



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50875797**

Appeal Reference: EA/2020/0130

Considered on the papers on 12 February and subsequently

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

PIETER DE WAAL & PAUL TAYLOR

Between

ANDREW CLARKE

Appellant

and

INFORMATION COMMISSIONER

First Respondent

COMMISSIONER OF THE CITY OF LONDON POLICE

Second Respondent

DECISION AND REASONS

1. Mr Clarke is dissatisfied with how the police handled a report that he made of suspected fraud. This report brought him into contact with centralised arrangements by which the various police forces of England and Wales deal with cases of fraud which are co-ordinated through the National Fraud Intelligence Bureau (NFIB) located within the City of London Police. Action Fraud (AF) is a national reporting system through which offences of Fraud are reported to the police. It has no remit to investigate and reports are passed to

the NFIB for further assessment and dissemination to local police forces and other statutory bodies with a power to investigate. The Home Office directly funds these two units. Demand for investigations exceeds the police resources available and details of the process used to manage demand have not been disclosed to the public domain. The police public explanation of how this process is done is: -

"With over 30,000 reports of fraud recorded each month, and limited resources, we have to prioritise those cases we have the capability to investigate further. This prioritisation is done on the basis of several factors, which include but are not limited to vulnerability of the victim and the ability to prevent further frauds. Other factors we consider are not made public. Fraud is the most prevalent crime in the UK currently and we work tirelessly to make fraud awareness and prevention integral to policing's approach to this crime".

2. On 4 March 2019 Mr Clarke sought information from the City of London Police (COLP): -

"[Name removed] in his email of 28.2.19 also refers to a scoring system applied by Action Fraud ('scored too low'). I question whether the Home Office and City of London Police legally are entitled to apply a scoring system and I would kindly invite the provision of details of the precise legal basis for the same..."

Even if a scoring system is legally justifiable, contrary to what [name removed] says in his email of 28.2.19 about not revealing these factors for 'operational reasons', I would maintain that this information is legally accessible under the Freedom of Information Act 2000, not being exempt thereunder and I hereby make such a request for the supply of the same. People reasonably should be entitled to know whether in making a report themselves using Action Fraud's online tool or asking the Police to do so, they are wasting their time".

3. In responding COLP stated that it held no information relating to the first part of the request and withheld information within the second part of the request relying on the exemptions in relation to law enforcement contained in FOIA which provides at s31: -

31 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...

4. Mr Clarke complained to the Information Commissioner on 3 October 2019. In his complaint he did not challenge COLP's statement that it did not hold information relating to the first part of the request and accordingly she

addressed herself to the question of whether s31 was engaged and where the balance of public interest lay.

5. In considering whether s31 was engaged she considered whether harm to the prevention and detection of crime would be likely to result from disclosure of the information having considered the arguments of COLP: -

Disclosure of this information will reveal details as to the prioritisation of specific threats in the investigating process. The potential harm in disclosure is the possibility that this could provide information to organised fraudsters that would be advantageous in terms of focusing their efforts on those fraud areas where there is less priority.

... it has additionally been identified that disclosure of the scoring matrix would result in a loss of intelligence which would further prejudice law enforcement. This is because where victims of fraud believe that no investigation will take place, they are less likely to report an incident. Given the volume of incidents reported, the loss of intelligence could be significant”.

and Mr Clarke: -

“... the disclosure of the information sought is not going to or would be likely to prejudice the prevention of crime. The information sought has nothing to do with the prevention of crime in as much as deciding which reported matters are to be investigated will not have any impact upon preventing crime. Crimes will be committed irrespective of the disclosure of this information and by definition will have occurred before this information and its use comes into play.

Disclosure of the information sought also will not prejudice or be likely to prejudice the detection of crime. Purposively, the information sought is used to exclude matters from detection. For the same reasons, disclosure of the information sought will not prejudice or be likely to prejudice the apprehension or prosecution of offenders or the administration of justice, neither of which have any relevance to matters where there is to be no investigation.

... I am unaware of any lawful entitlement of Police to limit crimes that will be investigated by recourse to value ...”

She concluded: -

“... disclosure would reveal methodology and thresholds which would be likely to be advantageous to those seeking to commit crime and avoid detection.

The Commissioner considers that the disclosure of the requested information, irrespective as to whether or not some of it is currently being relied on, clearly has the potential to give valuable insight into the system being used by AF. This would clearly be of genuine interest to any party who commits, or is considering committing, any

type of fraudulent crime. Knowing how such a crime would be dealt with by AF, and how decisions are made, would be likely to be of considerable interest and may make the commission of one type of crime 'preferable' to another...

, the thresholds applied to the various categories of crime may enable perpetrators to revise their actions to try and stay 'under the radar' in an effort to reduce the chance of their being caught."

6. In weighing the public interest, she considered Mr Clarke's argument: -

"... Reasonably the public should be entitled to know whether effectively they are wasting their time and effort in reporting matters to Action Fraud if such tests are being used and whether the Police are doing what they are supposed to do. The disclosure of the sought information may act as an imperative for improvements to be made in the investigation of such matters and indeed, it could even be used by the Police to secure greater resources with which to do so"

7. COLP argued that disclosure would be used by criminals to target their activities in ways which might reduce the likelihood of investigation and the role that the information gathered through AF shaped police activity: -

Reports to Action Fraud are linked in order to form a national picture of threat, risk and harm. Whether or not a report is passed for investigation, the information forms intelligence which supports and develops leads into other policing and law enforcement activities in the disruption of criminal activity. The release of information related to the scoring of information may discourage members of the public from reporting, as articulated in the applicant's request, and therefore affect the ability of UK law enforcement to investigate criminal activity and prevent victims of crime.

8. The Information Commissioner, while acknowledging the importance of increasing transparency, noted that *a significant amount of information about AF is already in the public domain, including concerns about shortfalls, resources and system issues. Such publications indicate that some of the complainant's concerns are already noted and the appropriate authorities are therefore currently aware.* She recognised the importance of not providing fraudsters with useful information, the potential loss of intelligence to the police if people stopped reporting fraud because it did not appear likely to be investigated and that local forces received weekly summaries of causes in their area enabling them to investigate cases even if they were not actively disseminated for investigation. She concluded that the balance of public interest lay in upholding the refusal.

9. In his detailed appeal Mr Clarke formulated two grounds of appeal: -

(A) Whether COLP by the imposition of particular scored criteria that fraud victims are highly unlikely to be able to satisfactorily address are manipulating/abusing the system to artificially depress scores thereby lessening the number of reports that have to be considered by NFIB reviewers

and as a result of that disseminated for investigation, to the benefit of police forces nationwide in terms of their workload and contrary to the public interest

(B) Whether COLP are imposing particular scored criteria where they have no lawful power to do so for the same purpose as that under (A) above

10. In addition, Mr Clarke has produced voluminous pleadings responding to the arguments of the Information Commissioner and COLP. In turn COLP have produced point by point rebuttals attempting to deal with the specific claims that he has made. COLP submitted data showing that the number of cases reported to Action Fraud significantly reduced during the period from August to October 2019 as a result of articles published in The Times critical of the police investigation of fraud.
11. The Information Commissioner and COLP have in their pleadings sought to uphold the Commissioner's decision. The Commissioner noted that in his appeal Mr Clarke did not appear to challenge the finding that the exemption in s31 is engaged.
12. The heart of Mr Clarke's case as set out in (A) above therefore is that COLP are acting in bad faith to reduce police workload by "manipulating/abusing the system to artificially depress scores". The second ground is that COLP have no legal power to do so.

Consideration

13. Mr Clarke in the first part of his original information request sought to know the legal basis upon which the police have developed a scoring system which they use to prioritise fraud investigations. COLP confirmed that it did not hold material within the scope of that part of the request. Mr Clarke did not pursue that part of the refusal in his complaint to the Information Commissioner. The second ground of his appeal sought to re-open the issue of the legal basis for the system of assigning priorities to individual cases.
14. It seems to the tribunal that Mr Clarke's critique is somewhat strange. There are not resources to place a police officer on every street corner. Choices must be made and priorities assessed in determining how and where to devote scarce resources to the best effect in every publicly funded service. It would be, to say the least, grossly negligent and improper if a public service did not have some mechanism of prioritisation. One of the mechanisms used to help organise and prioritise activities are the arrangements which are the subject of this appeal. The substantive issue of public interest is how should this prioritisation be carried out.

15. The performance of the system is of public interest. The parties have referred the tribunal to various materials related to the system of investigating fraud including COLP's review of its work published in 2020 and the Home Affairs Select Committee. In its Tenth report of session 2017-2019 "Policing for the Future" (22 October 2018) it discussed the significant problems the police have in countering fraud and issues around the reputation and effectiveness of Action Fraud. The Select Committee argued for a fundamental overhaul of the system, proper resources and enhanced capabilities and commented: -

"We commend the City of London Police for its leadership, but one under-resourced police force, facing the same budget pressures as every other force, does not have the capacity or the leverage to introduce the sort of drastic improvements needed at a national and regional level."

16. The Committee found: -

Despite efforts to improve its response to victims of fraud, Action Fraud has irretrievably lost the confidence of the public, and reasonable expectations from victims are not being met.

17. In setting out the issues the Committee quoted a senior officer from the Greater Manchester force: -

There are real challenges of resourcing. We cannot continue the way that we are operating around investigating fraud. What we will do is create a fertile area for more criminals to diversify into because the chances of being caught are slim unless it hits certain specific criteria.

18. While Mr Clarke has pursued issues which appear in part to have arisen out of his own experience, the tribunal is satisfied that the detailed rebuttals of those points by COLP properly frames the issue facing the tribunal. The tribunal is wholly unconvinced by Mr Clarke's assertions of bad faith and manipulation/abuse of the system. COLP appears to be simply working within resource and organisational constraints to support police efforts to counter fraud.

19. The question for this tribunal is the balance of public interest in disclosure. The tribunal is satisfied that the exemption is engaged. The Information Commissioner on the evidence before the tribunal was correct to conclude that information on prioritisation would be actionable by criminals to organise their activities in a way which minimised the chances of investigation and detection. The balance of public interest is decisively made out. There is significant public information about the shortcomings of the system and the difficulties it faces. There are detailed analyses by various public bodies concerned with the question. Disclosure of the information would not in any meaningful way increase public understanding, however it would assist

criminals and would be likely to reduce the effectiveness of information gathering and so of intelligence analysis by the police.

20. The appeal is dismissed.

Signed Hughes

Judge of the First-tier Tribunal

Date: 8 March 2021