



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50649981**

Appeal Reference: EA/2017/0121

**Heard on 22 February 2018, 4 December 2018
Deliberations 21 February 2019**

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

HENRY FITZHUGH, JEAN NELSON

Between

NEIL WILBY

Appellant

and

INFORMATION COMMISSIONER

First Respondent

CHIEF CONSTABLE OF NORTH YORKSHIRE POLICE

Second Respondent

Appearances:-

Appellant: in person

First Respondent: did not appear

Second Respondent: Mr A Ustych

Cases:-

Commissioner of Police for the Metropolis v Information Commissioner and Mackenzie [2014] UKUT 479 (AAC)

DECISION AND REASONS

1. The Appellant (Mr Wilby) is a journalist who has been critical of and involved in litigation with the Second Respondent ("NYP"). On 8 August 2016 he requested information from NYP about a police investigation, Operation Rome and civil litigation which followed after that investigation which was called Operation Hyson:-

"Please provide the following information concerning Operation Rome an investigation into complaints of criminal harassment that, according to the North Yorkshire Police and Crime Commissioner, cost local taxpayers £409,970 and ran from 2011 until July 2014

1The name(s)/rank(s) of Gold Commander of this operation

2Name(s) /ranks(s) of senior Investigating Officer(s)

3Policy log (sometimes described as the policy book)

4Final investigation report

(It is accepted that items 3 and 4 will be redacted to protect exempt personal information)

5All documents connected with collection, classification and codifying of financial information that produced the alleged final investigation cost of £409,970

Please also provide the following information concerning Operation Hyson, the civil harassment claim that followed Operation Rome

6The name(s)/rank(s) of Gold Commander of this operation

7Name(s) /ranks(s) of senior Investigating Officer(s)

8Policy log (sometimes described as the policy book)

9Final investigation report

(It is accepted that items 8 and 9 will be redacted to protect exempt personal information)

2. NYP replied on 6 September 2016. It provided some information and withheld other information relying on exemptions under FOIA. With respect to Operation Rome it gave the information sought by request 1, gave the ranks but not the names of two officers for request 2 - Detective Superintendent and Head of Professional Standards, and claimed an exemption for requests 3 and 4. With respect to costings it explained that the costs were not derived from any recording system but had been produced as a one-off manual estimate. The costings had been produced under conditions which attracted legal professional privilege, five calculations identifying time worked and cost for various parts of the work were given *"This is the best estimate of costs that can be provided, and is the recorded information held to answer your query"*. With respect to Operation Hyson information was given in response to request 6, the reply for the other three requests was *"No information held as Operation Hyson was a civil case."*
3. Mr Wilby challenged this response in a detailed letter of 6 September 2016 which he followed up on 8 September 2016 indicating that NYP had given a different response on request 2 to another individual seeking information.

4. NYP conducted an internal review and on 19 October 2016 wrote identifying errors it had made and clarifying the position.
 - With respect to request 2 the internal review explained that there had been no Senior Investigating Officer for Operation Rome since NYP did not consider that Operation Rome met the criteria for a Senior Investigating Officer, however the first response had *“tried to assist you by providing job titles of those who had been deemed to be the lead Officers in the Operation... I therefore accept your request for an internal review on point 2 and confirm that there is no information held.”*
 - *“In relation to your point 3 and 4 I again accept your request for an internal review on the basis that section 31 and 40 are not applicable as in fact no information is held. There is no policy log or final investigation report.”*
 - The internal review confirmed the reliance on the exemption from disclosure for legal professional privilege provided s42 FOIA.
 - The internal review upheld the decision to give Mr Wilby a warning about vexatious requests, apologised for the errors and confirmed that the inaccurate response had been inadvertent and denied any breach of the Police Code of Ethics.
5. Mr Wilby complained to the First Respondent (“the IC”) who investigated the response to parts 2-5 of the request, noting that parts 1 and 6-9 *“had been handled to [Mr Wilby’s] satisfaction.”* (decision notice paragraph 9).
6. In her decision she considered Mr Wilby’s concerns and the explanation provided by NYP for the error relating to request 2 and concluded that the requested information was not held (decision notice paragraphs 17-20).
7. With respect to points 3 and 4 of the request (a policy log and a final investigation report) she considered the information provided by NYP:-

“24. NYP told the Commissioner that, in making its initial response the drafting officer had initially been told that there had been a final report and that, although a policy log book had not been kept, a log had been documented in the investigation log book. On that understanding, the ...FOIA exemptions had been applied.

25. NYP said that, on revisiting this issue on internal review, it had realised that there had in fact been no final report and that the only document closing off the matter was a CPS advice, an entirely separate document.... Neither of these documents had been created by NYP as the case did not meet the criteria for a SIO to be appointed and so these documents were not needed. NYP told [Mr Wilby] that an error had been made, but no further explanation had been offered. Following her investigation and after receiving detailed explanations from NYP, the Commissioner accepted that, on a balance of probabilities, the requested information was not held.”
8. In considering part 5 of the request the IC investigated the circumstances under which the claim for legal professional privilege had arisen and

concluded, in the light of the evidence, that NYP was relying on litigation privilege and relevant litigation was in prospect at the time the information was compiled (decision notice paragraphs 32-34). She weighed the arguments for and against disclosure (paragraphs 36 and 37) and in the light of the intrinsic weight to be given to exemption due to its role in the administration of justice and the fact that the material was still “live” at the time of the request concluded that the information had been properly withheld.

9. Mr Wilby was dissatisfied with these conclusions and set out his objections in a lengthy statement of grounds of appeal. This included a range of issues which are not within the jurisdiction of the tribunal. These matters include allegations of misconduct by the IC and her staff (paragraphs 5,6), statements relating to actual or threatened proceedings against the Chief Constable of NYP, allegations against NYP staff, submissions relating to the possible application of s.14 FOIA to future requests from Mr Wilby and other matters.
10. Issues within the jurisdiction of the tribunal were that the IC had been wrong to conclude that information within requests 2-4 was not held by NYP and that legal professional privilege did not justify withholding the material sought by request 5. He argued that the amount of time a named senior officer devoted to Operation Rome “*would be regarded as well within the accepted parameters for a SIO who was undertaking parallel duties*”. He argued that the NYP data controller had lied and that senior officers had significant interests in suppressing information. He argued that a policy log and a final investigation report existed at the time of finalisation of the information and the explanation provided by NYP was far-fetched. He asserted that the IC had been misled as to the status of legal proceedings.
11. In her response the IC emphasised that much of the argument of Mr Wilby was outwith the scope of proceedings and maintained “*In determining the complaint, NYPs submissions were not accepted uncritically but were considered by the Commissioner in light of all the submissions of both parties. The Commissioner reached her decision based on these submissions and the evidence before her, and for the reasons set out in the Decision notice and below, that decision is correct*”. With respect to requests 2-4 she reviewed the explanations provided by NYP and concluded on the balance of probabilities that the information was not held. With respect to request 5 and the claim of legal professional privilege “*The Commissioner has seen no evidence that NYP intended to provide incorrect information regarding the legal proceedings in respect of which litigation privilege is invoked....legal privilege has not been waived and the s42(1) exemption is engaged.*” NYP resisted the appeal, repeating the explanations given in the internal review and adopted by the IC.
12. Mr Wilby in replying to the IC and NYP argued (bundle page 75) “*This is an appeal that turns on whether the second respondent can be relied upon to tell the truth.*” He dealt at length with his view of Operation Rome and Operation Hyson.

13. Ashley Malone the lawyer working in NYP civil disclosure unit who prepared the internal review provided a statement setting out how the information request was handled. It exhibited email communications which informed the responses to Mr Wilby. The issue of the SIO (request 2) was handled by a member of the unit by consulting a document which listed those involved in the operation and discussing it with the Acting Solicitor to NYP which led to the identification of the grades of two officers which were disclosed in the initial response. Another request at about the same time had asked for the "lead investigator" rather than the SIO this resulted in the identification of a Detective Inspector as the lead investigator. Ms Malone (exhibit AM5) clarified this and in the internal review provided Mr Wilby with an explanation.
14. Requests 3 and 4 led to a request from the civil disclosure unit on 6 September for information from an officer at 13:50 (exhibit AM6):-

"Quick question re the following.

3Policy log (sometimes described as the policy book)

4Final investigation report

(It is accepted that items 3 and 4 will be redacted to protect exempt personal information)

Did we have the following in relation to Op Rome? Need an answer today unfortunately. Okay if we do as I am exempting the information, but I just need to know whether we hold the information."

The officer replied one hour later:-

"There is a "closing/final report which is recorded within the spreadsheet and from memory the "policy" was documented in the Investigation book of the SIO/Dep SIO rather than in a separate Policy Book."

15. Ms Malone's witness statement (26 September 2017 paragraphs 15-20) explained that on the basis of these e-mails since the documents if they existed:-

"would undoubtedly contain personal information and information capable of prejudicing law enforcement, they were exempted on that basis.

14The civil disclosure unit did not ask to see the documents. It is accepted that the civil disclosure unit should have asked to see the documents at the time and since this is now standard practice within the department.

16I have had direct discussions with the author of the e-mail, who has confirmed that there are two entries within a spreadsheet relating to a closing/final report, however those entries relate to internal correspondence about a closing report.... He has

confirmed that he has not had sight of a "closing report" in relation to Operation Rome and that it was incorrect to state categorically that there was one...

17 I have also made additional enquiries with an officer involved with Operation Rome and have been informed that there was no policy log book or final investigation report held.

18... The Officer has confirmed that an investigation book was kept rather than a policy log. The difference between the two is that a Policy log records a list of decisions made and the rationale for those decisions. The investigation book records a running overview of the matter. I have discussed this matter at length with the Officer on both 21st September and 25th September 2017 and have again received the same instructions.

19 In addition, it was confirmed that there was no "closing report. Although discussions took place about the drafting of a closing report this work was never carried out."

16. The witness statement confirmed that the costings document was drafted by a police lawyer for the sole purpose of and in contemplation of litigation and the litigation was subsequently issued. She disputed that privilege had been waived, while there was some information in the public domain around costs the costings document had not been disclosed. At the time of the request the litigation had only recently been concluded and the issue of legal costs had not been finalised.

17. Mr Wilby submitted a witness statement from Mr Hicks (26 October 2017), who was interviewed under caution in 2012 by NYP for harassment but was not subsequently charged. A letter sent by the NYP solicitor to Mr Hicks' solicitor fixing the date for the interview identified a DCI as the officer in charge of the investigation. Mr Hicks subsequently understood that this interview was part of Operation Rome.

18. In her second statement (15 November 2017) Ms Malone addressed issues raised by Mr Wilby in the light of this statement:-

"...The letter states that the Officer in Charge of the investigation was DCI Pearson. The appellant contends that this is at odds with the witness evidence provided and that this raises issues of my credibility.

4. I refer back to paragraph 9 of my witness statement dated 6th September 2017, in which it is stated that the Officer in Charge of Operation Rome was a Detective Inspector who was overseen by A Detective Superintendent (DS). The letter at TH/1 is dated 2012, in 2012 the DS referred to in paragraph 9 of my earlier statement was a DCI. DCI Pearson was in the time following promoted to a DS.

5. The author of the letter no longer works for North Yorkshire Police, however it is assumed that the author believed the overseeing Officer to be the Officer in charge. In addition DS Pearson had agreed to be the Officer named in correspondence relating to Operation Rome, due to the nature of the investigation.

6. No reference is made to a Senior Investigating Officer and the correspondence is not supportive of the Appellant's view that there was a SIO."

19. The witness statement exhibited an extract from the investigation book of the Officer in Charge of the investigation which indicated that it was not intended that the investigation would keep a policy book. Ms Malone resisted Mr Wilby's request for six further witnesses from NYP. She confirmed that she had not misled the Tribunal.
20. In his witness statement (15 November 2017) Mr Wilby gave details of various information requests he had made of NYP and his dissatisfaction with how they had been handled. He emphasised his standing as a journalist and his wide experience of writing about policing matters. He exhibited a number of articles he had written about Operations Rome and Hyson criticising the conduct of NYP, police officers and other officials. The articles disputed information as to the costings figures which had been produced and challenged the accuracy of formal explanations given by the police. He exhibited College of Policing guidance on control of operations, a witness statement used in the civil proceedings and fee sheets of barristers instructed in proceedings. In the statement he sought to re-open issues raised by request 1, and in the light of the involvement of the Deputy Chief Constable in Operation Rome and the timescale and cost of that Operation challenged the assertions by NYP that no information was held with respect to requests 2,3 and 4. He emphasised:-

"37 NYP have further admitted in an information request that an investigations manager, a detective inspector, two detective constables, five investigators, a PSU co-ordinator, an IRBO, and an intelligence analyst were all deployed on Operation Rome. A total of 94.6 months of police officer time was spent in three years.

38 It requires no special policing knowledge to understand that without a log that records who was doing that, the reasons they were doing it and the outcome of their actions, then the investigation would descend in to utter chaos if fourteen officers, across six departments (or business areas), were allowed to "do their own thing".

39 In the response to the information request NYP admitted the existence of a policy log."

21. In the hearing Mr Wilby indicated that he was challenging the honesty and integrity of the witness. Ms Malone (who has subsequently married and has now left NYP) confirmed the truth of her statement. She had had no direct involvement with either of the police operations.
22. Mr Wilby questioned her about the start date of Operation Rome. In her witness statement she had indicated that the operation had been lengthy spanning approximately 7/8 years and that while it was complex, it related to a summary only offence and as such was not handled in the same way as a more serious offence. She was unable to state where her evidence as to the duration of Operation Rome had come from. It was put to her that the costs of

£409,000 only covered a period of 2 years and 7 months. Mr Wilby put to her that Operation Rome started in 2009, the witness stated that she “couldn’t say with certainty, it was not particularly relevant to the searches which had been conducted.”

23. She had seen the spreadsheet listing the documents relevant to Operation Rome. Officer A, the disclosure officer for Operation Rome had had full access but had not been able to find the documents requested, she had not had access to the case documents. Mr Wilby raised a number of issues not relevant to the hearing and was warned to make his questions relevant to matters the tribunal had to decide. In response to questioning the witness confirmed that public information on costings was not contradicted by what she had seen. Mr Wilby repeatedly questioned the witness about different officers in order to try to ascertain information as to whether they had had involvement in Operation Rome. The witness confirmed that costs of operations were not routinely collated. Mr Wilby concluded his questioning by observing that cross-examination was futile and naming an officer whom he believed had been a Detective Chief Inspector involved in the case.
24. The parties were given the opportunity to make closing submissions in writing. NYP did so, Mr Wilby, although indicating an intention to do so, did not.

Consideration

25. The tribunal reminded itself that the task it had to discharge was set out in s.58 FOIA:-

“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.

26. Mr Wilby made his request on 8 August 2016, on 19 October 2016 NYP gave him the outcome of its review which concluded that no information was held with respect to requests 2-4; NYP state that with respect to these requests the public authority discharged their obligation under s1(1) of FOIA:-

“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,”

by confirming that it did not hold information

27. NYP stated that request 5 was protected from disclosure by the exemption contained in s42 and that the public interest lay in not disclosing the information:-

"42 Legal professional privilege.

(1)Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

28. In order to determine whether the appeal should be allowed it is necessary to examine the evidence before the tribunal as to whether or not there was recorded information (requests 2-4) and whether a claim of legal professional privilege could be established (request 5).
29. It is clear that NYP gave an initially inaccurate response to the request for information. In her witness statements, the exhibits to the statements and her oral evidence the witness for NYP gave a clear and substantiated account of how the error came to be made and the steps she had taken to establish whether or not such information as was requested was held. The tribunal found her account clear coherent and convincing. The error with respect to request 2 was made in an attempt to provide information relevant to the leadership of the investigation rather than responding precisely to the request (paragraphs 4 and 13 above), the errors with respect to requests 3 and 4 arose due to haste and the feeling (which can be derived from the emails) that since the information would not be revealed the existence of the documents was a secondary matter (paragraphs 14 and 15 above). She properly acknowledged the errors.
30. Although Mr Wilby was critical of the NYP conduct of Operation Rome the tribunal was satisfied that these criticisms amounted to arguments as to how NYP should have conducted itself and did not address what NYP actually did. The tribunal bore in mind the dictum of Wikeley J in *Commissioner of Police for the Metropolis v Information Commissioner and Mackenzie* [2014] UKUT 479 (AAC) (paragraph 37): "FOIA is not a means of reviewing a public authority's record-keeping and in some way testing it against best practice". In this case there was a clear and coherent explanation of how NYP made mistakes in responding to the request and how it rectified those errors. The tribunal is satisfied that on the balance of probabilities the IC's conclusion that no information was held with respect to requests 2-4 was correct.
31. With respect to request 5 the evidence is clear. The document was drafted for the purpose of obtaining legal advice when litigation was in prospect and the exemption is engaged. Given the information already in the public domain the

incremental value of disclosing this information is minimal and the inherent importance of maintaining the exemption substantial. The tribunal is satisfied that there are no grounds for disturbing the IC's decision.

32. For the reasons stated this appeal is dismissed.
33. Any application under rule 10(1)(b) must be made within 14 days of the promulgation of this decision.

Signed: Chris Hughes

Judge of the First-tier Tribunal

Date: 15 March 2019