First-tier Tribunal
(General Regulatory Chamber)
Information Rights **Appeal Reference: EA/2018/0261**

ON APPEAL FROM:
The Information Commissioner's Decision Notice No: FS50750459
Dated: 29 October 2018

Date of Hearing: 19 June 2019

Before
JUDGE ROBERT GOOD

TRIBUNAL MEMBER(S)
MR ANDREW WHETNALL AND MR MICHAEL JONES
Between
JAMES BURLEY
Appellant
-and-
THE INFORMATION COMMISSIONER
Respondent
-and-
HER MAJESTY'S CROWN PROSECUTION SERVICE INSPECTORATE
Second Respondent

Subject Matter:
Freedom of Information Act 2000 (FOIA)
Section 33(1)(b) Audit functions

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal dismisses the appeal.

REASONS FOR DECISION

Factual background

1. In July 2017, Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI) published a report entitled 'MAKING IT FAIR: A JOINT INSPECTION OF THE DISCLOSURE OF UNUSED MATERIAL IN VOLUME CROWN COURT CASES'. It was a joint report with Her Majesty's Inspector of Constabulary (HMIC).

2. That report was critical of the disclosure procedures by both the Crown Prosecution Service (CPS) and the police. A paragraph from the summary captures the report's findings:

> "The inspection found the police scheduling (the process of recording details of both sensitive and non-sensitive material) is routinely poor, while revelation by the police to the prosecutor of material that may undermine the prosecution case or assist the defence case is rare. Prosecutors fail to challenge poor quality schedules and in turn provide little or no input to the police. Neither party is managing sensitive material effectively and prosecutors are failing to manage ongoing disclosure. To compound matters, the auditing process surrounding disclosure decision-making falls far below any acceptable standard of performance. The failure to grip disclosure issues early often leads to chaotic scenes later outside the courtroom, where last minute and often unauthorised disclosure between counsel, unnecessary adjournments and – ultimately – discontinued cases, are common occurrences. This is

likely to reflect badly on the criminal justice system in the eyes of victims and witnesses." (para 1.3 Summary of the Report).

3. Having identified a number of reasons for the failing described, the report makes recommendations for such things as improved training, supervision, communications and ICT systems, and for greater priority to be given to disclosure practices by those in key strategic roles. The report identified the need for "a cultural shift that approaches the concept of disclosure differently, that sees it as key to the prosecution process where both agencies add value, rather than an administrative function."(para 1.4 Summary of the Report).

4. In the course of producing this report, the audit team conducted interviews, surveys and focus groups with police officers, police staff and the CPS. The report also includes at Annex B a "File examination by Theme" relating to a sample of 146 case files, including 90 completed cases randomly selected from Crown Court Case files and 56 identified unsuccessful outcomes or ineffective trials due to prosecution disclosure failings.

5. Mr Burley works for a charity, the Centre for Criminal Appeals, which is concerned with miscarriages of justice. On 18/01/2018 he requested information under FOIA arising from this report. The relevant requests, which relate to this appeal were

"Item 1: Available transcripts or notes from the "police focus groups" referred to at paragraph 4.6 of the report, with any personal data (such as names of the participants) redacted;

Item 5: The names of the police forces who reported "that they have previously engage experts who have provided training which was subsequently shown to be wrong (paragraph 10.4) and the text of these reports;

Item 8: Copies of earlier drafts of the report including any tracked changes and comments" (p291).

6. HMCPSI provided the transcripts of the police focus groups with identifying information redacted. They stated that they were withholding the information at Item 5 under S33, and they provided the later drafts of the report but not the earlier ones.

7. Mr Burley requested a review of this decision, requesting the information redacted on the report of the focus group dated 18/02/2017. On review, the decision was not changed.

8. Mr Burley complained to the Information Commissioner (IC) on 29 May 2018 about the refusal to provide the above information.

9. The IC investigated the complaint. The IC found that HMCPSI did not hold the information at item 5 and upheld HMCPSI's decision on 22 March 2018 (p-9) in respect of the other two requests where information had been withheld. Mr Burley appealed to this Tribunal on 19 April 2018 (p10-15).

10. In his grounds of appeal, Mr Burley accepts that HMCPSI does not have the information at item 5 and sets out what information he is seeking at paragraph 5 (p21)

    a. The redacted text in the sentence "Impromptu focus group [redacted] 18/02/2017" in the notes from the police focus group 9, which is believed to identify the name of the police force to which the focus group participants belong
    b. The 35 earlier drafts of the July 2017 joint report between HMCPSI and HMIC entitled 'Making it Fair: The disclosure of Unused Material in Volume Crown Court Cases' ("the Report").

11. The redacted document is at p 427. Mr Burley had had disclosed redacted notes from the focus groups and 16 of the latest drafts of the report.

12. The IC was satisfied that HMCPSI has audit functions which come within S.33(1)(b) and that disclosure of the name of the police force involved in the focus group and the earlier drafts of the report would prejudice this function and that there are stronger public interest arguments in favour of maintaining the exemption of this information from disclosure. In her decision, she makes the observation that the identities of the seven police forces who participated in the inspection were named in a footnote at page 8 of the report (p237).

13. By Case Management Directions issued on 11/01/2019 HMCPSI was made the Second Respondent in this appeal.

The Hearing – Evidence and Submissions

14. Mr Burley attended the hearing, representing himself. At the beginning of the hearing he confirmed that he accepted that HMCPSI had an audit function and was covered by S33 and that the issue was whether there was prejudice or likely to be prejudice and the application of the public interest test.

15. The IC was represented by Mr Leo Davidson of Counsel and HMCPSI by Ms Holly Stout of Counsel. Mr Kevin McGinty, HM Chief Inspector of the CPS attended and gave evidence in both an open and closed session. There were no other witnesses.

16. The open bundle was divided into three files. Files one and two numbered 1-870. File three contained copies of the disclosed earlier drafts. The closed bundle consisted of 4 files. In addition, there was an open and closed witness statement from Mr Kevin McGinty and skeleton arguments from Mr Burley,

Mr Davidson and Ms Stout. At the hearing the Tribunal were given copies of 12 reported decisions, considered to be relevant to the issues to be determined.

17. Although Mr Burley did not put forward any witnesses, he included in his written submissions, three papers critical of the Report's recommendations. These were a blog by Ben Henriques, a submission from the Centre for Criminal Appeals and the Cardiff Law School Innocence Project and a paper entitled 'Fixing a Hole? Potential solutions to the problem of disclosure – The Justice Gap'. These documents are critical of the Report because it "proposes little, solves nothing, and avoids the state having to tackle the real resource-based source of the problems"(p189-192 OB). The papers argue that "tinkering with the existing system will likely result in few substantial improvements" because of flaws in the disclosure process and suggest the need for more substantial reform.

18. Part of Mr Burley's reasons for requesting earlier drafts was to find out whether radical recommendations had been discussed and eliminated or not considered at all. His view was that the public would be better able to assess the quality of the process if these earlier drafts were disclosed.

19. Mr Burley's request for the identity of the police force which took part in the focus group meeting on 17 February 2017 was because of the possible suggestion in that report of the focus group that officers may have been trained to deliberately mis-schedule evidence.

20. Both Mr Davidson on behalf of the IC and Ms Stout on behalf of HMCPSI provided detailed written submissions. In summary, Mr Davidson submitted that the disclosure of the name of the police force would make the identity of the participants readily identifiable because records existed as to who was there on that particular day and that this would prejudice the HMCPSI's investigative and fact-gathering functions. Confidentiality was essential for

this process and that doubt about confidentiality would prevent people providing this information. In addition, the releasing of this information would affect participation in the future.

21. Ms Stout, in addition, relied on the evidence of Mr McGinty and his evidence that he is "firmly of the view that the harm that would occur if the redacted information were released would be both real and significant".

22. At the end of the hearing, Mr Burley raised the issue of costs. He was aware of Rule 10 which provides that the Tribunal may award costs if a party has acted unreasonably in bringing, defending or conducting proceedings. He was unclear about how this rule worked in practice. The Tribunal was able to reassure Mr Burley that his application, appeal and his conduct had been reasonable and this was endorsed by Ms Stout.

23. The reported gist of the closed session was as follows:

    a. The CPS focus group notes in OB/441 relate to a CPS region that does not include the force the name of which is requested in this case. However, Mr McGinty said that he would not be surprised to see similar things being said by the CPS from any region.

    b. Mr McGinty confirmed that he believed "NCalt" on the notes of the focus group that is the subject of this request refers to a particular training company. He said that the investigation had found much of the training forces received to be not fit for purpose and this is covered in the Report.

    c. Mr McGinty said that although focus groups at court often take place on an impromptu basis, it will generally be a matter of record which cases were being heard on which day and so if any manager did want to find

out who was at a particular focus group, it would not be difficult for them to work it out.

d. Mr McGinty considered that the newsworthiness of the headline "[Named] Police force deliberately told to withhold material from the defence" would be very damaging, irrespective of the truth of it. He considered there was a material difference between that and what had been found in the inspection.

e. Mr McGinty confirmed that in being provided with focus group notes and survey responses (albeit on a redacted basis) the Appellant has been provided with more than is shared with the CPS or police forces. Focus group notes are not shared with them. Some evidence goes back in an 'Emerging findings' report, but it does not go back in 'raw form'.

f. Mr McGinty was asked about the time limits that are put in recommendations. He said that was a practice encouraged by HMCFPRS rather than him as he did not consider time limits to be practicable given that HMCPSI has no means of enforcing them. He said if recommendations were made previously, on a further inspection HMCPSI would generally consider whether those recommendations had addressed, but there would not necessarily be a further inspection just because adverse findings had been made previously.

g. Mr McGinty was asked if he ever arranged focus groups of defence lawyers. He indicated that it could happen, but it was not common in practice because it was difficult to get them to engage.

h. Regarding the drafts, Mr McGinty was asked about how he had decided what should be released and what should not be. He said that he had released drafts where the comments concerned minor drafting issues

and not released drafts where comments were more substantive. He was concerned about releasing the internal challenge process.

i. Mr McGinty was asked about whether he could have recommended more radical changes to the system such as Mr Burley contended should have been made. He said no, that was not his role and he was not qualified to do that. The system is fine, it is just being operated badly in practice.

Reasons and Conclusions

24. The issues in this appeal are fairly narrow. There are two distinct areas of information sought by Mr Burley. First, the name of the police force which took part in the focus group meeting on 18/02/2017. Second, the earlier drafts of the report. It is accepted by all parties that S33 applies in each case. The issue is whether disclosure would prejudice or would likely prejudice the audit function. This is a qualified exemption so there is a further test of public interest.

25. The motivation for the requests was that Mr Burley considered that the notes from the focus group may suggest that police were trained to conceal evidence that should have been disclosed and that earlier versions of the report may show that issues such as this were a concern but were toned down for later versions.

26. Mr Burley argued that there was not a significant chance of individual officers being identified because it was an impromptu focus group meeting and he was not seeking the name of the court where the focus group took place. In addition, no officer could be criticised because comments made at the focus group were not attributable to a particular individual.

27. Mr McGinty in his evidence said that his inspectors did not read out the undertaking (p391). This had been drawn up after the inspection. What was said to participants was that information given to the inspectors would be in confidence and, if published, would not be attributable. This was the reassurance given to everyone who spoke to the team. In his opinion and experience, there would be a reluctance to take part and a reluctance to disclose sensitive information if it was thought that this would not be kept in confidence.

28. Mr McGinty said that there were specific procedures should an inspector uncover any suspected criminal activity. These were different depending on whether this was identified in police files or CPS files. If an inspector suspected that evidence was being deliberately concealed, this may be perverting the course of justice and it would be reported and acted upon separately from the report.

29. It was his view, that police officers would be concerned that they could be identified. The views expressed in the focus group were critical. They were made on a specific date and records would exist to establish who was at court on that date. The disclosure of the name of the police force, he had no doubt would prejudice his organisation's ability to gather the necessary information from all levels to learn how things were on the ground. This was an essential function of their audits.

30. In respect of the earlier drafts, Mr McGinty said that the process of writing the report was that individual inspectors would write sections of the report. These early drafts were based on the individual inspectors' findings. The inspectors were encouraged to include unsubstantiated observations and findings and that these would then be challenged, disputed, confirmed by a process of challenge and discussion. This approach tried to capture all

possible findings. It may be the case that a comment made in one interview connects with another comment made to a different inspector.

31. Mr McGinty decided at what point the drafts were sufficiently developed to be disclosed. He stated that he wanted to disclose as much as possible. His concern is that if disclosure of earlier drafts were ordered this would significantly inhibit what his inspectors wrote. In addition, comments made in earlier reports which, through challenge were determined to be incorrect would be in the public domain and would undermine the report, and antagonise those organisations incorrectly criticised.

32. During the report writing phase, there is a process whereby early views may be put to the CPS to get their comments. It provides an opportunity for the CPS to dispute the accuracy of a particular statement or provide further information. However, the report itself only goes for comment just before publication.

33. The Tribunal found Mr McGinty a persuasive witness. He said that this was the first FOIA application HMCPSI had received and that it had been a steep learning curve. The Tribunal considered that he had approached the task of disclosure consistent with the spirit and intention of the Act. HMCPSI have made significant disclosures. For example, the decision to disclose the notes from the focus groups, redacting only information that would assist in identifying participants, was a decision which other organisations might have refused. The disclosure of the 16 earlier drafts of the report also showed a commitment to disclosure. These earlier drafts had not previously been disclosed to the CPS.

34. The Tribunal accept his evidence that disclosure of the name of the police force would prejudice the audit function of HMCPSI. HMCPSI relies on talking to all levels in an organisation in order to gain an accurate picture of

how the organisation is functioning. The Tribunal agrees that disclosure could lead to the identity of the group involved and would make them and other future participants fearful that they might be identified. This fear would inhibit what was revealed and would prejudice the audit function of HMCPSI.

35. HMCPSI go through an iterative process in producing a report. In total, 65 drafts of the report were produced. The organisation is relatively small having a staff of 24. The inspectors often work individually, discuss findings informally and write sections of a report. They are encouraged to include rather than exclude material and the drafts are then subject to challenge from colleagues. This challenge may confirm findings or reveal that the information is incorrect or unsubstantiated by other participants. The Tribunal considers that for this process to be effective there needs to be a safe space where the findings can be developed and challenged without the fear that these early thoughts are going to be disclosed.

36. Mr McGinty was asked if the team had considered making proposals for a different system of disclosure of evidence. His response was that HMCPSI's role was to consider the operation of the current system and whether it was working, and it was not part of his audit function to propose legislative changes. He also added, that in his opinion, the current system is simple and straightforward. The problem is that this relatively simple process is not followed.

37. The Tribunal found that there had been significant disclosure and that the information withheld would prejudice the audit function of HMCPSI.

38. The exemption is a qualified exemption. The Tribunal also considered the public interest test. The argument for disclosure is that transparency of the actions of a public body through disclosure of its policies and procedures promotes accountability and trust in that public body. Mr Burley argues that

there is a significant public interest in seeing how the whole process evolves. However, the Tribunal is satisfied that the public interest in non disclosure outweighs any public interest benefit derived from disclosure. There is little public interest in seeing early drafts of a report. The report itself is public. The process of the development of the published report has limited public benefit. There is significant public interest in the ability of HMCPSI to conduct proper, in depth audits so that the report can reflect the practice on the ground. The report writing involves a process of iteration and challenge, which is only effective if the early draft reports are not disclosed.

39. The same is also true for the disclosure of the redacted information on the police focus group on 18/02/2017. The content has been disclosed and there is limited value in the public knowing the redacted information. There is considerable public interest in ensuring that police officers and other participants feel able to speak freely to HMCPSI without fear of any adverse consequences.

40. In the circumstances, the Tribunal unanimously upholds the Commissioner's decision and dismisses the appeal.

Signed

R Good
Judge of the First-tier Tribunal

Date: 30 July 2019