



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

Appeal Reference: EA/2018/0046

**Heard at Liverpool Civil and Family Court
On 19 July 2018**

Before

**KAREN BOOTH
JUDGE**

**ANNE CHAFER and PAUL TAYLOR
TRIBUNAL MEMBERS**

Between

SINDONA TAGLIONI

and

THE INFORMATION COMMISSIONER

Appellant

Respondent

DECISION AND REASONS

DECISION

1. The decision notice issued by the Respondent on 5/3/2018 (Reference: FS50693653) is in accordance with the law and the appeal is dismissed.

REASONS

Background to the appeal

2. The Appellant is a former employee of Merseyside Police. He worked as an Enquiry Officer at a police station, where he was the first point of contact with members of the public. After hearing rumours about alleged paedophile activity by “powerful people” in the City of Liverpool and an alleged failure by the police to investigate those rumours, he reported his concerns to the then IPCC. According to the Appellant, he was advised that, as a police employee, he was not entitled to pursue a complaint. In 2012 he raised the matter with the then Chief Constable, but to no avail. His subsequent attempts to have the matter investigated (by the Police Commissioner, the current Chief Constable and, finally, the IOPC), were all rejected.

The request for information and the response

3. On 29 June 2017, the complainant wrote to Merseyside Police and requested information in the following terms:

“I would like to request the following information under the Freedom of Information Act 2000. It concerns [name redacted] who is now deceased and therefore no longer covered by Data Protection.

I would like to know if [name redacted] was ever questioned by the Merseyside Police or former Liverpool Police, including any concerns [sic] over his conduct with youths. I would like to be given details of any investigations that were carried out or closed by the FIMs. If there are, I would like the names and FINS of the officers who decided to close the incidents on NICHE.”

(Note: FIMS is an acronym for Force Incident Managers, FINS is an acronym for Force Identity Numbers and NICHE is the name of Merseyside Police’s records management system).

4. Merseyside Police responded to the request by providing the Appellant with the Response Table at pages 30-36 of the bundle of evidence. They refused to either confirm or deny whether any relevant information was held, in reliance on the exemptions in sections 30(3) (investigations and proceedings conducted by public authorities), 31(3) (law enforcement), 40(5) (personal information) and 43(3) (commercial interests) of the Freedom of Information Act 2000 (“FOIA”).

5. In his letter dated 13/7/17 the Appellant rejected the refusal to provide the information he had requested, citing the reasons set out on pages 38-39 of the bundle. The Merseyside Police conducted a review of their decision but did not change it, although they did make some changes to their Response Table.

The complaint to the Information Commissioner

6. The Appellant submitted a complaint to the Respondent on 29/7/17. The Respondent investigated the complaint. The Merseyside Police were advised that, in order to decide if they were entitled to neither confirm nor deny that relevant information was held, the Respondent only needed to be satisfied that one exemption applied. They were therefore asked to focus initially on section 30(3) and to explain what public interest test considerations were taken into account when deciding to neither confirm nor deny (“NCND”) that relevant information was held and why they had concluded that the public interest in an NCND decision outweighed the public interest in informing the Appellant whether or not relevant information was held.
7. The Merseyside Police replied to the Respondent’s questions on 8/1/18 (pages 58-61).

The Information Commissioner’s decision

8. On 5/3/18, the Respondent issued her Decision (Ref. FS50693653). She decided that the Merseyside Police *were* entitled to neither confirm nor deny that relevant information was held by them in reliance on section 30(3) of FOIA. Merseyside Police were not required to take any steps.
9. She decided that the information requested would, if held, fall within section 30(1)(a)(i) and that the duty to confirm nor deny did not arise because (for the reasons set out in her Decision) the public interest in an NCND response outweighed the public interest in informing the Appellant whether they held the information.

The appeal to this Tribunal

10. The Appellant appealed against the Respondent’s Decision. Section 58 of FOIA sets out our task when determining an appeal.

58 Determination of appeals

(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.

11. The following is a summary of the Appellant's grounds of appeal as set out on pages 13-16 of the bundle.

- The Respondent's Decision was based on assumptions, generalisations and supposition.
- The Police have already acknowledged that there is relevant information on the system.
- The issues of concern are more than matters of general public concern. This is supported by the establishment of the Independent Inquiry on Child Sex Abuse. The Respondent's Decision is dismissive of this.
- Her Decision reduces public confidence in the public authorities tasked with upholding the law and their decision-making processes (unlike in high profile cases, such as Jimmy Saville's) where the release of information increased public confidence.
- Her decision reduces transparency and adds to the ignorance of the public served by the Police.
- Given that names and identifying details can be redacted from information disclosed, she has made a major error in assuming that disclosure of the information sought could be damaging to witnesses or victims.
- There are no precedents concerning a deceased influential paedophile that support the argument that disclosure could hamper an investigation. The evidence shows that the opposite is true (citing cases where the disclosure of information has allegedly led to a Home Office decision to investigate and encourage victims to come forward).
- The alternative complaints channels have been blocked by Merseyside Police's refusal to investigate his complaints.
- The potential negative effect on the Respondent if it is subsequently found that the police have blocked his complaints due to improper influence.
- The Decision is contrary to the current approach towards CSE/CSA concerns of being open and transparent. The information requested isn't about a trivial issue. It's about "the abandonment and ultimate betrayal and denial of protection and justice for some of the most vulnerable youths on Merseyside."

His desired outcome was as stated at page 17: "I would like the Merseyside Police be ordered to release the information required with names of witnesses and victims redacted."

12. The Respondent's Response to the appeal (dated 10/4/18) is set out at pages 19-26 of the bundle, the main points in which are as follows.

- The Appellant had failed to set out why the Decision was not in accordance with the law or why the Commissioner should have exercised a discretion differently.
 - The Respondent had acknowledged that historic allegations of sexual abuse are a sensitive matter and that there is public concern regarding how such allegations have been handled by the criminal justice system. However, she had concluded that confirmation or denial that information is/isn't held wouldn't in itself address the Appellant's concerns, given that it would not allow reliable conclusions to be drawn.
 - Greater weight should be attributed to the public interest in protecting Merseyside Police's ability to conduct effective investigations (by guaranteeing confidentiality to complainants/participants and maintaining a free flow of information). And, furthermore, the Appellant's complaints could be dealt with by way of a formal complaint to the Police without the prejudice that confirmation/denial would cause.
 - The Respondent had recognised that scrutiny/accountability could result in improved practices and increased confidence in the police. But confirmation/denial would not allow the public to draw reliable conclusions about the Police's conduct. There was also no reason to doubt their representations about the inhibiting effect on the flow of information.
 - Due weight should be given to their representations as an authority tasked with the investigation of criminal conduct who are best placed to advise on the consequences which could arise as a result of confirmation/denial.
 - Additionally, if information *were* held, this would result in perceptions being created about the culpability of an individual in the absence of relevant facts/evidence. That is contrary to the public interest notwithstanding the fact that the individual is deceased.
 - Given that the issue under appeal is whether the Merseyside Police should confirm or deny whether information is held, the redaction issue is not relevant.
 - It is not clear to the Respondent why the Appellant's complaints were not pursued, but that does not alter the fact that avenues of complaint are available to the public if there are concerns about police conduct.
13. The Appellant submitted a further letter dated 21/4/18 (page 28A-B of the bundle). He complained about the lack of evidence to support the assertion that refusing to disclose information on a suspected paedophile prevents people coming forward with information (we understood this to mean that he had not seen any evidence to support the argument that a decision to disclose information would have that effect). He attached a Daily Mail article about further witnesses coming forward in a CSE case as a result of information

being made public and he asserted that the Decision Notice at pages 68-75, submitted by the Respondent, had no bearing on the case. The Respondent's response dated 25/4/18 is at page 28(C-D).

The hearing

14. The Appellant opted to attend an oral hearing. The Respondent chose not to attend or be represented at the hearing. The Appellant attended alone. There were no other attendees.

The issues we had to decide

15. Section 1(1) of FOIA provides as follows:

1 General right of access to information held by public authorities.

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

The duty of a public authority to comply with subsection (1)(a) is referred to in the Act as “the duty to confirm or deny” – see section 1(6). Both subsection (1)(a) and (b) are subject to exemptions. Some exemptions are absolute exemptions and some are subject to a public interest test.

16. Section 30 is an exemption that is subject to the public interest test. Subsection (1)(a)(i) provides as follows:

“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”).

In this case, the Appellant accepted that section 30(1)(a)(i) *would* apply to the informant he has requested, *if* any such information were held by Merseyside Police. He confirmed this at the hearing.

17. However, where information falls within section 30, even the basic duty to confirm or deny whether it is held does not apply if the public authority concerned decides that the public interest in neither confirming nor denying that information is held outweighs the public interest in confirming or denying whether it is held (section 30(3) read with section 2(1)(b)). In this case, that was the only issue we had to decide; i.e. whether the Respondent had correctly concluded that the public interest in neither confirming nor denying whether information was held outweighed the public interest in confirming or denying whether it was held.
18. For this reason, we could not consider the Appellant's arguments about the provision of redacted information. Those arguments could only arise for

consideration if Merseyside Police had confirmed that they *did* hold relevant information but were refusing to disclose it in reliance on one or more exemptions. That was not the position. Merseyside Police were claiming that the duty to confirm or deny in this case did not apply and the Respondent agreed with that conclusion. Our task was to decide whether the Respondent's decision was legally correct.

19. Even if the appeal was successful we could not order Merseyside Police to provide the information requested (if indeed it was held at all). If we concluded that the duty to confirm/deny *did* apply we could only require Merseyside Police to comply with that duty and, in the hypothetical event of them confirming that information is held, to either provide the information requested or issue a fresh refusal notice under section 17 specifying the substantive exemption(s) relied upon for refusing to provide it.
20. We noted the Appellant's assertions that the only available avenue of complaint about the conduct of Merseyside Police in relation to this matter is to the Respondent. However, there clearly are specific complaints procedures that can be pursued by members of the public where there are concerns about alleged police misconduct. The Appellant asserts that his complaints to the Police have been "blocked". That was not an issue that was within our remit.

What we decided and why

21. In assessing where the public interest lies when considering section 2(1)(b) (or 2(2)(b)), the Tribunal exercises its own judgement. With reference to paragraph 11 above, the public interest balancing exercise does not involve the exercise of a discretion. It is an issue of mixed fact and law and the Tribunal may substitute its judgement for that of the Respondent.
22. After considering all of the evidence before us (the paper evidence in the bundle and the Appellant's oral evidence) we agreed with the Respondent's decision, but for slightly different reasons.

PIT arguments in favour of confirming/denying that relevant information was held

23. It is indisputable that there is the strongest public interest in the protection of children and the uncovering and future prevention of child sex abuse.
24. It is also clear that there is a strong public interest in the public having access to information about how the police and other relevant authorities have dealt with, and are dealing with, suspicions about and revelations regarding child sex abuse. And the public interest in this matter is currently at a particularly heightened level, given the number of high profile (individual and institutional) cases that have come to light in recent times and the associated press coverage.
25. It is also clear that there is a strong public interest in transparency about such matters, the need for accountability on the part of the police and the

furtherance/maintenance of public confidence in the way they investigate and bring such matters to light.

26. We agreed with the Appellant that there is a strong public interest in knowing whether the Police investigate and pursue high profile, public figures in the same way as they treat other members of the public.
27. We also accepted the Appellant's point about the likelihood of public awareness about specific investigations resulting in additional victims coming forward (whilst recognising that this could also lead to false accusations).

PIT arguments against confirming/denying that relevant information was held

28. The Respondent asserted that confirmation or denial in respect of this specific request would not allow the public to draw reliable conclusions about the conduct of the Merseyside Police. We agreed. In the event that the Police were to confirm that they *did* hold information that is relevant to the request, this in itself would not disclose any useful information and could not practically, therefore, further the public interest.
29. We were not, however, convinced by the key assertion that confirmation or denial would have an inhibiting effect on investigations. Whilst the possibility of deterring individuals from providing information to the police might arise in particular cases, we were more persuaded by the Appellant's assertion that the opposite would apply (i.e. that it would be more likely to *increase* the flow of information by encouraging affected persons and those with relevant information to come forward).
30. We agreed that, due to their experience and expertise in such matters, the views of the Merseyside Police regarding the possible consequences of confirmation or denial should be given due weight. However, in our judgement, the Respondent had perhaps overstated the weight to be attributed to their views. We considered that although the Police were *well placed* to advise on such matters, they were not necessarily *best placed* to do so. It was for the Respondent to take a critical approach to their representations and to test their relevance, strength and credibility in relation to this particular request for information.
31. We agreed with the Respondent's concerns about a hypothetical confirmation of information being held resulting in perceptions being created about the culpability of the individual concerned, in the absence of any relevant facts or evidence. We considered this to be a very strong factor against confirmation/denial, notwithstanding that the individual is deceased. It seemed to us that there is a very strong public interest against disclosing information that could be widely interpreted as suggesting, without foundation, that an individual has been involved in serious criminal activity in view of the likely tarnishing of his/her reputation and the potential damage and distress to family and friends.

Outcome of balancing test

32. After carefully considering the arguments on both sides, we decided that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighed the public interest in disclosing whether the Merseyside Police held the information.
33. In reaching this decision, we recognised the need for a public authority, when maintaining that exclusion, to do so consistently in relation to requests of a particular type. If a public authority were only to issue such a response where it does not hold relevant information, it would always be understood to mean that information was in fact held and this would be self-defeating.
34. We considered the Appellant's assertion (on page 15 of the bundle) that the police have already acknowledged that relevant information is held. He referred to the letter from the current Chief Constable at page 67 of the bundle, which is a response to the Appellant's letter at page 66A. We noted that the letter at page 66A referred to 3 individuals by name (none of whom were the individual named in the request) and a fourth individual by profession only (who may or may not have been that named individual). We considered whether the Chief Constable's letter undermined the NCND response. Given that there is no specific reference in either letter to the individual named in the request for information and that the Appellant's letter covered various different issues, we were satisfied, on balance, that it did not.
35. There were strong public interest arguments on both sides. However, the arguments that, in our judgement, tipped the scales in favour of NCND in this case were:
- (a) the strong public interest against unfairly raising perceptions, without further relevant information, that an individual has been involved in serious criminal activity and the consequent unfair tarnishing of his/her reputation and resultant damage/distress to family and friends; and
 - (b) the absence of any public interest in a bare confirmation that relevant information is held, without further relevant information.

It was clear from his oral evidence that the Appellant has passionate and genuinely held beliefs that a public figure committed serious offences against children, was not investigated and has "got away with it". However, we agreed with the Respondent that if the Merseyside Police were to confirm or deny that the information requested is held, that would not further his aims and would result in the unfairness described above. There *are* specific police complaints procedures that can be pursued by members of the public who are concerned about the alleged police misconduct. The Appellant has pursued those other avenues unsuccessfully. His assertions that his complaints have been improperly "blocked" were not within our remit.

Conclusion

36. For the above-mentioned reasons we decided that the Respondent's decision notice was in accordance with the law and we dismissed the appeal.

Signed: Karen Booth

Judge of the First-tier Tribunal

3rd September 2018

Promulgation date 13th September 2018