



Case Reference: EA-2023-0218

Neutral Citation Number: [2024] UKFTT 00650 (GRC)

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

**Heard: By CVP
Heard on: 25 July 2024
Decision given on: 29 July 2024**

Before

**JUDGE SOPHIE BUCKLEY
MEMBER PAUL TAYLOR
MEMBER DR PHEBE MANN**

Between

POLICE OMBUDSMAN FOR NORTHERN IRELAND

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) MARK RAINEY**

Respondents

Representation:

For the Appellant: Mr McKay (Counsel)

For the First Respondent: Did not attend

For the Second Respondent: In person

Decision:

- 1) The appeal is allowed in part.
- 2) The Police Ombudsman for Northern Ireland ('the Ombudsman') was not entitled to rely on section 30 of the Freedom of Information Act 2000 (FOIA) in relation to the 'remaining information' identified in the closed annex to the decision of 26 October 2023.
- 3) The Ombudsman is entitled to rely on section 40(2) to withhold the following information: the contact details of any individuals, the names of any individuals that are not employed by the Ombudsman, and the names of any junior employees of the Ombudsman.

Substituted Decision Notice:

Organisation: Police Ombudsman for Northern Ireland

Complainant: Mark Rainey

The Substitute Decision – IC-126944-V7J6

1. For the reasons set out below and in the decision of 26 October 2023:
 - a. The Police Ombudsman for Northern Ireland (‘the Ombudsman’) was entitled to rely on section 44 of the Freedom of Information Act 2000 (FOIA) in relation to the part of the withheld information identified in the closed annex to the decision of 26 October 2023.
 - b. Part of the withheld information, identified in the closed annex to the decision of 26 October 2023, falls outside the scope of the request.
 - c. The Ombudsman was not entitled to rely on section 44 or section 30 in relation to the rest of the withheld information (‘the remaining information’).
2. If the Ombudsman’s appeal to the Upper Tribunal against the decision of 26 October 2023 is dismissed, the Ombudsman shall disclose the ‘remaining information’, as identified in the closed annex to the decision of 26 October 2023 to Mr. Rainey within 28 days of the date on which the Ombudsman is sent the decision of the Upper Tribunal.
3. Any failure to abide by the terms of the tribunal’s substituted decision notice may amount to contempt which may, on application, be certified to the Upper Tribunal.

REASONS

Introduction

1. This is an appeal against the Commissioner’s decision notice IC-126944-V7J6 of 28 March 2023 which held that the Police Ombudsman for Northern Ireland (‘the Ombudsman’) was not entitled to rely on section 44(1)(a) of the Freedom of Information Act 2000 (FOIA) to withhold the requested information. The Commissioner required the public authority to disclose the requested information and issue an appropriate refusal notice if it wished to withhold any personal data.
2. After a hearing on 2 October 2023 in a decision dated 26 October 2023 (the 26 October decision) the tribunal determined that:
 - a) the Ombudsman was entitled to rely on section 44 of the Freedom of Information Act 2000 (FOIA) in relation to part of the withheld information identified in the closed annex to that decision.
 - b) Part of the withheld information, identified in the closed annex to that decision, fell outside the scope of the request.
 - c) The Ombudsman was not entitled to rely on section 44 in relation to the rest of the withheld information (‘the remaining information’).
3. At the hearing on 2 October 2023 the tribunal gave the Ombudsman permission to rely on further exemptions: section 30 and section 42. The tribunal concluded that the document said to be covered by legal professional privilege was exempt under section 44. Section 30

is therefore the only outstanding exemption. The tribunal issued separate case management directions in relation to the determination of the issues under section 30. The application of section 30 to the remaining information is the issue that is the subject of this decision.

4. This decision should be read in conjunction with the 26 October decision.
5. This decision contains a closed annex. It is necessary to withhold the closed annex from the second respondent because to do otherwise would defeat the purpose of the proceedings. It is likely that a redacted version of the annex will be able to be released once the proceedings, including any appeal, have concluded. The tribunal will seek comments from the appellant and the first respondent before releasing any version of the closed annex.

Statutory and factual background to the appeal

6. This is set in the 26 October decision.

Requests, Decision Notice and appeal

7. These are summarised in the 26 October decision.

Responses and reply

8. These are summarised in the 26 October decision.

Legal framework

Section 30 – Investigations and proceedings conducted by public authorities

9. Section 30 provides insofar as relevant:

(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of—

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained—

- (i) whether a person should be charged with an offence, or
- (ii) whether a person charged with an offence is guilty of it,

...

(2) Information held by a public authority is exempt information if—

(a) it was obtained or recorded by the authority for the purposes of its functions relating to—

- (i) investigations falling within subsection (1)(a) or (b),

...and

(b) it relates to the obtaining of information from confidential sources.

10. Sections 30(1) and (2) are class-based exemptions. There is no requirement for a public authority to demonstrate prejudice for them to be engaged. They are subject to the public interest test.
11. In order to rely on section 30 there must be a past or current criminal investigation in respect of which the information has been or is being held. The tribunal is required to

undertake a fact-specific analysis in order to decide whether the information was held at any time for the purposes of a criminal investigation. It does not need to have been obtained for that criminal investigation but may form part of subsequent criminal investigations or there may be a pre-existing criminal investigation of which it forms part. Section 30 does not exempt from disclosure information that may be the subject of future or potential criminal investigations. (**Williams v ICO and Chief Constable of Kent Police** [2021] UKUT 149).

12. There is no requirement in section 30(1) (a) (i) for the public authority to be the body that will ascertain whether a person should be charged with an offence. It is sufficient that investigation is conducted by the public authority with a view to it being ascertained by another body whether a person should be charged with an offence (**Williams v ICO** [2023] UKUT 142)

The role of the tribunal

13. The tribunal's remit is governed by section 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 she 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

14. The issues for the tribunal to determine are:
 - 14.1. Has the remaining information at any time been held by the Ombudsman for the purposes of an investigation which the Ombudsman has a duty to conduct with a view to it being ascertained whether a person should be charged with an offence, or whether a person charged with an offence is guilty of it?
 - 14.2. Was the remaining information obtained or recorded by the authority for the purposes of its functions relating to such an investigation?
 - 14.3. If so, in all the circumstances of the case, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information.?

Submissions

Written submissions from Mr McKay for the Ombudsman

15. Mr. McKay notes that the 26 October decision sets out some of the provisions from Part VII of the Police (Northern Ireland) Act 1998 (the 1998 Act). In Re: Hawthorne's Application [2020] NICA 33, at para [40], Morgan LCJ characterised the principal role of the Ombudsman as "investigatory". Mr. McKay submitted that the investigation into the Loughinisland massacre was criminal in nature and included the investigation of homicide. He submitted that the former Ombudsman accepted complaints under section 52 of the 1998 Act and used his own motion powers under section 55 of the 1998 Act.
16. It is submitted that section 30 is engaged. The material was and is held for the purposes of section 30(1) and (2). It is submitted that the investigation into the murders at Loughinisland is extant and the connected homicide referred to in McEvoy is also current.

17. Mr. McKay submitted that the public interest is in maintaining the exemption in relation to the information for the following reasons:

(i) Contemporaneity of the investigation(s)

- (a) The information is, or is likely to be, subject to the provisions in relation to disclosure in criminal proceedings and the provisions of the Criminal Procedure and Investigations Act 1996 (the 1996 Act) will apply. This includes the Code of Practice issued under section 23 of the 1996 Act (and the applicable guidance issued by the Attorney General)
- (b) The Code requires the investigator to pursue all reasonable lines of inquiry and to seize and record any material of potential relevance to the investigation.
- (c) These are decisions for the investigator.
- (d) Material seized and later disclosed, is subject to a duty of confidentiality imposed on recipients, a breach of which renders the individual who has committed the breach vulnerable to contempt proceedings: see sections 17-18 of the 1996 Act.
- (e) These are issues for the criminal courts as the sole forum for determining guilt: see for example, Breeze v Information Commissioner and NHS Business Services Authority, FTT, 22 January 2014, at [39] and the Commissioner’s own guidance on Investigations and Proceedings, at paras [53]-[62].
- (f) For a comparable position, see also the Commissioner’s Decision Notice in FS50373733, 16 November 2011, involving the application of the exemption in a historical investigation case arising out of the Troubles in Northern Ireland.

(ii) Second Respondent’s motivation

- (g) The clear motivation behind the request is a belief on the part of Mr. Rainey that the Ombudsman was in some way responsible for leaking confidential material to “unauthorised persons”: see requests, 4 February and 3 June 2021 and complaint 1 September 2021. This is not the case.

(iii) Underlying purpose behind the request satisfied

- (h) Mr. Rainey makes clear that, in his view, “the very strong public interest” is in establishing whether the Ombudsman “attempted to establish how the film-makers came to be in possession of [the highly sensitive secret intelligence] material”. The answer to this is already in the public domain: see Re Fine Point Films & Another’s Application [2020] NIQB 55, paras [10]-[13].

Written submissions from the Commissioner

18. The Commissioner submitted that section 30 is not engaged in relation to the remaining information and the public interest favours disclosure.

19. The Commissioner stated that he struggled to understand the Ombudsman's argument that the remaining information was or is held by the Appellant for the purposes of a qualifying investigation.

Written submissions from Mr. Rainey

20. Mr. Rainey submitted in writing as follows:

“My submission relates to the public interest test. I would respectfully suggest it weighs heavily in favour of releasing the information. In Northern Ireland we have a Police Ombudsman entrusted with many of the powers available to a chief constable, and the authority to collate and retain highly sensitive information that, in the wrong hands, could put people's lives at risk.

While the ombudsman's office has a duty to maintain the trust and support of those making complaints, it is also duty bound to remain impartial to ensure the support of former police officers who voluntarily come forward in significant numbers to assist with historical investigations. Many former police officers were dismayed to see a serving ombudsman playing a key role in a documentary which relied heavily on secret intelligence that was either stolen or otherwise unlawfully leaked from the ombudsman's office. I am aware that formal complaints were made regarding Dr Maguire's participation in the documentary - including one from the Northern Ireland Retired Police Officers' Association, and others from individual former officers. The complaints were based on claims that the ombudsman had "brought discredit" to that office, and that his involvement with the film-makers created the impression of "bias" in favour of the complainants over the police officers under scrutiny.

The release of the correspondence between the ombudsman and the film-makers will help establish what action, if any, Dr Maguire's team took to establish how the film-makers acquired the leaked/stolen documents.

The correspondence may also help provide a general impression of the ombudsman's relationship with the film-makers.”

Oral submissions

21. We heard oral submissions from Mr. McKay for the Ombudsman and from Mr. Rainey. We took account of those submissions in full and, where relevant, we have set out those submissions within our discussions and conclusions below.

Discussion and conclusions

22. The Ombudsman relies on section 30(1)(a) and section 30(2).
23. It is important for the purposes of both those subsections to identify the relevant investigation. The relevant investigation must be one which ‘the public authority has a duty to conduct with a view to it being ascertained...whether a person should be charged with an offence’

24. The use of the definitive article ('the public authority' rather than 'a public authority') is important because it means that the relevant investigation must be one that the public authority holding the information has a duty to conduct, rather than any other public authority.
25. Section 30(1(a) and (2) can only be relied on by public authorities that have a duty to conduct an investigation with a view to it being ascertained and it will only be engaged if the information has been held, at any time, for the purposes of an investigation conducted by that public authority.
26. The body that has to ascertain whether a person should be charged with an offence can be a different body from the one conducting the investigation (**Williams v ICO** [2023] UKUT 142).
27. We are satisfied that the Ombudsman has the duty to conduct investigations with a view to it being ascertained whether a person should be charged with an offence. The functions of the Ombudsman are set out in detail in the 26 October decision. Section 58 of the Police (Northern Ireland) Act 1998 provides for steps to be taken after investigation by the Ombudsman. The Ombudsman must consider the investigation report "and determine whether the report indicates that a criminal offence may have been committed by a member of the police force" (see section 58(1)). If the Ombudsman determines that the report indicates that a criminal offence may have been committed by a member of the police force, the Ombudsman shall send a copy of the report to the Director of Public Prosecutions ("DPP") together with such recommendations as appear to her to be appropriate (see section 58(2)).
28. We accept that the investigation conducted by the Ombudsman into the Loughinisland Massacre was an investigation which the Ombudsman had a duty to conduct with a view to it being ascertained whether a person should be charged with an offence. The fact that the Ombudsman did not, ultimately, conclude that there was insufficient evidence to support submissions of a file for direction to the PPS in relation to a specific, identifiable officer, does not alter that.
29. That investigation concluded in 2015. Paragraph 29 of **Re: Hawthorne's Application** [2020] NICA 22 explains what happened at the conclusion of that investigation:

"[29] The investigation was concluded by September 2015 and the Ombudsman submitted an investigation report to the PPS indicating that it was not believed that the evidence would support submission of a file for direction to the PPS in relation to a specific, identifiable officer but that the enquiries revealed what would be better described as significant concerns in respect of disciplinary and/or corporate matters for the RUC. It was intended that these would be detailed in a subsequent public statement. The Ombudsman's Director of Investigations (Historic) met with the PPS on 14 April 2016 and the PPS confirmed that they had not identified sufficient evidence to charge or report any police officer for any offence in connection with the investigation.

...

[31] The Ombudsman issued [a public statement under section 62 of the 1998 Act] on 9 June 2016. It consists of an executive summary followed by nine

chapters and an appendix which includes a summary of findings in relation to the core complaints. In respect of those core complaints in some cases the Ombudsman sets out a narrative explaining why the complaint is made out and in others a narrative explaining why the complaint is not made out.”

30. As a result of a legal challenge to that public statement, an amended public statement was issued on 9 March 2018 to make clear that certain findings did not apply to a particular individual.
31. Mr. MacKay referred to and relied on a number of other actual or potential criminal investigations including ‘extant’ criminal investigations arising out of the same incident. Mr. MacKay submitted that this correspondence will form part of the material which would be disclosable in future criminal proceedings.
32. He submitted that under the Code of Practice issued under section 23 of the Criminal Procedure and Investigations Act 1996 the investigator (any police officer involved in the conduct of a criminal investigation) is required to pursue all reasonable lines of inquiry and to seize and record any material of potential relevance to the investigation. He submitted that these are decisions for the investigatory and any material seized and later disclosed is subject to a duty of confidentiality. He submitted that these are issues for the criminal courts as the sole forum for determining guilt.
33. Any investigations by the police are conducted by bodies other than the Ombudsman, and therefore they cannot be the relevant investigation that triggers the application of section 30. Section 30 only applies where information has been held at any time for the purposes of an investigation carried out by the body holding the information.
34. The next question for the tribunal, having identified the relevant investigation is to decide whether the requested information has been held by the public authority, at any time, for the purposes of that investigation.
35. The relevant investigation concluded in 2015. The requested information consists of correspondence in 2016 and 2017. It is correspondence between the Police Ombudsman’s Office’s former Director of Information and the filmmakers relating to the documentary ‘No Stone Unturned’ released in 2017. The specific information with which we are concerned today consists of information provided purely to facilitate administrative arrangement for organising meetings.
36. In our view there is no basis upon which we could conclude that that correspondence is held or has been held at any time for the purposes of that investigation.
37. FOIA as a whole and the exemption in section 30 apply to information rather than documents, and we have considered whether, even though the correspondence itself was created after the conclusion of the investigation, there is any information contained in the correspondence which has been held at any time for the purposes of the investigation. The correspondence with which we are concerned today contains information purely to facilitate administrative arrangements for organising meetings. There is no basis upon which we could conclude that this information has been held at any time for the purposes of the investigation.

38. Mr. Mackay made a broader argument along the following lines. The criminal investigations being carried out or that will be carried out by the police exist as a result of the investigation by the Ombudsman. He referred to **Re McEvoy's Application** [2022] NIKB 10, an application for judicial review, which concluded that the Ombudsman's public statement and the information published in the 'No Stone Unturned' documentary were sufficient to trigger a revival of the state's article 2 and 3 obligations, that there was a genuine connection between the article 2 and 3 obligations and the attack at Kilcoo in 1992 and that the state had failed to carry out an article 2 or 3 compliant investigation into the attack within a reasonable time.
39. He submitted that the link between the Ombudsman's investigation and subsequent police investigations meant that the information was held for the relevant purposes and that it is likely that the entirety of the information held by the Ombudsman will be passed over to the police to investigate.
40. We do not accept that the fact that future or current police investigation was triggered by the Ombudsman's Public Statement assists us in determining whether the particular information in question has, at any time, been held for the purposes of the Ombudsman's investigation. Our conclusion, as set out above, is that it has not been held at any time for those purposes. For that reason, section 30(1)(a) is not engaged.
41. The Ombudsman relied in the alternative on section 30(2)(a)(i) although Mr. McKay did not address us on section 30(2). We conclude that it does not apply because the remaining information does not relate to the obtaining of information from confidential sources, which is a necessary element of the exemption (see section 30(2)(b)).
42. For those reasons we conclude that section 30 is not engaged.
43. The application of section 40(2) is not controversial and so we do not set out our reasoning, but we accept that the Ombudsman is entitled to withhold the contact details of any individuals, the names of any individuals that are not employed by the Ombudsman, and the names of any junior employees of the Ombudsman.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 26 July 2024

Promulgated on: 29 July 2024