



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0213

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Ms Anne Chafer
and
Mr Malcolm Clarke

Between

Lloyd Anderson

Appellant

And

The Information Commissioner

1st Respondent

Chief Constable of Staffordshire Police

2nd Respondent

Representation:

Appellant: In person

1st Respondent: Not represented

2nd Respondent: Mr O Williams

Date of hearing: 11 June 2018

DECISION AND REASONS

INTRODUCTION

1. On 11 January 2008 after a trial lasting some three months five men were convicted of the murder of Kevin Nunes on 19 September 2002. On 4 July 2012, the Court of Appeal quashed the convictions and set out detailed reasons in a public judgment which has been included in the bundle before us by the Appellant: *Joof and others v R* [2012] EWCA Crim 1475.
2. In the trial, the prosecution relied upon the evidence of a number of witnesses, one of whom was described as ‘essential’ and who was given police protection during and prior to the trial. The Appellant (in the case before us) was at the time a detective inspector and manager of the Staffordshire police Sensitive Policing Unit (SPU). In November a 2006 Superintendent Costello was asked to carry out a management review into the (SPU). This followed a report from the Appellant in our case to the effect that there had been ‘corruption, falsification and dishonesty’ in the SPU, including into the handling of the essential murder witness. The result of the review was referred to as the Costello Report and did indeed identify serious problems in the SPU, including a number of serious issues about the handling by the police of the essential witness in the murder trial.
3. The Court of Appeal made it clear that the Costello Report should have been disclosed to the defence in the murder trial and that the police were responsible for that not having happened. The Court of Appeal also noted that when the Criminal Cases Review Commission subsequently came to investigate the case, the Appellant in our case came forward to make a lengthy statement setting out his concerns about the SPU and the way the murder witness had been handled, and the Court said that he ‘is to be congratulated for his willingness to come forward and reveal that justice had not been done. We hope that he will be formally recognised by the Chief Constable...’ (paragraph 33).
4. The appeal report concludes:-

38 This is a very bad case of non-disclosure. It bears similarities to *Maxwell [2011] 1 WLR 1837, [2010] UKSC 48, [2011] 2 Cr App Rep 31*.

39 It is to be hoped that the appropriate measures will be taken against those responsible for what appears to us to be a serious perversion of the course of justice, if those measures have not already been taken. It is to be hoped that lessons will be learnt from this shocking episode,

5. Following the acquittals, there was an investigation called Operation Kalmia managed by the Independent Police Complaints Commission, whose website stated that ‘The investigation looked at disclosure issues prior to the 2008 trial of five men for the murder of Kevein Nunes....- and how a protected witness was dealt with by Staffordshire police’ (see paragraph 3 of the Decision Notice in this case). The investigation concluded in March 2016.

6. Against this background the Appellant made a request to the Chief Constable of Staffordshire Police (the chief constable), for the following information on 10 November 2016:-

1.The number of officers from the 14 officers directly investigated by Operation Kalmia that received either a Chief Constable or Divisional Commander commendation.

2.The detailed ‘citation’ wording each of the commendation [sic] given to officers directly investigated by Operation Kalmia. (By citation, I mean the wording of the commendation that clearly indicates what personal quality or conduct is being commended.

3.An indication in respect of each commendation as to whether that officer was subsequently disciplined (formally or informally) following Operation Kalmia.

4.An indication in respect of each commendation as whether following Operation Kalmia disciplinary action was recommended or in respect of retired officers, or [sic] that an indication that disciplinary action would have been recommended had the officer still been serving’.

7. The Appellant presaged this with an explanation behind the request. This can be summarised as follows:-

- (a) The chief constable had indicated that a number of officers involved into the murder of Kevin Nunes had received commendations.
 - (b) The investigation had attracted public interest because murder convictions had been overturned in the Court of Appeal. A management report entitled the Costello Report had been cited in the Court of Appeal judgment.
 - (c) An Independent Police Complaints Commission (IPCC) report after the Court of Appeal decision, entitled Operation Kalmia, had investigated conduct of officers in the case, and 14 officers were notified they were being investigated.
 - (d) It appeared that some of those investigated, and who featured in the Costello report, had received commendations from the chief constable for their role in the investigation, and that some of the awards were actually made by Det. Chief Supt Costello, the author of the Costello Report. The awards were made ‘discreetly’ and there was no publicity.
8. As a result of the request, some of the information has been disclosed to the Appellant. Thus, he knows the number of officers (three) out of the 14 investigated who have received a commendation. He knows whether each of the officers who received a commendation was subsequently disciplined. And he knows that in relation to the divisional commendations, there are two which led to misconduct recommendations against one serving officer and one retired officer; and that in relation to the chief constable’s recommendation there was a misconduct recommendation against one retired officer.
9. Essentially, the only requested information that has not been disclosed is the detailed ‘citation’ wording of each commendation. The Appellant has made it clear that he is content for the officers’ names to redacted from the citations. Thus, the arguments before us focussed on the wording of the citations and whether these could be disclosed.

10. The appellant is appealing against the Decision Notice of the Information Commissioner (the Commissioner) dated 31 August 2017. We deal with the Commissioner's detailed consideration below, but in essence, the Commissioner decided that the contents of the citations amounted to personal data and that the chief constable was entitled not to disclose the requested information still in dispute in this case. The chief constable, as 2nd Respondent, supported the arguments of the Commissioner.
11. The Commissioner did not attend the hearing, but filed a response to the appeal. The chief constable was represented at the hearing. The Appellant represented himself. During the hearing we conducted a closed hearing in the absence of the Appellant in which we looked closely at the wording of the citations with the assistance of the chief constable's representative.

LEGAL FRAMEWORK AND APPLICATION

12. Section 40 FOIA reads, materially, as follows:-

40.— Personal information.

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if—
 - (a) it constitutes personal data which do not fall within subsection (1), and
 - (b) either the first or the second condition below is satisfied.
- (3) The first condition is—
 - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

13. The Appellant disputed that the citations requested in request (2) amounted to personal data. He thinks that redacting the names would take the information outside the definition of personal data. But in his grounds of appeal, in correspondence and at the hearing, he confirms that he knows the names of those who received commendations in any event. He also accepts, implicitly, in his grounds of appeal that there are others who would have a detailed understanding of the case, who also already know the names of the officers who have received commendations and would be able to identify those individual officers from the wording of the citations. We accept the Commissioner's approach in her response to this appeal that the risk of identification by this group of people is at least 'reasonably likely' if the wording of the citations is disclosed and, therefore, even if the officers' names are redacted, the wording of the citations amounts to personal data.
14. If it is the case that the information is personal data (as we have decided) then consideration has to be given under s40(3)(a)(i) and (ii) as to whether that personal data can be disclosed without contravention of data protection principles.
15. Materially, for the purposes of s40(3)(a)(i), the first data protection principle requires that personal data is processed (which includes disclosure) fairly. Section 10 of the DPA 1989 (as referred to in s40(3)(a)(ii)) refers to damage or distress caused by disclosure.
16. In relation to interpreting the first principle, the disclosure must also not breach the material conditions in Sch 2 to the DPA 1989 'relevant for purposes of the first principle'. Processing is permitted if the data subject has consented to it (Sch 2, first condition), but if not then for the purposes of the sixth condition in Sch 2 (which appears to be the only condition relevant in the present case) it must be established that the disclosure is necessary in order to meet the legitimate interests of the appellant.

17. Further for the purposes of the sixth condition, there is an exception to disclosure even where disclosure has been established as for the purposes of the appellant's legitimate interests. Thus, the exception covers a situation where the processing (disclosure) is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
18. In considering whether the disclosure of personal information would be fair, the Commissioner has taken account of a number of factors in the Decision Notice:-
- (a) The individual's reasonable expectations of what would happen to their information;
 - (b) The consequence of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned);
 - (c) The balance between the rights and freedoms of the data subject and the legitimate interests of the public.
19. The Commissioner and the chief constable are of the view that when 'discreet' commendations are made, the recipients of the commendations would have a high expectation of privacy in respect to the terms of the commendations, that the wording would not be disclosed, and disclosure could be damaging and distressing to them.
20. We accept that the officers to whom the commendations were made would not expect the fact that they had received commendations to be disclosed and possibly not the citations themselves with the names redacted.
21. However, the difficulty we have with the approach of the Commissioner and the chief constable is that it does not appear to be contested that the Appellant and others who were closely linked with the murder enquiry already know the names of those who have been investigated by Operation Kalmia and subject to disciplinary proceedings, and who have also received commendations. It is not proposed or requested by the Appellant that their names should be revealed if disclosure is made, and so what would be disclosed is simply the wording of the commendation.

Although this is personal information as defined in the Act, disclosure will not increase the likelihood of identification because the identities are already known to the Appellant and others.

22. This is a significant factor when considering the damage or distress caused to the individuals. How does the disclosure of the wording of the commendations increase damage or distress when the identities of those who received commendations are already known? In our view, the answer is very little. We note that that it is not argued by the Commissioner or the chief constable that disclosure would significantly enlarge the pool of people able to identify the officers (and who could communicate this to others if they chose to do so). In relation to the text of the commendations themselves these are in fairly broad and unsurprising terms given that the context for the commendations is fairly well known (although specific enough to enable the reader to see for what conduct the commendations were awarded).
23. In relation to the legitimate interests of the public in disclosure this appears to us to be more significant than allowed by the Commissioner. As set out above this was an important miscarriage of justice case where officers involved in the criminal investigation received commendations in 2009 following the convictions. However, those convictions were later quashed. The quashing of the convictions was as a result of non-disclosure by the police of information which threw considerable doubt on the manner in which police officers had protected the main prosecution witnesses in the case.
24. In balancing the interests of the data subject and the legitimate interests of the subject it is our view that the relatively minor increase of a risk of damage or distress to the individuals concerned, is outweighed significantly by the legitimate public interest in the disclosure of the text of the commendations in circumstances where there has been a major miscarriage of justice as a result of police misconduct, and much of that misconduct had been recognised by the police at the time the commendations were made.

25. In our view taking all these factors into account, in this case it is our view that disclosure of the wording of the citations (but not the names of the officers nor references to the ranks of the officers, which has not been requested) would be fair.
26. Having reached this conclusion we also have to consider for the purposes of condition 6 in Sch 2 to the DPA whether it can be established that the disclosure is necessary in order to meet the legitimate interests of the Appellant in this case, and if it is whether disclosure is nevertheless unwarranted by reasons of prejudice to the rights and freedoms or legitimate interests of the officers. As the Commissioner found that disclosure of the information would be unfair, she did not go on to consider this aspect of the case.
27. The Appellant was in charge of the protection unit in the pre-trial period, and it was he who raised the alarm about the actions of his team, which led to the Costello Report, about which information should have been disclosed to the defence during the murder trial. He later made a statement to the CCRC, and was specifically praised for his efforts by the Court of Appeal for revealing an injustice.
28. The Appellant clearly has an ongoing concern about the circumstances in which officers involved in the murder investigation who were later subject to actual or potential misconduct proceedings, were awarded commendations for their work shortly after the trial had completed. One of the things he is concerned about is that some of the commendations were given by Supt Costello, the author of the Costello Report, which (as mentioned) was highly critical of officers involved in the murder investigation. The Commissioner states in the Decision Notice that the giving of the commendations was not initiated by Supt Costello, although he did subsequently make the awards. The Commissioner argues that therefore the Appellant's 'concerns about the that point are to some extent misplaced' but it seems to us that whether he initiated or made the commendations, Supt Costello was clearly very much involved in the process.
29. The Commissioner has also mentioned that the officers concerned have all now been 'formally dealt with using the appropriate channels', but that seems to miss the point of the Appellant's request: he does not want to see the wording of the

commendations to somehow ‘name and shame’ the individual officers; rather he is interested in the process by which the force came to commend officers who appeared to have been already criticised by the force and the reasons for the awards.

30. Even though he has now retired, in our view the Appellant has a legitimate interest in pursuing what actually occurred and seeking disclosure of the wording of the commendations (without naming officers) is a reasonably necessary step for him to take to achieve those legitimate interests.

31. Having found that that is the case we repeat once more that (for the reasons set out above) the disclosure of the wording of the commendations will cause little prejudice to the rights and freedoms of the officers who received commendations, or their legitimate interests.

32. There is a small group of people who know which officers received commendations for their work in the murder trial, the disclosure of the wording of the commendation will not increase significantly the pool of people who have that knowledge, and therefore we do not find that disclosure would be unwarranted.

33. For those reasons we would allow this appeal, and substitute for the Commissioner’s Decision Notice our decision that the wording of the commendation citations requested by the Appellant with any reference to the names or ranks of the officers concerned, should be disclosed by the chief constable.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date of Decision: 24 July 2018.

Promulgated: 31 July 2018.