



Neutral citation number: [2024] UKFTT 64 (GRC)

Case Reference: EA/2023/0445

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

**Heard: On the papers
Heard on: 22 November 2023
Date of Decision: 19 January 2024
Promulgated on: 22 January 2024**

Before

**TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER ROSALIND TATAM
TRIBUNAL MEMBER KATE GRIMLEY EVANS**

Between

THE CHIEF CONSTABLE OF SOUTH YORKSHIRE POLICE

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) ROB WAUGH**

Respondents

Decision: The appeal is allowed.

Substituted Decision Notice:

Organisation: The Chief Constable of South Yorkshire Police

Complainant: Mr Rob Waugh

The Substitute Decision - IC-142505-Z5P6

1. For the reasons set out below the public authority was entitled to rely on section 38(1) of the Freedom of Information Act 2000 to withhold information requested in part 3 of the request dated 22 July 2021.
2. The public authority is not required to take any steps.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-142505-Z5P6 of 22 November 2022 which held that the Chief Constable of South Yorkshire Police (SYP) was not entitled to rely on sections 38 and 42 of the Freedom of Information Act 2000 (FOIA) to withhold the requested information. The Commissioner required SYP to disclose the information described in part 3 of the request.
2. The tribunal apologises for the delay in promulgation. The tribunal considered it in the interests of justice to allow the appellant and the Commissioner to make submissions on whether parts of the reasoning should appear in a closed annex. The decision was therefore sent to the appellant and the Commissioner under embargo. The appellant made submissions dated 19 January 2024.
3. The appellant made submissions that sections of what are now paragraphs 111, 113, 126.2 and 126.4 should appear in a closed annex to the decision, on the basis that those sections contain highly personal potential harms that could befall the claimants if the disputed information were to be disclosed and reveals private medical histories of individuals who could be identified by members of the public (or, at the least, risks the public speculating about the private medical histories of identifiable Hillsborough victims) and risks stigmatisation and embarrassment.
4. The tribunal is satisfied that it is necessary for most of the information highlighted by the appellant to appear in a closed annex. There is limited impact on open justice and a real risk of harm were that information to be published. Without those sections the basis of the decision is still clear to Mr. Waugh and to the public. Some parts of the information highlighted by the appellant were, in the tribunal's view, anodyne and have been included in the open decision.
5. The open decision accordingly contains some redactions made on the above basis. The closed annex to the decision contains those redacted sections. Other than the addition of paragraphs 2-5 and those redactions, this decision is identical to the one sent out under embargo.

Factual background to the appeal

6. This background is taken largely from SYP's grounds of appeal.
7. The High Court has issued a Group Litigation Order in respect of all claims being brought for misfeasance in public office against SYP and the West Midlands Police in relation to their actions following the Hillsborough tragedy in April 1989. The litigation is known as the Hillsborough Victims' Misfeasance Litigation.
8. The issues that were to be determined in the misfeasance litigation were:
 - 8.1. Whether SYP and/or West Midlands Police officers deliberately concealed the true circumstances of the disaster to deflect blame from SYP officers for the deaths and injuries, and to avoid criminal and civil liability and public censure in relation to the part played by the actions and inactions of police officers in the events.
 - 8.2. Whether SYP and/or West Midlands Police set out to establish a false narrative of the events leading up to the tragedy and the causes of the deaths including by suppressing the truth and setting out to blame the Liverpool FC supporters by deliberately manipulating evidence and ignoring or marginalising lines of inquiry and investigations that suggested/had the potential to suggest fault on the part of SYP officers.
 - 8.3. Whether the false narrative thus promulgated was then promulgated by SYP to inquiries and investigations and in the public domain.
9. To deal with those claims the parties agreed, in about June 2021, the Hillsborough Victim's Misfeasance Compensation Scheme ("the Scheme") which is a voluntary form of Alternative Dispute Resolution intended to provide a fair, just, efficient, proportionate and cost-effective settlement of the claims.
10. As of 15 July 2022, SYP had received 489 claims and had settled 424. SYP had also received a small number of civil claims for pain suffering and loss of amenity/negligence. The first claim through the Scheme was settled in May 2021 and the most recent claim at the relevant time had settled in July 2022. A small number of other civil claims had settled between 2020 and 2021.
11. In the minutes of a meeting of the Public Accountability Board on 28 January 2020 the Office of the Police and Crime Commissioner (OPCC) provided a forecast of estimated 'legacy costs' SYP up to 2023/2024. This included estimates of the costs expected to arise from civil claims arising from the Hillsborough Disaster. In a response to a FOIA request dated 11 March 2020, the OPCC confirmed that the figures for such costs were for the financial years 2020-2021 to 2023-2024.
12. SYP's published statement of accounts contains the total cost related to the Hillsborough Disaster incurred for each financial year, including for example, legal

and damages costs, disbursements, staffing and special grant funding. The figures also include provision for damages and legal costs where these could be quantified with material accuracy. The figures do not contain the overall compensation figure.

Request and response

13. The claimant made the following request for information on 22 July 2021. Only part 3 of the request remains in issue in this appeal, although the other parts of the request have been included here for context:

“Further to the response from last year ... and the recent annual accounts which seem to show much lower costs than expected I would like to make a request for some specific information.

Please note, I am sending the request to SYPCC [South Yorkshire Police and Crime Commissioner] and South Yorkshire Police as it maybe that only one of the bodies holds some of the specific information requested.

Clearly, if one body holds all the relevant information I would be happy for that body only to respond. That body is possibly more likely to be SYPCC given the final question below but I am happy to receive two separate responses if that's how the information is held.

1. Please provide the number of claims received against SYP for misfeasance in public office under what I understand is called the 'Hillsborough Victims' Misfeasance Litigation' group action begun in 2015. (If there are separate civil claims relating to Hillsborough since 2015, I would be grateful if you would identify what these are for and how many have been received)
2. Please provide the number of claims so far settled, identifying when the first settlement was made and the most recent.
3. Please provide the total amount so far paid out in compensation.
4. Please provide the total amount paid to any outside solicitors and/or barristers working on behalf of SYP to defend or respond to the claims.
5. Please identify the solicitors and/or barristers concerned.
6. Finally, I would be grateful if you could provide any updated information of the type provided in the response in March, which set out expected legacy costs over the coming years.

This may now reach a further year beyond 2023/24, if available”.

14. SYP did not respond to the request and a decision notice was issued by the Commissioner on 12 October 2021 requiring SYP to issue a substantive response.
15. SYP responded on 16 November 2021 refusing to provide the information relying on sections 36(2)(b)(i)(ii) & (c), 38(1), 40(2), 41, 42(1), 43(2) and 44(1)(a) FOIA. SYP upheld their position on internal review on 24 November 2021.
16. In the course of the Commissioner's investigation the Commissioner advised SYP and the OPCC to provide separate responses to the request.
17. SYP provided a revised response dated 19 August 2022. SYP provided some information in relation to part 1 and 2 of the request and parts 4 and 5. SYP stated that the information requested in part 6 was held by the OPCC. They withheld the information requested in part 3 of the request under section 40(2) (personal information) and section 38 (health and safety) FOIA. At a later stage SYP indicated that it also relied on section 42 (legal professional privilege) FOIA in relation to part 3.
18. We have not seen the relevant correspondence, but the Commissioner records in the decision notice that Mr. Waugh indicated that if SYP were to disclose the total sum for part (3) of his request (i.e. with no further breakdown) the case could be informally resolved. SYP declined to do so, maintaining reliance on the exemptions cited. No informal resolution was reached. As a result of this correspondence the Commissioner limited the scope of her decision notice to part (3) of the request and this appeal is accordingly so limited.

Decision notice

19. In a decision notice dated 22 November 2022. the Commissioner concluded that SYP were not entitled to rely on sections 38, 40(2) or 42 to withhold the information requested in part 3 of the request. The Commissioner required no steps.

Section 40 – personal information

20. The Commissioner concluded that the information was not personal information. This aspect of the decision is not challenged in this appeal.

Section 38 – health and safety

21. The Commissioner stated that the OPCC had previously provided some monetary information to the complainant. The Commissioner would expect that, were there any realistic risk of endangerment to any individual's physical or mental health, SYP would have been able to evidence this after that information had been placed into the public domain via FOIA. Whilst the OPCC is a separate public authority, the Commissioner is aware SYP have liaised closely with the OPCC over these requests and he would have expected any such evidence to have been shared. No

actual evidence of any endangerment resulting from the previous disclosure has been presented to the Commissioner.

22. SYP had drawn the Commissioner's attention to a decision notice where he found that section 38 was engaged in relation to compensation payments. In that case, the details being sought related to the survivors of Child Sexual Exploitation, and the Commissioner did not consider that a direct parallel could be drawn between the information being sought. In any event, each request is considered on a case-by-case basis.
23. Having considered the withheld information, i.e. a monetary figure paid to an unknown number of people, the Commissioner did not accept that SYP had demonstrated that endangerment would occur through its disclosure. The Commissioner concluded that section 38 was not engaged.

Section 42- legal professional privilege

24. The Commissioner concluded that disclosure of an overall amount of compensation would not breach legal professional privilege.

Grounds of Appeal

25. The Grounds of Appeal are:

- 25.1. The Commissioner's decision that the section 38 exemption did not apply was wrong in law and an impermissible exercise of discretion in that it failed to recognise and give appropriate weight to the logical connection between the release of the information and the risk of harm to the mental health of the claimants given the likely press interest.
- 25.2. The Commissioner's conclusions that the section 42 exemption was not engaged were wrong in law and an impermissible exercise of discretion.

Ground 1 - section 38

26. SYP argues that the decision was flawed because it focused solely upon whether SYP had provided evidence that the previous OPCC disclosure of estimated legacy costs had caused some harm.
27. It is asserted that the Commissioner erred in requiring SYP to produce 'actual evidence', which set the bar for the application of section 38 too high.
28. It is argued that the Commissioner failed to engage properly or at all with SYP's key submission that, given the nature of the Hillsborough tragedy and the allegations made by the claimants against SYP, the inevitable reopening of matters and press comment would likely harm the already psychologically vulnerable

claimants. Had the Commissioner properly engaged with that argument it is submitted that it would have been clear that there was a logical connection between the release of the information and a risk of harm to traumatised and vulnerable claimants.

29. It is submitted that this is even more apparent in the light of new evidence relied on by YSP in the form of letters from the claimants' solicitors and a psychiatric report to be obtained.
30. YSP submit that Commissioner was wrong to distinguish the present appeal from the Commissioner's decision in IC-114836-D2X6 (the Rotherham CSE case).
31. Had the Commissioner carried out the public interest test, it is submitted that he would have found that the balance lay in favour of non-disclosure.

Ground 2 – section 42

32. The Commissioner accepted that, had the request been for individual terms of settlement, this would have been held in individual case files and would be likely to engage the exemption. YSP submit that the rationale for applying legal professional applies as much to the combined figure as to any individual figure. Each figure was arrived at because of privileged legal advice, the consideration of confidential and without prejudice medical evidence and through privileged negotiations between the parties. The privilege does not evaporate simply because a combined figure is requested.
33. It is submitted that if it were possible to estimate the individual awards the overall figure would be subject to section 42. The Commissioner failed to appreciate that such an estimation is possible and/or that it is likely that a more accurate estimate may be possible in the future.

The Commissioner's response

Section 38

34. The Commissioner accepts that it is legitimate to consider that a risk of the relevant harm is likely to eventuate even where there is no direct evidence of that harm, where the feared harm flows logically from disclosure. The Commissioner also acknowledges that it will often be difficult for public authorities to provide definitive evidence that endangerment (or prejudice) would occur in the event of disclosure given the predictive nature of the exemption.
35. The Commissioner argues that in this instance there is a clear distinction between the disclosure of individual settlement figures attributable to identifiable individuals, and the disclosure of a total figure not attributable to any specific

individual. The Commissioner remains unconvinced that the disclosure of a total figure would lead to anything more than distress or worry.

36. The Commissioner maintains that it was relevant to consider the OPCC disclosure as, even if it were to not have reached wider public awareness, a conscious decision was still made that the figure could be released under FOIA. This, the Commissioner submits, is indicative of the OPCC not considering such disclosure to be likely to endanger the mental health of any individual, or at least that the public interest favours the disclosure of the expected sums involved.
37. The present matter is distinguishable from IC-114836-D2X6 as that matter involved the disclosure of individual payments, and the arguments concerning re-opening matters ought to be seen in that context. In any event decision notices are not binding on the Commissioner or the Tribunal.
38. The Commissioner notes the views of the solicitors representing the claimants. The Commissioner accepts that there would be expectations of confidentiality and privacy in respect of the individual claims. It is the total figure that the Commissioner remains sceptical of with regards to the consequences of disclosure, in terms of whether anything more than distress would be likely to be caused.
39. The Commissioner remains unconvinced that there is a causal connection between disclosure and the identified consequences, beyond a hypothetical or remote possibility. The Commissioner considers that the letters from the solicitors almost suggest an argument that any reporting on matters relating to Hillsborough is likely to exacerbate mental health conditions, and accordingly reporting on Hillsborough should be discouraged. It is unclear why the disclosure of the total paid in compensation would not assist in demonstrating how SYP has been held to account for its actions.
40. With regards to the psychiatrist report referred to in the grounds the Commissioner would expect this to address the question of whether the disclosure of the total figure, unattributed to any specific individual, would be likely to endanger any individual's mental health, and whether any reporting on the Hillsborough tragedy in general would have a similar effect. If any endangerment were to be likely to arise the report ought to address the severity of that endangerment. For these purposes, and consistent with the Upper Tribunal's guidance in Lownie, the endangerment must go beyond mere distress or worry and be likely to prompt, or worsen, a recognisable mental health condition, in order to engage the exemption.
41. With regards to the public interest, if a public interest test is required the Commissioner considers that the balance would favour disclosure on the grounds that it is in the public interest for the public to understand how much the actions of South Yorkshire Police have cost the public purse, and such accountability would be within the reasonable expectations of the families.

Section 42

42. The Commissioner does not consider that the terms of a settlement, once reached, will usually be privileged – see Walker v Wilsher (1889) 23 QBD 335 and more recently BGC Brokers LP and others v Traditions (UK) Ltd and others [2019] EWCA Civ 1937.
43. In any event, the request in this matter was for the combined figure, not the individual settlement amount. In such circumstances the Commissioner maintains that such a combined figure would not attract legal privilege as it would not reveal the actual payments reached by any one individual.

Response from Mr Waugh

Context

44. Mr. Waugh submits that the following context is relevant:
 - 44.1. The settlement underlines the scale and impact of wrongdoing by SYP. This is underlined by public statements issued by lawyers representing claimants issued in June 2021.
 - 44.2. The public statements refer to 601 victims having claims settled, which is significantly different to the figure provided by SYP.
 - 44.3. The SYP response suggests the cases were ongoing in apparent contrast to the statements issued by law firms representing the claimants. The FOI request and SYP response post-dated the statements confirming full settlement had been reached.

Section 38

45. Given that the claimants' lawyers put information about the settlement into the public domain, Mr. Waugh submits that it is difficult to see how media coverage or public disclosure, per se, is necessarily a danger to victims' mental health. Indeed, the statements, which received widespread media coverage, included significant detail about the history of the aftermath of the disaster.
46. It is submitted that the nature of the information revolves around the wrongdoing of public authorities, specifically SYP. It underlines where blame lies, it amplifies that blame and who has been held accountable for it and how.
47. Mr. Waugh notes that the Hillsborough disaster has and will continue to attract significant public attention and media coverage. Public campaigning relating to Hillsborough continues. Media comments have been provided by the Hillsborough Survivors Support Alliance. This has entirely laudable aims but clearly brings Hillsborough into the news.
48. The high-profile drama-documentary on ITV called Anne told the story of the tireless campaigning of Anne Williams whose son died at Hillsborough. Mr. Waugh

submits that this demonstrates that media coverage does not have to automatically be considered something to be avoided.

49. Mr. Waugh submits that it is not clear how or whether the impact is likely to meet the weight of harm indicated.
50. In the context of the sheer weight of media coverage over a 34-year period, it is submitted that some of that coverage will have led to harm but equally it is difficult to conclude all coverage of Hillsborough has done so – particularly when some of the coverage has clearly vindicated the bereaved, the survivors and their families.
51. SYP refers to the “inevitable re-opening of matters and press comment...” It is submitted matters are not closed and will continue to attract public attention, as is indicated by any cursory search for articles relating to Hillsborough as well as the examples provided to the tribunal.
52. Given that there should be a reasonable expectation that publicity around Hillsborough will continue, Mr. Waugh questions if disclosure of information that underlines the principled position of victims is a danger to mental health or potentially a salve to other ‘negative’ coverage.
53. Mr. Waugh submits that it is difficult to see how a reasonable expectation about the total figure being confidential can exist when such total expense must be publicly reported by SYP in the context of its public funding.

Section 42

54. Mr. Waugh supports the submission of the Commissioner.
55. Mr. Waugh submits that it is unclear how a total figure can attract legal professional privilege when public bodies have to publicly account for expenditure. For example, SYP cannot publicly issue financial information regarding its budget and why it needs a particular amount of public funds without a reasonable disclosure of information around spending.
56. In addition, it is argued that it is not clear how estimated figures can attach legal professional privilege.

Additional issue

57. Mr Waugh submits that if the global figure includes an amount set aside as a ‘treatment fund’ it would not be possible for estimates to be obtained for any individual amounts, because it is unlikely every claimant would access funding for treatment. Mr. Waugh indicates that he would be happy to be provided a figure for the overall amount, including any specific figure set aside for treatment, which would remove even the possibility of estimation of individual amounts.

YSP's reply

58. YSP obtained a joint expert report from the lead psychiatrists from the Hillsborough Misfeasance litigation. That report was served alongside the Reply.

59. On the basis of that report YSP submit that the exemption is engaged:

59.1. The applicable interest is the protection of any one individual's physical and mental health from being endangered by the disclosure of the information.

59.2. In terms of the nature of the endangerment:

59.2.1. Professor Greenberg and Dr Busuttil are clear that the disclosure will, for some the affected claimants have "very severe" consequences that will cause or exacerbate underlying, recognisable and clinically significant mental health conditions. The endangerment is therefore "real, actual and of substance";

59.2.2. Further, the experts are equally unequivocal that there is a causal link between the disclosure and the prejudice claimed: e.g., "Both experts agree that the release of the total figure of compensation paid to date, unattributed to any individual would, on the balance of probabilities, endanger some of the Claimant's mental health";

59.2.3. Further, there is compelling expert evidence that not only would disclosure seriously endanger the mental health of some the claimants, but would also endanger their physical health.

59.3. In terms of the likelihood of endangerment, whilst it is accepted that for some of the claimants the likelihood of endangerment is low, for some of the claimants the expert medical evidence is that the disclosure of the information would seriously endanger their mental and physical health.

60. In light of the above, it is submitted that it is strictly not necessary to address other issues raised by the Respondent, but for completeness YSP submit:

60.1. The OPCC is a legally separate body to YSP. Moreover, the figures disclosed by the OPCC encompass the complete spend on the civil claims and do not relate solely to the question of compensation. That other data has been released does not alter the experts' view.

60.2. The views of the claimants' solicitors, and by extension, the claimants themselves should not be lightly dismissed. Whether the release of the information would in some way demonstrate that SYP has been held to account is a factor that should be considered only in the context of the public interest test;

60.3. While disclosing information about individual settlement figures would likely create a greater danger to the health of individual claimants, the

experts are clear that disclosing the total figures paid will also endanger the health of various individuals in the necessary sense.

61. In relation to the public interest test, YSP submit that the following has to be weighed against the public interest in accountability and transparency:
 - 61.1. There is a strong public interest in avoiding harm to already vulnerable claimants.
 - 61.2. There is a public interest in maintaining the confidence of the claimants in the integrity of the scheme.
 - 61.3. There is an obvious public interest in not disrupting community relationships.
 - 61.4. The settlements were concluded on a without prejudice basis and the claimants have a reasonable expectation that the details of the settlement will remain confidential.

Legal framework

Section 42 – Legal Professional Privilege.

62. Section 42(1) provides that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
63. For our purposes, information is exempt where (a) it satisfies the exemption in s.42(1) FOIA; and (b) “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”. (See s.2(2)(b) FOIA - referred to here as the ‘public interest test’).
64. Legal professional privilege covers both legal advice privilege and litigation privilege. Legal advice privilege covers confidential communications between lawyer and client for the purpose of giving or receiving legal advice or related legal assistance. Litigation privilege applies to confidential communications between either the client or his lawyer and a third party made for the dominant purpose of being used in connection with actual, pending or contemplated litigation and for the purpose of either (i) enabling legal advice to be sought or given, and/or (ii) seeking or obtaining evidence or information to be used in or in connection with the litigation concerned.¹
65. S 42 is a qualified exemption, so that the public interest test has to be applied. It is recognised that there is a significant ‘in-built’ interest in the maintenance of legal professional privilege (**DBERR v O’Brien and Information Commissioner** [2009] EWHC 164), due to the importance in principle of safeguarding openness in communications between a legal adviser and a client, to ensure that there can be

¹ **Three Rivers District Council v Governor and Company of the Bank of England (No.6)** at [102]; **Grant v Downs** (1976) 135 C.L.R. 674 at 677, cited in **Waugh v British Railways Board** [1980] A.C. 521 at 544; **WH Holding Limited, West Ham United Football Club Limited v E20 Stadium LLP** [2018] EWCA Civ 2652 at [27]; **BGC Brokers LP and others v Tradition (UK) Limited and others** [2019] EWCA Civ 1937 at [23].

access to full and frank legal advice, which is fundamental to the administration of justice. The tribunal recognises that “although a heavy weight is to be accorded to the exemption, it must not be so heavy that it is in effect elevated into an absolute exemption” (**DCLG v IC and WR** [2012] AACR 43 at [44]) and the weight will vary according to the specific facts of each case.

66. We adopt the approach as set out in **DBERR v O’Brien and Information Commissioner** at para 53:

...the proper approach for the tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least.

Section 38 – health and safety

67. Section 38(1) FOIA provides that information is exempt information if its disclosure would or would be likely to:

- (a) Endanger the physical or mental health of any individual, or
- (b) Endanger the safety of any individual.

68. Section 38 is a qualified exemption and so the tribunal must go on to consider if the public interest in maintaining the exemption outweighs the public interest in disclosure.

The Task of the Tribunal

69. The tribunal’s remit is governed by s 58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner’s decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

70. The issues we have to determine are:

Section 38 – health and safety

71. Whether disclosure would be likely to endanger the physical or mental health of any individual. This entails:

- 71.1. Identifying the applicable interest within the exemption.
- 71.2. Considering the nature of the danger (identifying a causal relationship and that it passes a de minimis threshold)

- 71.3. Determining the likelihood of danger (more probable than not or a real and significant risk of endangerment)
- 72. In all the circumstances of the case, whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. This includes:
 - 72.1. Identifying what actual harm or prejudice the proposed disclosure would or would be likely to cause, focussing on the public interests expressed in the particular exemption in issue.
 - 72.2. Identifying what actual benefits the proposed disclosure would or would be likely to cause.

Section 42 - legal professional privilege

- 73. Whether the information is covered by legal professional privilege.
- 74. In all the circumstances of the case, whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. This includes:
 - 74.1. Identifying what actual harm or prejudice the proposed disclosure would or would be likely to cause, focussing on the public interests expressed in the particular exemption in issue.
 - 74.2. Identifying what actual benefits the proposed disclosure would or would be likely to cause.

Evidence

- 75. We have read an open and two versions of a closed bundle of documents, which we have taken account of where relevant. It was necessary to withhold one of the closed bundles from Mr. Waugh, otherwise the purpose of the appeal would be defeated. The open bundle includes a witness statement from Deborah Carrington, Chief Finance Officer of SYP, dated 28 July 2023.

Written submissions

Submissions from YSP dated 22 September 2023

Section 38

- 76. YSP urges upon the Tribunal to keep in mind that:
 - 76.1. The parties to the Hillsborough Victims' Misfeasance Litigation engaged with that litigation on a without prejudice basis and with an expectation that the workings of the scheme and any settlements would remain confidential to the parties.

- 76.2. YSP is seeking to express the wishes of the majority of the claimants to that scheme.
- 76.3. The motivating factors behind YSP's position have been to ensure the integrity of the scheme and to prevent further harm being caused to the claimants.
- 76.4. Should the disputed information be released to the second respondent, it is likely that it will be published in the media. That publication will involve discussions about the overall figure of compensation and will, in all probability, involve speculation about the average amount of compensation given that the number of settled claims has already been disclosed.
77. It is submitted that it is clear from the uncontroverted evidence of the expert psychiatrists that the disclosure of the overall compensation figure is likely to endanger both the mental and physical health of a significant number of individuals.
78. It is submitted that Professor Greenburg and Professor Busuttil are eminent psychiatrists in the field of psychological trauma. The expert report sets out the potential scale of harm should the total figure for compensation be released. The expert evidence clearly demonstrates a direct causal relationship between the information becoming public and "significant psychological harm".
79. It is submitted that that harm goes beyond worry and distress and indeed goes beyond even the exacerbation of existing illness to the onset of new illness. There is no question that the potential harm would be trivial or insignificant.
80. Further, YSP submit that whilst it would be enough for YSP to establish a real risk of endangerment to just one individual, the risk here is to approximately 20% of the cohort (and possibly up to 33%).
81. In light of the evidence of Professors Busuttil and Greenberg, it is submitted that it is not necessary to address the Commissioner's point about the OPCC disclosure. However, it is submitted in any event that the figures provided by the OPCC are significantly different from the disputed information.
82. YSP submit that:
- 82.1. In its view, the figures should not have been released.
- 82.2. The figures were released some time ago and prior to the expert reports. It is unlikely that the OPCC would release the figures now.
- 82.3. As far as YSP knows the figures released by the OPCC have not been published. In all likelihood the requested figures will be made public by the second respondent.

- 82.4. The previous publication by the OPCC does not detract from the uncontested evidence of Professors Busuttil and Greenberg that the release of the disputed information will, on the balance of probabilities, cause significant harm to a significant number of individuals.
83. In relation to the publication of YSP's accounts, it is submitted that YSP has a responsibility to publish those accounts in line with the Code of Practice of Local Authority accounting. One cannot discern from the published accounts the overall amount of compensation.
84. In relation to the public interest, YSP recognises that there is a public interest in transparency and accountability but submits that the interest in finding out the total figure of compensation does not justify the risk to the physical and mental health of those involved.
85. Whilst a small number of claimants have no issue with the disputed information being released the majority (of those who replied to their solicitors) have confirmed that they agree with the concerns raised and do not wish for the sum to be disclosed. YSP submit that it is not in the public interest to ignore the views expressed by those who will be affected by the disclosure and who already feel rightly aggrieved by 'the system'.
86. It is already public knowledge that compensation has been paid. It is submitted that that satisfies in large part the need for transparency and accountability. The risks involved in revealing the precise figure of overall compensation are not justified by the incremental gain of transparency.

Section 42

87. YSP maintains its position as set out in the Grounds of Appeal

Submissions from Mr. Waugh dated 6 October 2023

88. Mr. Waugh sets out the background of his involvement in reporting on Hillsborough, focussing on the ongoing financial cost of the failures of SYP to take responsibility. His reporting is part of ensuring accountability for the ongoing financial burden on the force and the public for its failings.
89. In relation to the evidence of endangerment, although Mr. Waugh asserts that is questionable whether the impact of disclosure of a global figure has been discussed in any detail with the claimants and there appears to be a degree of supposition involved, he states that he would "expect the Tribunal to accept the expert evidence" and accepts that the evidence of individual claimants is compelling.

90. In the light of that, Mr. Waugh states that there appears to be little value in advancing a public interest argument because he would expect the tribunal to rule against disclosure of the total compensation paid to individuals per se.²
91. He submits that the existence of a treatment fund as part of the settlement weakens YSP's arguments. If the treatment fund is represented by a specific figure within the overall, global total, he submits that any division of totals or references to averages for individual compensation would no longer hold water as the global figure would not represent the total of individual compensation payments.
92. it would appear to be open to YSP to provide a global figure that includes the element for a treatment fund as this by its nature could not identify a total paid in compensation to claimants, per se. If this was the case, Mr. Waugh submits that section 38 could not apply in the way advanced by YSP, because the harm is said to come from a figure for the total compensation paid.
93. If the argument is made in relation to any information relating to Hillsborough being put in the public domain, this is undermined by the fact that the claimant's lawyers have put information about the Scheme and Hillsborough into the public domain and financial information will continue to be published in years to come, not least as part of SYP's public accountability requirements.
94. It is submitted a global settlement figure including but not specifying a total amount of compensation paid to individuals can be viewed as meeting the public interest test in terms of accountability for the expenditure of public money and recognition of wrongdoing by a public body. Compensation totals connected to controversial and deeply upsetting events involving public bodies have been published before.

Submissions from YSP dated 13 October 2023

95. YSP submit, in the light of Mr. Waugh's concessions that the appeal should be allowed.
96. In response to the argument about the 'treatment fund' YSP submit:
- 96.1. It is wrong and artificial to see the costs of treatment as not being part of the claimants' overall compensation,
 - 96.2. Mr. Waugh's suggestion does not detract from the unchallenged evidence of the experts that the reporting of financial matters would risk endangering the health of a significant proportion of claimants

Discussion and conclusions

Previous decisions of the Commissioner or the OPCC

² In fact Mr. Waugh states that he 'would not expect the Tribunal to rule against disclosure of the total compensation paid to individuals, per se.'. However it is clear from the rest of his submissions that this is a mistake.

97. The tribunal is not assisted by previous decision notices of the Commissioner. They are not binding or persuasive authority. The public interest balance in particular is multi-factorial and fact sensitive and assessed at a particular point in time on the basis of the information before the decision maker. The fact that the Commissioner has decided on the information before him that an exemption was engaged and the public interest balance did or did not favour disclosure in one case is unlikely to be of assistance in another case.
98. Nor is the tribunal assisted by the decision of the OPCC to release estimated future financial information ('the OPCC information') to the extent that it is indicative of the OPCC not considering such disclosure to be likely to endanger the mental health of any individual, or at least considering that the public interest favoured disclosure. We do not accept that the conclusion of the OPCC in relation to different information reached on the basis of facts and reasoning unknown to us, and in the absence of the expert evidence which we have before us, is of any assistance in deciding whether or not endangerment would be likely to arise or where the public interest balance lies.

Section 38 – Health and safety

Is the exemption engaged?

99. The tribunal considers that the applicable interest in the exemption is the protection of physical or mental health.
100. In considering the impact of the release of the requested information under FOIA, we find that it is likely that this information will be reported in the press. We make this finding on the basis that (a) it has been requested by a journalist for the purposes of reporting on the financial cost of failings of SYP and (b) that Hillsborough remains a high-profile issue of significant interest to the media and the public.
101. When considering the likely impact of the release of the requested information we do so on the basis that:
- 101.1. We find that it is not possible to accurately calculate the amount of compensation which has been paid to any individual claimant from the total amount paid out so far at the relevant date and the number of claims settled. That is because claimants may have received different amounts.
- 101.2. We find that it is possible, however, to calculate the *average* amount of compensation which has been paid to each individual claimant from the requested figure (which is the amount of compensation paid out 'so far') and the number of claims settled through the scheme at the relevant date. The existence of a 'treatment fund' has, in our view, no impact on the ability to calculate the average amount paid out so far per claimant.

- 101.3. We find that it is likely that, based on that average amount, people will speculate or make assumptions as to the amount individual claimants might have received.
 - 101.4. We find it likely that, based on that average amount, individual claimants might speculate or make assumptions as to the amount other claimants might have received.
102. The endangerment or harm relied on by YSP is the exacerbation of or the causing of recognisable diagnosable and clinically significant mental health conditions and a negative impact on physical health conditions amongst the claimants in the misfeasance litigation.
103. YSP relies on the evidence of Professor Greenberg and Dr Busuttil as to:
- 103.1. The nature of the harm,
 - 103.2. The causative link between the disclosure and the harm,
 - 103.3. The likelihood of the harm, and
 - 103.4. The extent of the harm.
104. The questions which the experts were asked to address are as follows:
- 104.1. Whether the release of the total figure of compensation paid to date, unattributed to any individual, would be likely to endanger any individual's mental health;
 - 104.2. Whether the reporting of the Hillsborough tragedy in general would have a similar effect;
 - 104.3. If there is any endangerment, the severity of the endangerment, i.e., would it go beyond distress and/or worry and be likely to prompt or worsen a recognisable mental health condition?
105. Follow up questions were then asked in response to matters raised by the Commissioner as follows:
- 105.1. Has the psychiatrist discussed this request for information, which was only for a total amount of compensation rather than individual payments, directly with any victims and, if so, how many?
 - 105.2. On what evidential basis has the psychiatrist's opinion been made? i.e. when did the relevant interviews on which the opinion is based take place, what specifically was discussed (by way of a summary of the topics, for example did the discussions include topics such as reactions to any public commentary in respect of the claims), and how many victims were interviewed / involved.
 - 105.3. What are the Psychiatrist's views in respect of the likely number of individuals that would suffer the various reactions that have been set out? Given the reference to a spectrum of reactions it is important to understand whether, for example, the vast majority would suffer no harm to their

mental or physical health (as distinct from distress) with only a limited number experiencing the more severe reactions, and what those severe reactions are, and what would be the concern that would prompt such a reaction).

- 105.4. Can the Psychiatrists please clarify the likely number of individuals who would be likely to react in a way that was beyond distress, and would be likely or would prompt or worsen a recognisable mental health condition. Paragraphs 11 and 12 of the report are noted in this regard however further evidence would be beneficial on this important point. Ultimately, distress alone is insufficient to engage the s.38 FOIA exemption, and accordingly it is important to have the fullest evidence on this point.
106. When considering the weight to attach to the expert opinions in the report we have taken account of the following:
 - 106.1. The issue of whether the exemption is engaged is ultimately a decision for the tribunal to take.
 - 106.2. Both experts are highly qualified and very experienced in the relevant areas. Both experts have many years of experience in medicolegal, and clinical, settings dealing with psychiatric clinical presentations including those who have been affected by psychological trauma and highly stressful events. Both experts are considered leaders in the field in psychological trauma nationally and worldwide. Both are currently in clinical, and medicolegal, practice working with victims of psychological trauma and people who have been exposed to significant non-traumatic stressors.
 - 106.3. They were the lead experts in the misfeasance litigation jointly instructed by the claimants and SYP. As part of the misfeasance litigation 14 claimants were jointly selected by the party's solicitors to represent the spectrum of severity of psychiatric illness thought to exist in the claimant population. Between 2017 until around 2020 the experts had interviews with seven of those claimants. In the last three years the experts undertook desktop based reviews in relation to the remaining seven claimants.
 - 106.4. They experts have not spoken to or reviewed the medical documentation in relation to the remaining claimants and have not spoken to any claimants for the purposes of preparing the report for this appeal.
 - 106.5. The experts undertook a 'rapid evidence assessment' of the scientific literature but did not carry out a full systematic review of the literature.
107. There are, in our view, some limitations on the value of the expert evidence. The experts have not directly spoken to any of the claimants in relation to the issues in question in this appeal. They have only undertaken a limited review of the scientific literature. Even as part of the misfeasance litigation they have only

interviewed or undertaken a 'desktop review', between them, in relation to a very small sample of claimants.

108. However we acknowledge that the 14 claimants were specifically selected to represent the spectrum of severity of psychiatric illness thought to exist in the claimant population. Further we acknowledge the experts' relevant experience and expertise. For those reasons we accept that they are in a good position to give an opinion as to the likely effect of the release of the information in that case. That opinion remains, necessarily, speculative given the predictive nature of the exemption.
109. In summary, the opinion of the experts is that the release of the total figure of compensation would, on the balance of probabilities endanger some of the claimants' mental health and that there is a real risk in some cases of endangerment to physical health.
110. In relation to causation, both experts note that their clinical assessments of Hillsborough Claimants have identified that most of them had reported episodes of mental ill health, or deterioration in pre-existing mental health conditions, as a result of the protracted process of the litigation and Court proceedings as well as the media coverage of the disaster and subsequent events. The experts state that there are a number of ways that release of this information could negatively impact on Claimants' mental health including directly or indirectly by causing Claimants to perceive their compensation payments as being unfair and/or fostering increased distrust in the legal system which many already view as unjust given the length of time it took for the cover-up to be acknowledged.
111. They take the view that financial aspects of any claims process have the potential to disrupt the supportive relationships between community members which in turn is likely to adversely impact on Claimants' mental health. Further, they take the view that the publication of compensation award information could lead to [*redacted reasoning – contained in the closed annex*].
112. We are satisfied on the basis of this explanation that there is causative link between the release of the requested information and the harm relied on by YSP.
113. In relation to the nature of the harm, the experts state that in some cases there is a real risk of [*redacted reasoning – contained in the closed annex*] or significant negative impacts on physical health conditions. They take the view that reporting on compensation payouts will act as an additional stressor triggering some to experience a deterioration or relapse of mental health problems and, for others, it may lead to the onset of new mental health condition. On this basis we are satisfied that the harm is more than de minimis.
114. In terms of likelihood the experts have given their opinion on the balance of probabilities and on the basis of a real risk of harm. On the basis of the opinions

of the experts we find that the alleged harm would be likely to be caused to at least one individual by the disclosure. That is sufficient to engage the exemption. We consider the likely extent of the impact further under the public interest below.

115. For all those reasons we conclude that the exemption is engaged.

The relevance of the OPCC release of information

116. These conclusions are unaffected by the fact that there is no evidence before us that the release of the information by OPCC caused harm for the following reasons.

116.1. We have no positive evidence before us that the release OPCC information did not cause harm – there is simply no evidence on the matter before us. Unlike the Commissioner we now have before us an expert opinion on the likely impact of release of the requested information. In the circumstances the fact that YSP have not attempted to provide other evidence that might have been available carries significantly less weight.

116.2. Further, we have found that the requested information is likely to be reported by the press. We have no evidence before us to suggest that the OPCC information was reported by the press.

The relevance of the impact of other reporting on Hillsborough

117. The Commissioner is correct to observe that the letters from the claimants' solicitors suggest that any reporting on matters relating to Hillsborough is likely to exacerbate mental health conditions. The experts take a similar view ('Both experts note that, in the vast majority of Claimants, the process of litigation and the publication of information, and controversies, related to Hillsborough in the media has caused, or exacerbated underlying, mental illness and impaired clinical recovery... We consider that any reporting of Hillsborough will act as a trigger for some of the Claimants.').

118. Although the tragedy took place in 1989 we accept Mr Waugh's assertion that it remains high profile and of public interest, and that it appears in media reporting reasonably frequently. YSP submit that the harm is likely to be caused by "the inevitable re-opening of matters and press comment..."

119. Mr Waugh notes that some of the media reporting has been instigated by or contributed to by the claimants themselves, for example the press release of the claimants' solicitors, the documentary and public campaigning. It is important to note that Mr Waugh makes no criticism of the claimants and stresses that the entirely laudable aims behind this. Mr Waugh's point is that matters are not closed and will continue to attract public attention.

120. We accept that ‘matters’ as a whole are not closed in the sense that there continues to be and will continue to be reporting on the Hillsborough Disaster, but the misfeasance litigation is, to some extent, closed. According to the experts and as a matter of common sense, the litigation process will have been a stressful process which will have caused harm to some of the claimants. Agreeing an overall settlement, as announced in public statements by the claimants’ solicitors in 2021, can fairly be described as closing matters to some extent, and when an individual is paid their damages this closes the litigation from their point of view. To that extent we accept that further discussion and media speculation as to the amount received by claimants can be described as re-opening matters.
121. Further we accept the evidence of the experts that the release of the requested information in particular is likely to cause additional harm, given the potential for comparisons to be made between what claimants have received and the total sum paid out: They conclude: “we consider that reporting on compensation payouts will act as an additional stressor triggering some to experience a deterioration or relapse of mental health problems and, for others, it may lead to the onset of new mental health condition”.
122. The question for us to consider is whether the release of the requested information would be likely to cause harm, irrespective of whether the release of other information or other reporting would also cause harm.
123. For those reasons set put above we do not consider that the fact that the release and wider publication of other information/and or other media reporting would or might cause similar harm affects our conclusions on whether or not the exemption is engaged.

The public interest balance

The public interest in withholding the information

124. The likelihood and the extent of harm is relevant to the public interest balance. In the light of their experience, both in general and of a small but representative sample of these claimants, the experts have attempted to predict this. We accept that this is speculative but it gives an indication as to the likely level and extent of harm.
125. The view of the experts is that at least 10% but not more than 33% of the claimants would suffer significant psychological harm. This is a significant number of people. A greater proportion of the claimants are likely to be caused non-illness distress.
126. In terms of the nature and seriousness of the harm, the experts say the following:

- 126.1. 'there are likely to be some who will experience very severe responses'.
 - 126.2. 'the publication ... could lead to [redacted – contained in the closed annex]. In our view, on the balance of probabilities, [redacted – contained in the closed annex] could also lead to additional distress and [redacted – contained in the closed annex]'.
 - 126.3. 'the endangerment in terms of severity will vary with some individuals experiencing no, or mild distress or worry, and for others, on the balance of probabilities, causing, or exacerbating underlying, recognisable diagnosable and clinically significant mental health conditions.'
 - 126.4. 'in some cases there is a real risk of [redacted – contained in the closed annex] or significant negative impacts on physical health conditions'.
 - 126.5. 'reporting on compensation payouts will act as an additional stressor triggering some to experience a deterioration or relapse of mental health problems and, for others, it may lead to the onset of new mental health condition'.
127. Overall, we find that the number of individuals who are likely to be harmed is significant, and the level of harm is likely in some cases to be very serious. We consider that there is an extremely strong public interest in not causing further harm to the mental and physical health of these vulnerable individuals, who have been through significant trauma. On this basis we conclude that there is an extremely strong interest in withholding the information.
128. There is already other information about the cost to SYP and the public purse in the public domain. The OPCC has published expected legacy costs. SYP has to publish information about expenditure each year in its accounts. The public has the right to ask questions of the auditor about those accounts.
129. This has two potential impacts on the public interest.
130. First, we accept that other financial information in the public domain could potentially be used in a similar way to speculate, albeit with less certainty, about the amount paid to individual claimants. There is therefore already a risk that public discussion of settlement matters could be reopened in any event even if the requested information is not released. This reduces the public interest in withholding the information to some extent.
131. The second is relevant to the public interest in disclosure and is considered below.

The public interest in disclosure

132. We accept that there is a strong public interest, in the context of the Hillsborough Disaster in particular, in transparency and accountability in relation to how much the actions of SYP have cost the public purse. We note that Mr. Waugh states that the recent annual accounts 'seem to show much lower costs than expected', which increases the public interest in transparency. The total figures paid in

compensation so far will assist in demonstrating publicly how SYP has been held to account for its actions.

133. We accept that there is also a general public interest in transparency in relation to high-profile compensation schemes following wrongdoing by public bodies and in the compensation scheme relating to this particular disaster, given the scale of the disaster, the loss of life and the ongoing impact on survivors and the bereaved.
134. If the majority of claimants were in favour of the total amount being made public, we would consider that there was an additional public interest in accountability to those directly affected. As the evidence suggests that the majority of claimants are not in favour of the total amount being made public, we do not take account of any additional public interest to reflect this.
135. We find that the public interest in disclosing the requested information for the purposes of transparency and accountability is reduced to some extent because the overall cost to the SYP, including the amounts paid on legal fees etc. is already available in terms of an estimated future cost and in terms of an actual cost in the yearly accounts. We accept that there remains a fairly strong public interest in terms of accountability and transparency in the particular information requested, but the public interest in disclosure would be even weightier if no similar financial information about the cost to YSP was publicly available.

Conclusions on the public interest balance

136. Having considered all the factors set out above, even though there is a fairly strong public interest in disclosure of the requested information we find that it is outweighed by the extremely strong public interest in not causing further harm to the mental and physical health of one or more of these vulnerable individuals, who have been through significant trauma.

Conclusion on section 38

137. On that basis we conclude that the public authority was entitled to withhold the information under section 38.
138. For those reasons, in the light of the evidence which was not before the Commissioner, we conclude that the Commissioner should have exercised his discretion differently. We allow the appeal and issue a substitute decision notice.

Section 42 - Legal professional privilege

139. We do not need to make a decision on the application of section 42. However, for completeness, we have determined that we would have agreed with the Commissioner that section 42 does not apply.

140. The figures agreed in a settlement agreement, whether individual or as a sum total of compensation paid do not fall within the scope of either limb of legal professional privilege.
141. Legal advice privilege covers confidential communications between lawyer and client for the purpose of giving or receiving legal advice or related legal assistance.
142. Litigation privilege applies to confidential communications between either the client or his lawyer and a third party made for the dominant purpose of being used in connection with actual, pending or contemplated litigation and for the purpose of either (i) enabling legal advice to be sought or given, and/or (ii) seeking or obtaining evidence or information to be used in or in connection with the litigation concerned.
143. A settlement agreement is not a communication between lawyer and client for the purpose of giving or receiving legal advice or related legal assistance. Nor is it a document which was made for the purpose of enabling a party to take legal advice or a document made for the purpose of seeking or obtaining evidence or information to be used in connection with contemplated proceedings.
144. This is confirmed in **BGC Brokers LP and others v Traditions (UK) Ltd and others** [2019] EWCA Civ 1937.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 19 January 2024