



Appeal number: EA/2019/0213/P

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

FAISAL A. QURESHI

Appellant

- and -

**THE INFORMATION COMMISSIONER
CROWN PROSECUTION SERVICE**

Respondents

**Before:
JUDGE ALISON MCKENNA (CP)**

**Determined on the papers, the Tribunal sitting in Chambers
on 24 and 27 April 2020**

MODE OF HEARING

1. This determination was conducted by a Judge, sitting alone. The Tribunal was satisfied that it was appropriate to compose the panel in this way, having regard to paragraph 6 (a) of the Senior President's Pilot Practice Direction dated 19 March 2020¹ and the desirability of determining all cases which are capable of determination by the most expeditious means possible during the pandemic.
2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.

¹ <https://www.judiciary.uk/wp-content/uploads/2020/03/General-Panel-Composition-Pilot-Final-for-Publication-1.pdf>

3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 197, plus additional papers including the parties' final written submissions. It also considered a closed bundle comprising pages 1 to 1114, plus closed submissions on behalf of the CPS and an un-redacted copy of the schedule referred to at paragraph 15 below.

DECISION

4. The appeal is dismissed.

REASONS

A: Background to Appeal

5. The Appellant made an information request to the Crown Prosecution Service ("CPS") on 9 July 2018, as follows:

I understand that during September – November 1981, the Director of Public Prosecution asked for a copy of a West Yorkshire Police Report looking into the death of British Nurse, Helen Smith, in Jeddah Saudi Arabia on 20 May 1979.

I would like all documents concerning this matter to be released to me under the Freedom of Information Act.

6. On 2 August 2018, the CPS refused the information request in reliance upon sections 30(1)(c), 38(1)(a) and 40(2) of the Freedom of Information Act 2000 ("FOIA"). On the internal review dated 24 September 2018, the CPS relied on s. 30(1)(c) and s.40(2) FOIA only. In February 2019, the CPS disclosed some information within the scope of the request. The Appellant also received some information from the Foreign and Commonwealth Office and Cabinet Office.

7. The Appellant complained to the Information Commissioner's Office, which conducted an investigation. On 13 June 2019, the Information Commissioner issued Decision Notice number FS50788774, which upheld the CPS's then reliance on sections 31 (1) (c) (*prejudice to the administration of justice*), and 38 (1) (a) (*endangering the physical or mental health of any individual*) FOIA. The Decision Notice concluded at paragraph 40 that here disclosure of the requested information would be likely to prejudice law enforcement if there were to be a further investigation into Helen Smith's death. It further concluded at paragraph 62 that, in accordance with the Commissioner's public guidance, the disclosure of information about a deceased person might endanger the mental health of their surviving relatives.

8. The Information Commissioner concluded that the public interest favoured maintaining both exemptions and not disclosing the requested information. As to s. 31(1) (c) FOIA, she concluded at paragraphs 50 to 53 of the Decision Notice that whilst there are public interest arguments in favour of disclosure, the balance of public interest favoured the strong public interest in CPS being effective in its role as prosecutor, particularly in relation to high profile cases such as this. As to s. 38 (1) (a)

FOIA, she concluded at paragraph 79 of the Decision Notice that the public interest arguments in favour of disclosure were not strong enough to outweigh the significant public interest in protecting individuals from risk to their physical and mental well-being. She was satisfied that release of the requested information would be likely to cause significant distress in this case.

9. The Information Commissioner did not find it necessary to consider the engagement of s. 40 (2) FOIA, which the CPS also relied upon. She concluded that the CPS had breached s. 17 (1) FOIA but required no steps to be taken.

10. The Appellant appealed to the Tribunal.

B: Appeal to the Tribunal – the Parties' Submissions

11. The Appellant's Notice of Appeal, erroneously dated 23 July 2019, (it was submitted on 23 June 2019) relied on grounds of appeal that (i) reliance on s.31(1)(c) FOIA was not justified because there was no likelihood of a future criminal investigation; (ii) he is against the 'blanket application' of the s. 38 FOIA exemption.

12. The Information Commissioner's Response dated 1 August 2019 maintained the analysis as set out in the Decision Notice. It was submitted that, as to s. 31 (1)(c) FOIA, the Appellant's case was that the police case had not been re-opened or re-examined for many years. The Commissioner's response was that this argument did not address the relevant test as to the prejudice to a future investigation and/or prosecution. As to s. 38 (1)(c) FOIA, it was denied that there has been a blanket application, as this exemption was applied to certain information only.

13. The Appellant's Reply to the Information Commissioner's Response dated 4 August 2019 set out the background to his journalistic interest in the Helen Smith case. He complained about the CPS's inconsistency of approach in relying on different exemptions throughout the life of the case.

14. He submitted that there is no reasonable prospect of further investigation following a letter from the Director of Public Prosecutions in 1981 which confirmed that there were no murder suspects. He also submitted that there is so much information already in the public domain (released by Helen Smith's family in their campaign for a further investigation) as to make the CPS's and Information Commissioner's position that disclosure of the requested information would endanger the mental health of the deceased's surviving relatives untenable. The Appellant asked for the disclosures from FCO made after the date of his request and the Decision of a different First-tier Tribunal (EA/2018/0026) to be taken into account in determining this appeal. He exhibited press reports including a newspaper's photograph of Helen Smith's body and some of the correspondence he has obtained, including a letter from the Cabinet Office to Mr Smith dated August 1997 which concluded that *it is now unlikely that we will ever know exactly what happened that tragic night*. He also exhibited the Saudi Arabian autopsy report.

15. The CPS was joined as a party to this appeal. Its Response to the Appeal supported the Decision Notice in respect of the exemptions at s. 31 (1) (c) and s. 38

(1)(a) FOIA, but also sought again to rely on s. 40 (2) FOIA. It included a useful schedule, describing the disputed information and identifying which of the three claimed exemptions is relied on in respect of which category of documents. A redacted version of this schedule is included at page 72 of the open bundle. I have cross-referenced the material in the closed bundle with this schedule and have satisfied myself that it is an accurate description of the withheld material.

16. With respect to s. 31 (1) (c) FOIA, the CPS submitted that there remained the possibility of a further investigation or prosecution notwithstanding the age of the case and that the 1997 letter from the Cabinet Office was not determinative of any future re-investigation, should new information come to light. It is submitted that the disclosure of the requested information would be likely to prejudice any future investigation and/or prosecution, as it could enable a suspect to evade justice or prevent a defendant from having a fair trial. It is submitted that there have in fact been investigations many years after a crime, for example for the murder of WPC Yvonne Fletcher. It is submitted that the CPS's ability to obtain confidential personal information from witnesses would be compromised in other cases if it were thought that such information could be made public in circumstances other than for the purposes of law enforcement. The identified prejudice was therefore submitted to be relevant to the administration of justice so as to engage the exemption. The CPS acknowledged that some information about the Helen Smith case is already in the public domain but asserted that the withheld information is different in nature from that already available. It further submitted that the Tribunal should give weight to the CPS's authoritative assessment of the real risk to any future prosecution from disclosure, given its statutory role. The strong public interest in the proper administration of justice if this matter were to be re-investigated is submitted to outweigh the acknowledged public interest in transparency about this case.

17. In respect of s. 38 (1)(a) FOIA, the CPS submitted that the Decision Notice was correct to note at paragraph 58 that the CPS's Head of Security and Information Assurance had judged the material *distressing*. Disclosure under FOIA is, of course, disclosure to the world and therefore carries the risk that such material will find its way onto the internet. The CPS submitted that this would re-expose Helen Smith's family and friends to the trauma of Helen Smith's death. It is submitted that the withheld photographic material is very different in nature from the press photograph that the Appellant has exhibited and more likely to cause distress.

18. The CPS's continued reliance on s. 40 (2) FOIA is submitted to be relevant to the personal data (including special category data) of third parties, which is contained within the withheld material. It is submitted that those third parties have not consented to the release of their personal data and that there are no relevant GDPR exemptions which would permit disclosure.

19. The Appellant's Reply to the CPS response, dated 9 September 2019, noted that the documents in the CPS's schedule are not referred to by dates, but he made his own working assumptions about their provenance.

20. As to s. 31 (1) (c) FOIA, the Appellant disputed the relevance of the CPS's comparison with the WPC Fletcher case. He submitted that both Respondents have argued that the "likely to prejudice" test should take no account of the likelihood of a fresh investigation/prosecution occurring and submitted that this was an incorrect approach, citing a First-tier Tribunal Decision.

21. As to s. 38 (1) (a) FOIA, the Appellant submitted that the friends and family of Helen Smith have suffered more from the secrecy surrounding her death than they would from exposure to the withheld material.

22. The Appellant notes that the schedule of withheld material includes witness statements which he says were relied on in open court at the inquest.

23. The Appellant did not challenge the engagement of s. 40 (2) FOIA in his Reply. It is of course an absolute exemption.

24. In its open final submissions, the CPS addressed the additional arguments in the Appellant's Reply. It invited the Tribunal to assess the correctness of the Appellant's assumptions with the benefit of the closed material. It is submitted that there is no suggestion of similarity between the cases of Yvonne Fletcher and Helen Smith, and that the Yvonne Fletcher case is referred to only to illustrate the possibility of further investigations being undertaken decades after the index events. It is submitted that the likelihood of a further investigation is not the only relevant consideration for the Tribunal in considering the engagement of s. 31 (1) (c) FOIA. The general point about release of unused witness statements being likely to discourage public co-operation with police inquiries is not, of course, contingent on there being a further investigation in this case. As to s. 38 (1) (a) FOIA, it is submitted that the Appellant's submissions are speculative. In any event, it is submitted that there is a significant difference between a member of Helen Smith's family actively looking for archive press reports or reading a book published in the 1980's and the risk of them coming across new material on the internet or elsewhere. As to the inquest, it is submitted that the Appellant has not established which parts of the witness evidence were referred to in open court. The CPS also made closed submissions, which I refer to in a closed annexe to this Decision.

25. The Appellant's final submissions invite the Tribunal to put additional questions to the Respondents. It is unclear when or how he expected this to happen given that these are final submissions and the parties have consented to a determination of the appeal on the papers. He supplies additional documents about Helen Smith which are in the public domain and an extract from a book about the case which describes events at the inquest.

C: The Law

26. The duty of a public authority to disclose requested information is set out in s.1 (1) of FOIA². The exemptions to this duty are referred to in section 2 (2) as follows:

"In respect of any information which is exempt information by virtue of any provision of Part II, section 1 (1) (b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or*
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."*

27. The first exemption relied upon by the CPS in this case is s. 31(1)(c) FOIA, which provides as follows:

"Law Enforcement

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –...

- (a) the prevention or detection of crime*
- (b) the apprehension or prosecution of offenders*
- (c) the administration of justice".*

28. The second exemption relied on is s. 38 (1) (a) FOIA:

Health and Safety

"(1) Information is exempt information if its disclosure under this Act would, or would be likely to—

- (a) endanger the physical or mental health of any individual, or..."*

29. The third exemption is s. 40 (2) FOIA:

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—

² <http://www.legislation.gov.uk/ukpga/2000/36/contents>

- (a) it constitutes personal data which does not fall within subsection (1), and
(b) the first, second or third condition below is satisfied.

(3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act—

- (a) would contravene any of the data protection principles, or
(b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.

(3B) The second condition is that the disclosure of the information to a member of the public otherwise than under this Act would contravene Article 21 of the GDPR (general processing: right to object to processing).

(4A) The third condition is that—

(a) on a request under Article 15(1) of the GDPR (general processing: right of access by the data subject) for access to personal data, the information would be withheld in reliance on provision made by or under section 15, 16 or 26 of, or Schedule 2, 3 or 4 to, the Data Protection Act 2018, or

(b) on a request under section 45(1)(b) of that Act (law enforcement processing: right of access by the data subject), the information would be withheld in reliance on subsection (4) of that section.

30. The first two exemptions relied on by the CPS are so-called qualified exemptions, giving rise to the public interest balancing exercise required by s. 2 (2) (b) of FOIA. However, s. 40 (2) FOIA is an absolute exemption so that if it is engaged, there is no applicable public interest test.

31. The public interest in disclosure for any qualified exemption falls to be assessed as at the date of the public authority's final response to the information request i.e. in this case, the date of the CPS's final internal review. Events which post-date the CPS's final response to the information request (24 September 2018) are therefore not capable of being included in the public interest balancing exercise – see paragraphs [61] to [73] in *Maurizi v IC and CPS* [2019] UKUT 252 (AAC)³.

32. Public authorities are entitled to rely on new exemptions before the Tribunal when it is hearing an appeal against a Decision Notice – see *Malnick v IC and ACOBA* [2018] UKUT 72 (AAC)⁴.

33. First-tier Tribunals are bound as a matter of legal precedent by Decisions of the Upper Tribunal but not by Decisions of differently constituted First-tier Tribunals. See *O'Hanlon v Information Commissioner* [2019] UKUT 34 (AAC).⁵

³ https://assets.publishing.service.gov.uk/media/5d8dec7ce5274a21b7408487/GIA_0973_2018-00.pdf

⁴ https://assets.publishing.service.gov.uk/media/5ac3336440f0b60a4be86c2f/GIA_0447_2017-02.pdf

34. The right of appeal against a Decision Notice arises from s. 57 FOIA. The powers of the Tribunal in determining an appeal against a Decision Notice are set out in s.58 of FOIA, as follows:

“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.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

35. The burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant as the party seeking to disturb the status quo.

D: Evidence

36. The documentary evidence before the Tribunal included the withheld information and the correspondence from the Information Commissioner’s investigation. I have commented on the withheld information in a closed annexe to this Decision.

37. None of the parties relied on witness evidence.

E: Conclusion

38. Having considered the submissions and the withheld material itself, I am satisfied that the Information Commissioner was correct to conclude that s. 31 (1) (c) FOIA was engaged by the parts of the withheld information where this exemption was relied on by the CPS. The potential for re-investigation and/or prosecution remains live in the view of the CPS and I give weight to its view, as it is the public body entrusted by Parliament to make such decisions. I am not persuaded by the Appellant’s submissions that re-investigation of the death of Helen Smith is so unlikely that the exemption is not engaged. I am satisfied that, if there were to be a further investigation, as the CPS states remains possible, there is a realistic likelihood of prejudice to the administration of justice if those parts of the withheld material were to be disclosed, under FOIA, to the world at large by disclosure to the Appellant. This prejudice could take the form of hampering an investigation or of preventing a

⁵ https://assets.publishing.service.gov.uk/media/5c71b354e5274a3f8edc00cf/GIA_1680_2018-00.pdf

fair trial. On a wider view, I also accept CPS's argument that the administration of justice would be likely to be prejudiced more generally if information given to the authorities for the purpose of a formal investigation were to be made available to the general public, as this might decrease the likelihood of public co-operation with future investigations.

39. Turning to the public interest test, I agree with the Decision Notice that whilst there is a public interest in this high-profile case, the balance of public interest favours protecting the integrity of any possible re-investigation and in promoting the highest possibility of there being due process in any resulting prosecution.

40. I am not persuaded that the availability of certain information already in the public domain reduces the particular risks to the administration of justice that I have identified. The withheld material is significantly different in nature and volume from the information exhibited by the Appellant in support of this argument. He is of course at a disadvantage on this point, not having seen the withheld information for himself and being unable to compare the two. Having undertaken this exercise for myself, I discern no error of law or inappropriate exercise of discretion in the Decision Notice.

41. The Appellant is also at a disadvantage in not being able to assess the likely distressing impact of the material he has not seen. I have reviewed it myself and am satisfied that it would be likely to endanger the mental health of Helen Smith's friends and family if they were to become aware of it following its disclosure to the Appellant. In the absence of any evidence, the Appellant has not persuaded me that their previous or existing distress is greater than that likely to be experienced by disclosure of those parts of the withheld information for which CPS relies upon this exemption. Once again, I note that the information already in the public domain is different in nature and volume from the withheld material and I am not persuaded that the material exhibited by the Appellant demonstrates that the exemption is not properly engaged. I am satisfied that s 38 (1) (a) FOIA is engaged.

42. Turning to the public interest test, I agree with the Information Commissioner that significant weight should be attached to the public interest in protecting individuals from risk to their mental health. I agree with her that this factor outweighs the public interest in transparency about the investigation. I discern no error of law or inappropriate exercise in the Decision Notice.

43. The Information Commissioner did not determine the engagement of s. 40 (2) FOIA in the Decision Notice. I note from the schedule that there is no part of the withheld material where s. 40 (2) FOIA is relied upon alone to refuse the information request, so that my conclusions above are sufficient to dispose of this appeal. Without formally determining the issue, I note here that the withheld information I have seen does contain the personal data of identifiable third parties. It is probable that some of these people are still alive and I observe that it is likely that their legal rights in relation to their personal data will have to be considered carefully in relation to any future information request. The Appellant has not so far engaged with this issue.

44. The Appellant refers to parts of the withheld material having been considered in open court during the inquest. It is impossible for me to make a finding of fact about that issue from the material now before me. However, if he is right, then following the Supreme Court's judgment in *Cape Intermediate Holdings v Dring* [2019] UKSC 38⁶, he may be able to obtain some information from the Coroner's Court in accordance with open justice principles.

45. For all these reasons, I now dismiss this appeal.

(Signed)

**Judge Alison McKenna
Chamber President**

DATE: 27 April 2020

⁶ <https://www.supremecourt.uk/cases/uksc-2018-0184.html>