the disclosure of those pages of the MG3 form which do not contain information falling within the relevant exemptions.

Action Required

The second respondent disclose pages 5, 6 and 7 of form MG3 within 35 days.

Dated this 17th day of December 2015

Judge Hughes
[Signed on original]

REASONS FOR DECISION

Introduction

1. The appellant is concerned as to the lawfulness of a large cycling event involving approximately 2000 cyclists which took place in the New Forest in October 2013. He considers that the criminal offence of causing a public nuisance as well as an offence under the Road Traffic Act 1971 was committed by the organisers. He claims that police officers participating in a part of the event had been guilty of an offence. He shares the concerns of a significant number of individuals and organisations within the Forest about the disruption caused by the event.

2. He complained to the Hampshire Constabulary (the second respondent) providing statements of witnesses. The police, having considered the material supplied to them, investigated and consulted the Crown Prosecution Service (CPS), decided to take no further action.

3. The appellant entered into correspondence with the police and its solicitor concerning the event and advancing his view that offences had been committed and setting out the legal basis for his conclusions. He also corresponded with the CPS; writing on 13 May 2014 (bundle page 107):-

"… I remain concerned that I reported an indictable offence of Public Nuisance to the Police, I supported the complaint to the Police with 10 relevant statements. The police themselves had received complaints and they interviewed one of the 10 witnesses. I also sent a detailed resume of the law of Public Nuisance to the Hampshire Police Solicitor …..

CI Rowlinson sent a file to the CPS including the 10 statements and drew the CPS Prosecutors attention to an allegation that Police Officers had been involved in the Public Nuisance.

Someone at the CPS reviewed something – you will not tell me who that was or what was reviewed in respect of what offence. You have spoken to a Senior Crown

Prosecutor who say the Police did not provide a sufficient file to give charging advice….

I have over 40 years' experience as a practising lawyer and I have no doubt that the evidence I provided to the Police was sufficient for the CPS to give charging advice to the Police. It looks to me as if the Police have failed to provide you with the relevant evidence."

4. He again wrote to the CPS on 17 July 2014 asking for the material provided by the police and on 22 July 2014 (bundle page 110) was notified that *"The CPS does not hold any recorded information within the scope of your request"*.

5. In response to a FOIA request the appellant was notified of the contents of the police file (letter 19 November 2014, bundle pages 48-50). On 17 January 2015 he wrote to the police asking for information and certain documents from the file. The parts of the request which were denied and form the subject matter of this appeal were:-

   "MG 3 – the report to Crown Prosecutor for charging decision/investigative advice

   Other complaints

   Officer's report after visiting a witness"

6. The information was withheld relying on the exemption contained in FOIA section 30:-

   30(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.

7. The police also relied on section 40(2) with respect to personal data within the material.

8. The appellant complained to the first respondent (the Information Commissioner, "ICO") who investigated. He concluded that the material fell within the exemption.

9. In considering the balance of public interest between disclosure and non-disclosure he acknowledged the appellant's arguments concerning the disruption caused to the life of residents by the event that some of them considered they had been victims of crime and wished to know why no prosecution had resulted, there was a public interest in the allegation of misconduct by police officers in that a team of police officers had participated in an allegedly unlawful cycle race for charity. The matter was already in the public domain, and since the investigation was closed there was a public interest in disclosure to further accountability as to how the investigation had been conducted. the public interest

10. The first respondent however acknowledged that only some of the information was in the public domain and that disclosure of the information could result in less information being forthcoming in future due to the fear that it would be disclosed due to a FOIA request. The information had been supplied for the purpose of a criminal investigation and should not be more widely disseminated. He acknowledged the important interests protected by this exemption, of the public being able to communicate their concerns about possible criminal offences to the police in confidence and the police being able to communicate freely with the CPS without the possibility of this communication and advice being revealed to the public.

11. The ICO concluded that the strong public interest in protecting information acquired during the course of police investigations favoured maintaining the exemption as its disclosure would hamper future investigations. He further found that the disclosure of the MG3 and witness information to the world at large was not an appropriate way of dealing with any suspicions that the police had failed to protect the public. He therefore concluded that the material as exempt under section 30(1) and did not further consider the reliance on section 40(2).

The appeal to the Tribunal

12. The appellant's central argument was that the holding of the event was a Public Nuisance. The disclosure of the information had to be considered in all the circumstances of the case and as part of this examination the ICO should consider whether the papers disclosed a prima facie offence. He argued that *"The public are entitled to know why the dossier submitted by the public to the HC has been rejected on the unsupported assertion that it discloses no crime – and no reason is given or recorded."* He noted that the he had submitted a complete dossier to the police; the police investigation was no more than to interview one witness who was a former police officer. He further argued that there was no transparency about whether the matter had been correctly handled by the police and the CPS and the grounds for maintaining the exemption had been generalised assertions not related to the specific case.

13. In oral submissions the appellant confirmed his understanding that the police had done nothing with his complaint, the entire investigation was his and accordingly he had already had all the witness statements, this had been confirmed by the police. He had been offered the opportunity to inspect the file on a private basis; however this would preclude him discussing the contents of the file with the Verderers and Commoners of the Forest and the various individuals who shared his concerns.

14. The appellant (a retired judge) explained that police had prepared the file for the CPS and it was the duty of the CPS to return the file with a note of advice to act otherwise was in breach of the Attorney-General's guidelines. An email from the CPS Information Management Unit (bundle page 114) giving general information to the appellant stated: *"if the police are seeking any form of advice on the case, this is provided in the form of a charging advice called an MG3, which is retained and recorded on our Case Management System (CMS). The advice is returned to the police electronically and noted on CMS."* While emails from the police indicated that the CPS had stated that there was no case as no crime had been committed, the CPS had confirmed to him that there was no information within the scope of his request to the CPS about the public nuisance he alleged.

15. He submitted that the ICO had not made an independent assessment of the case and without investigating, could not properly carry out the balancing test of the competing

public interests. He agreed that the material clearly fell within the ambit of s30 FOIA, however the general principles which brought it within the section could not again be deployed in the balancing test, rather specific fresh case specific considerations needed to apply. In this case there was no difficulty in getting witnesses to the events, the public were keen to lodge complaints. He further submitted that the argument for the need for a safe space for the police to consult the CPS without concern about public disclosure was over-ridden by the equally strong public interest in the police ensuring that the proper procedure for obtaining advice from the CPS was followed and that the police should have insisted on the CPS completing the MG3 *"if the police don't play by the rules why should the public worry about the safe space"*. He emphasised the impact that the event had had on the ordinary life of the Forest, including offensive conduct towards local residents, and requiring the cancellation of one of the approximately 40 "drifts" (the rounding up of the Forest ponies and a key part of the management of livestock in the Forest).

16. The respondent maintained the position adopted in his decision notice. The disclosure, was not just of information in the public domain and in event would only confirm that advice was sought from the CPS but would not disclose the reasoning of the CPS in concluding that no criminal offence had been identified. The information already disclosed included a list of the material submitted to the CPS which should go some way to satisfying the public interests without disclosing the disputed information. The police had not received complaints about the handling of its investigation which suggested that there was not widespread local concern about that.

17. The respondent emphasised the policy basis for the exemption as set out in the White Paper "Your right to know" and also the substantial public interest in protecting the ability of the public to approach the police in confidence about their concerns and the loss of this confidence would prejudice other investigations, and the public interest in maintaining frank communication between the police and CPS. The respondent had avoided considering and commenting on whether an offence had been committed since to do so would amount to reviewing the CPS decision on whether an offence had been committed which was not within his remit. It was open to the appellant to pursue his concerns about the handling of his complaint (that an offence had been committed) by the police and CPS without recourse to FOIA.

18. The respondent concluded that the appellant's public interest factors were insufficient to outweigh the interest in maintaining the exemption, the handling of the issue was not a matter of wider public concern and therefore it was not in the public interest to risk prejudicing other investigations by disclosing the disputed information.

19. The second respondent adopted the first respondent's case. In oral submissions it was advanced that it was by no means unusual for the CPS to indicate that there was no case to be considered but not to complete the MG3 form.

The questions for the Tribunal

20. The question for the tribunal is whether the first respondent's decision is correct in law. There were, in essence four issues pursued by the appellant:-

- the respondent should have investigated more thoroughly and come to a view of whether an offence had been committed. The tribunal is entirely satisfied that the respondent's handling of this case was correct in law, to go into the merits of the CPS view of whether an offence had been committed would be to act as something akin to an appellate body with respect to CPS charging decisions – laying claim to a role far beyond his statutory remit or competence.
- it was a matter of concern for the police to be implicated in criminal conduct; however that is to place the cart before the pony. A group of police officers were engaged in the apparently innocuous and indeed meritorious activity of a charity cycle ride, in the circumstances that is unlikely to give rise to public concern.
- The respondent was wrong in law to rely on general issues with respect to the exemption, while these issues (such as the effect on future police investigations) meant the exemption was engaged, there was no specific evidence relating to this case which gave any weight to these in the public interest test. The tribunal was satisfied that this was unsustainable in law. For many qualified exemptions there will be no case specific evidence, of a person who has said "if the cycling case papers are released to the public I will never give information to the police"; what is important is the general level of public confidence that the confidentiality will be respected. This confidence would

be progressively eroded if in cases such as this the information was routinely publicised in response to FOIA requests.

- The forth argument was that the balance of public interest was incorrectly struck. The tribunal is satisfied that the respondent weighed the issues correctly. The New Forest is a crowded place with residents and many visitors pursing their everyday lives, their business and leisure activities. In such circumstances there is congestion and pressure on resources. The police and other statutory authorities strive to keep the Forest moving and to ensure as best they can that all are able to enjoy the Forest. The CPS concluded that no criminal offence had been committed, while there is some irritation at the disruption caused by large numbers of visitors on cycles the public concern is neither widespread nor intense. The over-arching public interest in this case is clearly in protecting the confidentiality of police investigations and of police/CPS communications in the investigation of alleged offences.

21. For the reasons stated above the tribunal upholds the decision of the first respondent.

22. The tribunal also notes that some of the material within the MG3 is personal data of the appellant and therefore exempt from disclosure on that basis. Pages 5,6 and 7 of the MG3 do not disclose any information within the exemption and therefore should be disclosed.

23. Our decision is unanimous

Judge Hughes
[Signed on original]

Date: 17 December 2015