



Neutral citation number: [2023] UKFTT 692 (GRC)

Case Reference: EA/2022/0386

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

Heard on GRC - CVP: 22 August 2023.

Decision given on: 31 August 2023

Before:

**Tribunal Judge: Brian Kennedy KC.
Tribunal Member: Marion Saunders.
Tribunal Member: Paul Taylor.**

Between:

JAGDISH CHAND

and

THE INFORMATION COMMISSIONER

and

THE CROWN PROSECUTION SERVICE

First Respondent

Second Respondent

Representation:

For the Appellant: Jagdish Lal Chand as Litigant in Person.

For the First Respondent: Raphael Hogarth of Counsel -
in a written Response dated 25 January 2023.

For the Second Respondent: Jennifer Thelen of Counsel.

Decision: The appeal is Dismissed.

REASONS

Introduction:

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”) against the Commissioner’s decision notice dated 25 October 2022 with reference number IC- 18886-L6X2 (the “DN”), which is a matter of public record.

Factual Background to this Appeal:

2. Full details of the background to this appeal, the complainant’s request for information and the Commissioner’s decision are set out in the DN but on 24 January 2021, the Appellant made the following information request (the “Request”) to the Crown Prosecution Service (the “CPS”):

“With reference to the above subject, this is my Freedom of Information request, requesting to be provided all [sic] recorded information pertaining to the following 2 criminal convictions, as reported through the following 2 web links;

1. *In relation to the conviction of Dr Amitabh Kumar.*

<https://www.thetelegraphandargus.co.uk/news/11414370.doctor-molestedteenage-girl-on-bus-in-moment-of-madness-after-drinking-court-told/>

2. *In relation to the conviction of Brian Lord OBE.*

<https://www.bbc.co.uk/news/uk-england-gloucestershire-41503393>”

3. The first of those two news reports are an article of 16 August 2014 headlined *“Doctor molested teenage girl on bus in 'moment of madness' after drinking, court told”*. It states: *“Prosecutor Paul Ramsay told the court heard that on April 18 this year, Kumar had rubbed his foot up and down his victim's leg and rubbed the back of her neck with his hand, while both were on the top deck of a 617 service from Bradford Interchange”*.

4. The second of the two reports are an article of 4 October 2017 headlined “*Ex-GCHQ boss Brian Lord admits Truth or Dare assault*”. It indicates: “*Prosecutor Robert Duvall said: ‘During some party games the defendant placed his hand on the lady’s knee. It was not momentary. It was there for a significant time and caused her embarrassment and awkwardness.’-”*
5. On 23 February 2021, after some clarification on the scope of the request, the CPS responded to the Appellant. It confirmed that it held the requested information but refused to provide it, citing section 30(1)(c) FOIA and section 40(2) FOIA. In its letter it also provided the Appellant with some advice under section 16 FOIA. On the same day the CPS provided a Section 17 refusal notice alongside its letter (the “Refusal”), outlining its reasons for refusal in more detail. On 22 April 2021 the Appellant requested that the CPS conduct an internal review of its decision and provided submissions against the CPS’ decision to refuse the request. On 20 August 2021 the CPS provided the outcome of its internal review. It confirmed that it upheld the position taken in the initial refusal of the request, the Commissioner’s investigation, and the DN. On 18 July 2021 the Appellant wrote to the Commissioner to complain about how their request had been handled by the CPS. On the same day the Commissioner wrote to the CPS and asked that an internal review was provided within 10 working days. On 19 November 2021 the Appellant wrote back to the Commissioner and confirmed that he had received the internal review dated 20 August 2021 and was unhappy with the result of it. On 13 July 2022 the Commissioner began an investigation. He asked questions of the CPS in writing, to which the CPS responded.

The Legal Framework:

6. Section 30(1)(c) the FOIA (“section 30(1)(c)”) provides: “*Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of: - (c) any criminal proceedings with the authority has the power to conduct.*”
7. The phrase “*at any time*” means that information can be exempt under section 30(1)(c) if it relates to an ongoing, closed, or abandoned investigation:
8. The Commissioner’s Guidance - Investigations and Proceedings FOI Section 30 (the “Section 30 Guidance”); states at §§8-9. Section 30(1) is a class-based exemption,

which means there is no need to demonstrate harm or prejudice in order for the exemption to be engaged. The information must be held for the purpose of specific proceedings.

9. The CPS is a public authority with the power to conduct criminal proceedings: In the Section 30 Guidance at §§25; 27. Section 30 is a qualified exemption and is therefore subject to a public interest test. (*The CPS agrees with the analysis of section 30 set out in §§18-19 of the Commissioner’s Response.*) In summary, the key interests protected by section 30 include protecting witnesses and informants (including their confidentiality “*the data protection principles*” means the principles set out in ; –
 - (a) Article 5(1) of the UK GDPR, and -
 - (b) Section 34(1) of the Data Protection Act 2018, “*data subject*” - has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act) - “*personal data*” and “processing” have the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see sections 3(2), (4) and (14) of that Act). The UK GDPR” has the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(10) and (14) of that Act). In determining for the purposes of this section, whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of the information, Article 6(1) of the UK GDPR (*lawfulness*) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted.
10. Here, the relevant condition is contained in section 40(3)(a), which applies where the disclosure of the information to any member of the public would contravene any of the data protection principles set out in Article 5 of the General Data Protection Regulation (“GDPR”).
11. **Section 40(2) of the FOIA (“Section 40(2)”) provides an absolute exemption which is not subject to the public interest balancing test. [Section 2(3)(a) FOIA] The effect of Section 40(2) of FOIA is that a request for personal data of a third party may only be disclosed if it is compatible with the data protection principles.**
12. Personal data is defined broadly as: “ - any information relating to an identified or identifiable living individual.”- [Data Protection Act 2018 (“DPA 2018”), s.3(2)] Processing includes disclosure under FOIA.

13. **Article 5(1)** of the GDPR provides that personal data *“shall be processed lawfully, fairly and in a transparent manner in relation to the data subjects”*. This means that the processing – disclosure in response to the FOIA request – can only occur if it is lawful, fair, and transparent.
14. To be lawful, one of the conditions of lawful processing listed in Article 6(1) of the GDPR must apply to the processing. The potential application condition here is the *“- legitimate interest”* condition set out in Article 6(1)(f): *“- processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.”*
15. The Commissioner in his assessment has given guidance which states that relevant considerations include the possible consequences of disclosure on the individual, including what potential harm or distress disclosure may cause and the reasonable expectations of the individual.
16. The case law has established that to determine if disclosure is necessary for the purposes of legitimate interests three questions must be answered: (1) is the data controller or the third party to whom data are disclosed pursuing a legitimate interest or interests; (2) is the processing involved necessary for the purposes of those interests; and (3) is the processing unwarranted by reason of the prejudice to the legitimate interests, or rights and freedoms, of the data subject? Section 42: Legal Professional Privilege
17. **Section 42 of FOIA** (“Section 42”) provides:
“(1) Information in respect of which a claim to legal professional privilege ... could be maintained in legal proceedings is exempt information.”
18. **Section 42** is a qualified exemption. The public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP, in effect safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice. *DBERR v O’Brien and Information Commissioner [2009] EWHC 164.*

19. Section 38: Disclosure under FOIA is disclosure to the world at large, not just the Appellant. Thus, it must be assumed that the Information would enter the public domain. *(The CPS argues there has already been media reporting about both incidents. If further information were released, more media reporting is anticipated. If the Information were to enter the public domain, it could potentially re-traumatise the victims of these sexual assaults. These endangerments could also apply to those who were witnesses, or otherwise connected to, these proceedings. Here, the CPS also maintains that the public interest plainly favours maintaining the exemption. The CPS recognises the public interest in transparency and openness about the investigation and prosecution. But, on the other side of the scale, there is a very strong public interest in not endangering the mental health and safety of the victims, their families or other connected third persons. Maintaining the exemption would also maintain the integrity and effectiveness of the criminal justice system, insofar as there is an expectation that case files with private and confidential information are treated appropriately.)*

The Decision Notice:

20. By the DN, the Commissioner concluded that:

a. S.30(1)(c) was engaged by the request, because the information was held by the CPS for the purpose of criminal proceedings which it has power to conduct (namely, criminal proceedings in relation to the two cases identified above).

b. Considerations in favour of disclosure included (i) transparency in relation to CPS decision-making, and (iii) the need to increase public understanding and awareness thereof.

c. The chief consideration in favour of maintaining the exemption was the strong public interest in safeguarding the prosecution process. In particular, disclosure could (i) undermine the confidentiality of police-CPS communications and inhibit officials in freely justifying their thought processes when making decisions on criminal cases (including in relation to, for example, any weaknesses in a prosecution case), (ii) dissuade witnesses from assisting in future investigations, (iii) dissuade victims from coming forward.

d. In all the circumstances, given the importance of a robust prosecution function which protects the public and the risk that disclosure would adversely affect the quality of evidence obtained in criminal prosecutions and prejudice the conduct of those prosecutions, the public interest favoured maintaining the exemption in this case.

21. The Commissioner argues these points have been re-emphasised by this Tribunal since; *“In Public Prosecution Service for Northern Ireland v IC and John Collins EA/2010/0109, this Tribunal held that: “the public interest balancing exercise must take into account the need for prosecutors to have a 'safe space in which to make their decisions without fear of frank assessments being publicised after the event as to whether or not any particular case meets the threshold of there being a reasonable prospect of a successful prosecution. To erode such safe space in the circumstance of this case would be to undermine the independence of prosecution authorities. This would compromise the quality of decision-making. It could also deter witnesses from co-operating with police and prosecution authorities and could undermine (without good reason) public confidence in those authorities.” As the Tribunal further held (and as was endorsed in Wynn v IC and Serious Fraud Office (EA/2011/0185), “these factors in favour of maintaining the exemption attract very substantial weight”, such that “in order for disclosure to be ordered, public interest factors of at least equal weight must be adduced. A general interest in the transparency of a prosecution authority's decisions will not suffice. Something substantial and particular to this information is needed.”*
22. The Commissioner submits that the *“something substantial and particular”*, is not present in this case.

The Grounds of Appeal and Responses:

23. At §§1, 2 and 4 of the Grounds, the Appellant criticises the CPS's delay in dealing with his request, and the Commissioner's approach thereto. He accuses the CPS of a *“deliberate stone walling attempt”* and submits that the Commissioner's failure to consider this delay in the DN indicates bias on the Commissioner's part. The Commissioner argues in response; *“There was indeed delay in the CPS's handling of the request; the Commissioner accordingly asked the CPS to complete the Internal Review promptly in July 2021. However, this delay does not bear on whether balance of public interests favours disclosure in this case, and there is no basis for alleging bias on the Commissioner's part. Nor is any bias disclosed by the Commissioner's omission of certain details of the long chronology of this matter from the DN, as appears to be alleged at Grounds §4.”*
24. At §§5-6, the Appellant alleges that it was a breach of natural justice for the CPS to make representations to the Commissioner without such representations being shown to the Appellant. The Commissioner argues in Response: *“Procedural allegations such as*

this are not relevant to a full merits review but, in any event, any allegation of a breach of natural justice is denied. It is typical for the Commissioner to consider closed representations from public authorities in order better to understand the contents of the withheld information, just as this Tribunal hears closed submissions."

- 25.** At Grounds §§7-9, the Appellant argues that witnesses and others would not be deterred from assisting the CPS by disclosure of the withheld information, because witnesses make statements on the understanding that they may be "required" to give evidence at Court. The Commissioners' Response is that: *"This Tribunal has repeatedly found to the contrary, and (with respect) rightly. Notably, (i) not all police investigations result in prosecutions, (ii) not all witnesses who assist the police are asked to give evidence in Court, and (iii) not all witnesses who are asked to give evidence in Court are compelled to do so if they do not wish to do so. Witnesses may in many cases assist the police by giving a statement, which goes no further. Disclosure of the statements to the whole world in this case would, in the Commissioner's submission, risk deterring such witnesses in future."*
- 26.** At Grounds §§11-13, the Appellant relies on a statement by Dr Kumar that alleges various wrongdoing and failings by the CPS in his trial, including the falsification of evidence. The Appellant further alleges discrimination. The Commissioner Responds as follows: *" - a statement by a convicted defendant in a criminal trial that there were flaws in that trial does not give rise to a reasonable suspicion of wrongdoing capable of substantially supporting the case for disclosure. In the absence of any evidence from an independent and/or expert third party, or of public concern, that the CPS acted improperly in the course of a trial, these allegations do not substantially affect the public interest balance. The Commissioner further notes that a criminal trial is itself a public process, subject to public scrutiny, and would have provided a forum in which for the public (and Dr Kumar and/or his representatives) to scrutinise the CPS's conduct of the case."*
- 27.** At Grounds §14 - on, amongst some more general points, the Appellant emphasises the importance of the CPS's role and the importance of transparency in relation to its functions. The Commissioner submits in Response: *"The CPS indeed has significant powers, and the Commissioner acknowledges the public interest in transparency. However, that public interest must be weighed against the weighty public interests in maintaining the*

exemption, repeatedly articulated by this Tribunal, set out above, and in particular, the powerful public interest in preserving an effective prosecution function”.

- 28.** By way of a more general Response, but not exclusive to other matters raised, the Commissioner argues that: *“There was indeed delay in the CPS’s handling of the request; the Commissioner accordingly asked the CPS to complete the Internal Review promptly in July 2021. However, this delay does not bear on whether balance of public interests favours disclosure in this case, and there is no basis for alleging bias on the Commissioner’s part. Nor is any bias disclosed by the Commissioner’s omission of certain details of the long chronology of this matter from the DN, as appears to be alleged at Grounds §4.”*
- 29.** The CPS agrees with the Commissioner that the issue of delay is not engaged on appeal, and that there is no material basis, in the Notice of Appeal, which gives rise to a claim for bias on the part of the Commissioner. The CPS does accept there was a delay in responding to the Appellant’s request or an internal review.
- 30.** On opportunity to make Representations, the CPS argue that the Commissioner, and this Tribunal, have established procedures for considering CLOSED materials which afford fairness to both parties, by ensuring the Commissioner (and ultimately this Tribunal) is properly informed, whilst at the same time ensuring that the purpose of the appeal is not thwarted: see e.g., *Browning v Information Commissioner [2013] UKUT 236 (AAC)*. In any event, this Tribunal is charged with, and has the tools for, ensuring fairness in the current process, which is a full-merits appeal.
- 31.** On prosecution witness evidence, the CPS agree with the Commissioner that there is no basis to infer that by providing a statement, a witness accepts that he or she may be required to give evidence at court and therefore has a limited expectation of confidentiality in the document. Rather, there are many steps between giving a statement and providing evidence in court, some of which require the intervention of the court. Overall, there remains a strong public interest in ensuring the ongoing confidentiality of statements made for the purpose of a criminal prosecution. The prejudice that can result from the disclosure of witness statements has been recognised at the highest levels: see *R v Police Complaints Authority, ex p. Green [2004] 1 WLR*

725 at [73], where Lord Rodger sets out the prejudice that can result from the disclosure of witness statements, and the public interest in nondisclosure.

32. On Flaws in the trial process/discrimination, the CPS argue that no independent evidence of a flawed prosecution has been presented. The CPS agrees with the submissions of the Commissioner and maintains that the proper course, if Dr Kumar had concerns about the conduct of his prosecution and/or trial, was for him to appeal. FOIA. the CPS argue, should not be used to circumvent, (*or attempt to circumvent*) the appellate process. Indeed, that is precisely the type of conduct section 30(1)(c) is designed to prevent.
33. On role of the CPS, their argument (*which the Tribunal find compelling*) is that their role is in ensuring a fair and effective public prosecution service which points in favour of maintaining the exemption, rather than disclosure.
34. There is a strong public interest in maintaining the exemption, for the reasons already provided. The Grounds of Appeal, they argue, do not identify any public interest in disclosure. In addition, within their response the CPS also claimed sections 38(1) (health and safety) and 42(1) (legal professional privilege).
35. The Respondents have invited the Tribunal to dismiss the appeal.

Appellants Reply to Respondents Responses:

36. On 24 March 2023 the Appellant provided extensive detailed Replies to the Response to the Grounds of Appeal from each of the Respondents.
 - a) In reply to the Commissioners Response, the Appellant repeated the import of his earlier submissions and argued about significant misrepresentations on the facts by the Commissioner. He emphasised again, the balance of the public interest test and his important arguments for the grounds that weighed heavily in favour of disclosure.
 - b) In reply to the CPS Response to the Grounds of appeal he referred not only to misrepresentations on the facts but lying in the representations on behalf of the CPS.

The Appellant added complaints about the “*freedom of impunity*” claimed by the CPS in the name of “*safe space*” and complained that he had not been privy to important information and/or exchanges between the Respondents. He argued that disclosure would present no risk to anyone and argued he was at a great disadvantage because the Respondents had engaged (at significant expense) private lawyers to contest his appeal.

The Hearing- 22 August 2023:

37. The Tribunal welcomed the Appellant who attended by way of telephone connection throughout. The Tribunal explained that we were all grateful for his extensive submissions, that we had read all the papers thoroughly, including witness statements submitted to support his appeal and we explained the procedure and proposed running order for the appeal. The Appellant took no issue with the proposed process and responded to invitations to ask questions and/or make further submissions throughout by declining to do so, until the closing submissions were sought. At the outset, the Tribunal invited the CPS to reply to the Appellants arguments including those set out in his detailed submissions dated 24 March 2023 referred to at § [36] above. Ms. Thelen, on behalf of the CPS, made the following comprehensive submissions;

- (1) *To the extent challenges to issues around the internal review, the Commissioner’s role, and bias of and collusion between the Respondents, I note this is a full merits review, which means this Tribunal will approach all the issues afresh. Thus, by way of example, the allegations around the CPS’s delay in responding to the request for internal review do not affect the ability of the Appellant to put his case fully, as to why the information he seeks should be disclosed, to the Tribunal.*
- (2) *Next, the Appellant says that the allegations he makes around the criminality of the CPS are so serious, that they mandate disclosure. Presumably, the way he puts his point is that he says these issues come down so strongly in favour of public disclosure, that they outweigh any concerns raised by the ICO and the CPS. As to this:*
 - a. *First, the Appellant himself has supplied no evidence of improper conduct – just made allegations.*

- b. *Dr Kumar's witness statement does not contain evidence of improper conduct.*
- c. *Further, the Tribunal has been given a statement by a convicted defendant that there were flaws in his criminal trial; it merits very little weight.*
- d. *More than a mere allegation is required to weigh in on the side of public disclosure. (The Tribunal will of course be able to look at the material and make a judgment if on its face it raises issues which should be disclosed, in the public interest).*
- e. *The withheld information concerns two very different cases – which brings into question the very basis on which the information is sought.*
- f. *Further, and as the Tribunal has recognised, the role of this tribunal is not to determine parallel allegations.*

(3) Witness Statements:

- a. *The Appellant argues that witnesses should expect their statements to be made public.*
- b. *The CPS's clear case is that to release case information may dissuade witnesses from assisting in future investigations.*
- c. *Witnesses are a vital part of the prosecution process, and it is crucial they are able to approach the investigative body and provide statements without fear that they may one day be placed into the public domain – save through the court process.*
- d. *Witnesses do make a statement on the understanding they may be required to attend court.*
- e. *But this is very different than full disclosure of their statement to the world by means of FOIA.*

(4) To the extent the Appellant says that because these two cases did not proceed to trial, the concerns raised by the CPS about the trial process are not live, that is not accepted. The CPS relies on a chilling effect, which means that disclosure here, can have an impact in future cases and in future trials.

(5) *Personal Information: the Appellant says he is not seeking disclosure of any personal information, and that any personal information can be redacted. [B12/¶16]*

a. Even if redactions were applied, personal information would remain.

(6) *On section 38, the Appellant challenges the causal relationship between the potential disclosure and endangerment.*

a. That causal relationship is real, and readily apparent.

b. Disclosure under FOIA is to the world at large, not just the Appellant.

c. It has to be assumed that Information would enter the public domain.

d. There has already been media reporting – stands to reason there would be more.

e. Should the information enter the public domain, it could potentially re-traumatise the victims.

f. Strong public interest here in not endangering the mental health and safety of the victims, their families or other connected third persons. Or indeed the defendants.

(7) *On section 42, it is quite clear that the CPS and the police have an established lawyer/client relationship.*

38. Ms. Thelen then called Ms. Kelly Byott to give her evidence as per her statement (dated 28 March 2023) in chief in Open session (see Page I 105 of the Open Bundle). Ms. Byott has been employed by the Crown Prosecution Service (“CPS”) for 21 years and is currently working as the Deputy Head of the Information Access Team (“IAT”) of the CPS and is based in London at CPS HQ. She been in this role since 2018. She is duly authorised to make her statement on behalf of the CPS. In preparing her statement she has discussed the facts in it with relevant colleagues in IAT. She confirmed so far as the contents of her Witness Statement is concerned, they are within her own personal knowledge, they are true, otherwise they are true to the best of her knowledge, information, and belief and confirmed she was aware of the importance of telling the truth at the Tribunal hearing. The Appellant was invited to ask questions of this witness and declined to ask any.

39. The Tribunal then explained to the Appellant the need for a Closed session where the Tribunal would ask relevant questions of Ms. Kelly Byott on the material issues before us. The Appellant confirmed he understood the need for a closed session. At the conclusion of the Closed session the Tribunal reverted to Open Session and the Appellant returned to the hearing and participated at least by way of responding to questions put to him by stating he had nothing to say at that point. Subsequently Ms. Thelen provided to the Tribunal and the Appellant the following gist of the Closed Proceedings;

1. *Ms. Byott was asked questions in CLOSED by counsel to the CPS, Ms. Thelen, as well as by members of the Tribunal. The questions concerned the contents of the two CLOSED exhibits – KB1 and KB2, the Kumar and Lord prosecution case files respectively.*
2. *Ms. Byott explained the process of how the CPS assessed which document fell within which exemption. This was done by reference to a CLOSED index, which detailed the documents held in the file by reference to the “Lead Exemption” and the “Additional Exemption”. The OPEN version of these documents is at I/125-127.*
3. *Ms. Byott made four minor corrections to the CLOSED version of the exemptions. The corrections were in terms of the additional exemptions upon which the CPS placed reliance.*
4. *Ms. Byott explained that Section 30 was the exemption which was common to all of the withheld documents. Additionally, with respect to some documents, reliance was placed on sections 38, 40 and 42.*
5. *Ms. Byott explained the documents to which, in her view, LPP applied, and outlined the basis on which the exemption (section 42) was claimed.*
6. *Ms. Byott explained the CPS’ approach to reliance on section 38. This was most evidence with respect to the witness statement.*
7. *Ms. Byott explained the CPS’ approach to reliance on section 40. She was asked if this could be addressed by way of redaction, as suggested by the Appellant. She explained that even if material such as names and addresses were redacted,*

personal, identifying information would still be present. A good example of this is that the identifying information of the two defendants would still be available.

8. *Ms. Byott was asked about the issue raised in Dr Kumar's witness statement at C/169-170 – the dates of the interview. She confirmed that there was no written endorsement which in her view could or would indicate, on the face of the documents contained in either KB1 or KB2, indicate impropriety on the part of the CPS. She also confirmed that many of the documents contained in each file would have been available to the defendants involved as part of the prosecution. They would have had, available to them, opportunities to take recourse had they considered that there had been unfairness in their individual cases.*
9. *Ms. Byott was asked if witnesses were told anything at the time of giving their statements about confidentiality. She was unable to answer that question.*
10. *In the break, the CPS has considered the question asked further, and can refer the Tribunal to the Witness Charter. Page 9 addresses the issue of confidentiality.*

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/264627/witness-charter-nov13.pdf

40. Ms. Thelen then made her final submissions to the Tribunal which largely reflected those as set out in her written Response dated 2 February 2023, which she had presented on behalf of the CPS and as set out at § [37] above. The real issue, she submitted, was the Public Interest Test and while the CPS accept the points in favour of disclosure made by the Appellant, she argued again that the strength in the Public Interest, by far lay in favour in non-disclosure.
41. The Appellant was invited to make his closing submissions and proceeded to read out a prepared written statement in which he announced, for the first time at the hearing that he was refusing to take part because of bias on the part of the Tribunal for refusing to hear witness evidence from Dr Kumar. The Tribunal thanked the Appellant for attending and for the participation he had evidently taken part in.

Discussion:

42. The Tribunal were somewhat taken aback at the last-minute withdrawal of the Appellants' participation in the appeal. In his final written requests to the Tribunal in his reference to Dr Kumar as a witness he used the term 'passive' witness which could be construed as being an observer of the hearing which of course was permissible and by that time both of the 'witness' statements the Appellant had provided had been included in the bundle. Subsequently, he made an extremely late indication of wishing to call this witness. No formal proper application was ever proffered. At this hearing the Tribunal indicated that we had read all written statements supplied and confirmed we find nothing of material value to the issues before us in Dr Kumar's written statement. It was disappointing that the Appellant failed to take the opportunity to address the Tribunal on the important issues before us at the close of the evidence and the hearing. However, there can be no doubt he has made his comprehensive submissions at length and in depth from the outset and right up to the days before this hearing. If we had known in advance that he was going to refuse to partake in the hearing, much time and resources could have been saved by having a decision made on the papers.
43. The Tribunal acknowledge and thank Ms. Thelen for her comprehensive and what we found to be compelling submissions and accept and adopt her 7 succinct points (see § [37] above) which address the most pertinent issues before us. We also welcome the prompt answer to our query on the issue of confidentiality and the link she provided to the advice given to CPS witnesses which very clearly on page 9 gives the expectation that information provided for one purpose will not be used for another without permission. See also therein: Standard 5: After a statement is given. *"Once you have signed your statement, the content cannot be changed. However, if you do need to alter or add anything later you can make an additional statement. Unless it is relevant to the case, your personal details will not be shared beyond criminal justice agencies and relevant support organisations. You will be asked for your consent for this information to be shared more widely unless it is a legal requirement. Personal details about defence witnesses have to be shared with the defendant but they will only be shared more widely with your consent."* Having reviewed all the closed material and with the assistance of the witness, Kell Byott, the Tribunal can confirm that there does not appear to be anything which could be considered as a cause for concern or indicate a Flawed prosecution as envisaged or alleged by the

Appellant. Further that because of the differing nature of the 2 cases (*subject matter of the requests*) the Tribunal find it is impossible to draw any conclusions that they have not been dealt with equitably.

44. Ms. Thelen made further submissions on redaction and explained that it is not only names and addresses (*of both witnesses and defendants*) which constitute personal information, as the information would be released to the public there would almost certainly be something that could be used to identify the individuals concerned particularly as there is already some information in the public domain. (*The Tribunal also note also there must be a degree of expectation of privacy on the part of defendants and their families*).
45. To the extent that the Appellant challenges issues around the internal review, the Commissioners' role, and bias of and collusion between the Respondents, the Tribunal note this is a full merits review, which means this Tribunal will approach all the issues afresh. Thus, by way of example, the allegations around the Second Defendants' delay in responding to the request for internal review do not affect the ability of the Appellant to put his case fully, as to why the information he seeks should be disclosed, to the Tribunal. It was at all material times, including throughout the hearing of the appeal on 22 August 2023 which he attended, open for him to do so. However, it cannot be denied the Appellant has made voluminous, extensive and far-reaching detailed submissions on his concerns, both general and specific prior to the appeal hearing of this appeal and the Tribunal panel members have read them all thoroughly.
46. The Tribunal note that the Appellant says that the allegations he makes around the criminality of the CPS are so serious, that they mandate disclosure. We understand that he says these issues come down so strongly in favour of public disclosure, that they outweigh any concerns raised by the Commissioner and the CPS. The Tribunal observe as follows;
 - a. First, the Appellant himself has supplied no evidence of improper conduct – he has just made bare allegations.
 - b. Dr Kumar's witness statement does not contain credible material or independent evidence in support of an allegation of improper conduct.

- c. The Tribunal have been given a statement by a convicted defendant that there were flaws in his criminal trial which merits very little weight.
- d. More than a mere allegation is required to weigh in on the side of public disclosure.

“The Tribunal will of course be able to look at the material yourself and make a judgment if on its face it raises issues which should be disclosed, in the public interest.”

- e. The withheld information concerns two very different cases – which brings into question the very basis on which the information is sought.
- f. Further, and as the Tribunal has recognised, the role of this tribunal is not to determine parallel allegations.

47. On CPS witness statements the Tribunal find ;

- a. The Appellant argues that witnesses should expect their statements to be made public.
- b. The CPS case is that to release case information may dissuade witnesses from assisting in future investigations.
- c. Witnesses are a vital part of the prosecution process, and it is crucial they are able to approach the investigative body and provide statements without fear that they may one day be placed into the public domain – save through the court process.
- d. Witnesses do make a statement on the understanding they may be compelled to attend court.
- e. However, all this is very different than full disclosure of their statement to the world by means of the FOIA.

48. To the extent the Appellant says that because these two cases did not proceed to trial, the concerns raised by the CPS about the trial process are not live – the Tribunal do not accept this. The CPS relies on a chilling effect, which means that disclosure here, can have an impact in future cases and in future trials and the Tribunal acknowledge

the veracity of this premise on the part of the CPS and indeed it is more widely recognised in precedents.

- 49.** On personal Information: The Appellant says he is not seeking disclosure of any personal information, and that any personal information can be redacted. [B12/¶1 On the evidence before us, the Tribunal accept without doubt the premise that even if redactions were applied, personal information would remain because of the unique circumstances of both cases.
- 50.** On section 38, the Appellant challenges the causal relationship between the potential disclosure and endangerment. The Tribunal rejects the Appellants concerns and make our observations and findings on these challenges as follows;
- a. That the causal relationship is real, and readily apparent.
 - b. Disclosure under FOIA is to the world at large, not just the Appellant.
 - c. It has to be assumed that Information would enter the public domain.
 - d. There has already been media reporting – it therefore stands to reason there could or would be more.
 - e. Should the information enter the public domain, it would potentially re-traumatise the victims.
 - f. There is a strong public interest here in not endangering the mental health and safety of the victims, their families or other connected third persons. - or indeed including the defendants.
- 51.** On section 42, the Tribunal are of the view that it is quite clear that the CPS and the police have an established and recognised lawyer/client relationship. This has not been challenged or rebutted in any material way.
- 52.** Without prejudice to the generality of the arguments against disclosure the Tribunal consider the following extracts from the Open Bundle (“OB”) to be highly relevant and decisive;
- OB, p.29, .4.1 (Second Respondent's Response) - Applicability of s.30(1)(c) The Tribunal are of the view that the appeal is misconceived. Section 30(1)(c) of FOIA, which applies to information which has been held for the purposes of criminal

proceedings, is designed to exempt precisely the sort of information sought here. There is a clear and coherent rationale for reliance on section 30(1)(c) in these circumstances, and no factor has been identified which weighs in any real way on the side of the public interest in disclosing the information.

- OB, p.4, §§ 21 & 22 (DN) - Public Interest factors for disclosure; The CPS explained that it is keen to demonstrate transparency in relation to its decision-making processes. In relation to the prosecution process, it publishes the Code for Crown Prosecutors as well as a range of legal guidance documents on its website. The CPS stated that in considering the merits of this request due regard was given to the need to increase public understanding and awareness of the decision-making process.
- OB, p.37, §33.3 (Second Respondent's Response) - Public Interest factors against disclosure - Witness evidence. The CPS agrees with the Commissioner that there is no basis to infer that by agreeing to provide a statement, a witness accepts that he or she may be required to give evidence at court and therefore has a limited expectation of confidentiality in the document. Rather, there are many steps between giving a statement and providing evidence in court, some of which require the intervention of the court. Overall, there remains a strong public interest in ensuring the ongoing confidentiality of statements made for the purpose of a criminal prosecution. The prejudice that can result from the disclosure of witness statements has been recognised at the highest levels: see *R v Police Complaints Authority, ex p. Green* [2004] 1WLR 725 at [73], where Lord Rodger sets out the prejudice that can result from the disclosure of witness statements, and the public interest in non-disclosure.
- OB, p.37, § 33.4 (Second Respondent's Response) - Public Interest factors against disclosure. Flaws in the trial process/discrimination. No independent material evidence of a flawed prosecution has been presented in this appeal. The CPS agrees with the submissions of the Commissioner and maintains that the proper course, if Dr Kumar had concerns about the conduct of his prosecution and/or trial, was for him to appeal. FOIA should not be used to circumvent the appellate process. Indeed, that is precisely the type of conduct section 30(1)(c) is designed to prevent. The Tribunal agrees.
- OB., p.42, point 7 (Appellant's Response to the Second Respondent's Response) - Public Interest factors against disclosure. The Tribunal accept that there is an

overwhelming public interest in disclosing whatever purported “frank and free” communications were exchanged in order to justify such serious criminality. However, having read the disputed information, the Tribunal find nothing within the closed bundle that appears to be an attempt to justify criminality of any sort and we find no flaws in the prosecution process.

- OB, p.6, § 28 (DN) - Public interest balance; The Commissioner also has concerns that disclosing information considered as part of a criminal investigation, such as witness statements could create a perception among the wider public that sensitive information about criminal investigations may be disclosed to the world at large after a trial has been completed. He considers that there is a real chance this may deter people (including witnesses, victims, and suspects) from coming forward in the first place and from co-operating with prosecution authorities, if they are concerned that following a trial any content of their statements may be disclosed to the world at large under FOIA. The Commissioner is concerned that this may adversely affect the quality of the evidence obtained during investigations, which would, in turn, prejudice the successful conduct of criminal proceedings by the CPS. The Tribunal accept and endorse the veracity of these concerns and the significant weight arising in the public interest therefore in non-disclosure of the withheld information.
- OB, p.23, §19 (IC's Response) - Public Interest Balance; ...*In Public Prosecution Service for Northern Ireland v IC and John Collins EA/2010/0109*, this Tribunal held that “the public interest balancing exercise must take into account the need for prosecutors to have a 'safe space in which to make their decisions without fear of frank assessments being publicised after the event as to whether or not any particular case meets the threshold of there being a reasonable prospect of a successful prosecution. To erode such safe space in the circumstance of this case would be to undermine the independence of prosecution authorities. This would compromise the quality of decision-making. It could also deter witnesses from co-operating with police and prosecution authorities and could undermine (without good reason) public confidence in those authorities.” As the Tribunal further held (and as was endorsed in *Wynn v IC and Serious Fraud Office (EA/2011/0185)*, “these factors in favour of maintaining the exemption attract very substantial weight”, such that “in order for disclosure to be ordered, public interest factors of at least equal weight must be adduced. A

general interest in the transparency of a prosecution authority's decisions will not suffice. Something substantial and particular to this information is needed."

- OB, p.23, § 21 (IC's Response) The Commissioner submits that the "something substantial and particular" to shift the public interest from being in non-disclosure is not present in this case.... After careful consideration of the voluminous submissions before us in this appeal and for all the above reasons this Tribunal accept and adopt this conclusion.

Conclusion:

53. The Tribunal acknowledge that each case must be determined on its merits. Having considered all the evidence before us afresh, we have decided the appeal must fail. We find that S.30(1)(c) of the FOIA was engaged by the request for the reasons as set out in the DN and referred to in § [20] above. For all the reasons above we unanimously find that the Public Interest test weighs significantly and undoubtedly in favour of maintaining the exemption. It follows therefore also that we also find there is no error of Law within the DN or in any discretion exercised by the Commissioner in his reasoning therein.
54. For the avoidance of doubt, and if we are wrong in finding section30(1)(c) was engaged and the Public Interest favours releasing the information, we find for the reasons set out above that the CPS can properly rely on the additional exemptions claimed by them (sections 40 (2); 42 and 38 where applicable as argued by the CPS (and see §§[10] – [19] above). Again, and for the same reasons as set out generally above, where applicable (*i.e., the qualified exemptions relied upon*), we find the public interest favours maintaining the exemptions relied upon by the CPS.
55. Accordingly, we refuse the appeal.

Brian Kennedy KC

26 August 2023.