



Neutral Citation Number: [2024] UKFTT 00792 (GRC)

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

**Appeal Reference: EA/2023/0333,
EA/2023/0334 & EA/2023/0335**

**Determined in Chambers on 21 February 2024
and on 30 July 2024.**

Decision given on: 4 September 2024

Before

**UPPER TRIBUNAL JUDGE RINTOUL
(SITTING AS A JUDGE OF THE FIRST-TIER TRIBUNAL)
TRIBUNAL MEMBER A CHAFER
TRIBUNAL MEMBER P DE WAAL**

Between

THOMAS EDWARD MILES FAIRBAIRN

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

CHIEF CONSTABLE OF NORTHUMBRIA POLICE

Second Respondent

DECISION AND REASONS

Decision

For the reasons set out below the Tribunal allows the appeal

REASONS**Preliminary matters***Abbreviations*

DPA	Data Protection Act 2018
First Decision Notice	IC-228497-R3H3 dated 20 June 2023
First Request	9 May 2022
FOIA	Freedom of Information Act 2000
GDPR	General Data Protection Regulation, Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, as enacted by the European Union
GRC Rules	The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009
Northumbria	Northumbria Police
ICO	Information Commissioner, the First Respondent in this appeal
Second Decision Notice	IC-3229050-P9F0 dated 20 June 2023
Second Request	11 July 2022
Third Decision Notice	IC-229145-CL6L6 dated 20 June 2023
Third Request	23 September 2022

Mode of hearing

1. The parties were content for there not to be an oral hearing. The panel was satisfied that it could determine the appeal including considering the closed material justly and fairly without having to convene an oral hearing.
2. The panel first convened on 21 February 2024 and proceeded to determine the appeal. On 14 March 2024, as is usual in a case where there is a closed bundle, we arranged for an embargoed draft to be sent to the ICO and the public authority, Northumbria, to ensure that no closed material had been referred to inadvertently
3. In an email sent on 15 March 2024, Northumbria responded, stating that, contrary to what had been written in the draft, they had responded to the grounds of appeal on 20 November 2023. We therefore made enquiries. It then became clear that, owing to an administrative error, Northumbria's response had not been put before us. We therefore took the decision to reconvene the panel which was not possible until 31 July 2024 owing to the panel's other commitments.
4. When we reconvened, we considered first whether in all the circumstances, we could fairly make a fresh determination of the appeal, having already indicated our views as to the merits of Northumbria's case. We were satisfied that we could do so, noting that there was little in Northumbria's response which had not otherwise been put to us, or which differed from the ICO's response, and taking into account the overriding objective.
5. In reaching the decision to reopen the appeals, and whether we could proceed to determine it fairly, we had regard also to Barrett v ICO [2024] UKUT 107 (AAC) as there is a closed bundle. For the reasons set out below we were satisfied that we could fairly do so without prejudice to any of the parties.

Preliminary matters

6. Although there were three requests made, they all relate to the same issue. We have not been assisted by them being dealt with separately by the ICO, nor by the redactions in the requests as set out in the Notices of Decision which make them incomprehensible without referring to the actual requests themselves. Nor have we been assisted by the first request in time being treated as the second request.

Closed Proceedings

7. The Tribunal received a copy of the disputed information, and it was held on the basis it would not be disclosed pursuant to rule 14 (6) of the GRC Rules. There was no closed hearing and there is no closed decision.

Introduction & Background

8. On 30 May 1977, the appellant's mother, Joanna Fairbairn died in a fire at the Charlotte Straker Hospital, Corbridge, Northumbria. An inquest was held, and on 11 July 1977, the jury returned an open verdict. The appellant, then 15, was told that she had started the fire herself by dropping a lit cigarette while she was drunk. He later queried that, and requested a copy of the Inquest file.
9. The appellant concluded from the file that, contrary to what he had been told, the forensic evidence indicated that his mother was dead when the fire first started; and there were defects in the coroner's inquest in that a witness statement had been altered, photographic evidence had been staged and witnesses who suspected foul play had been improperly excluded by the coroner. The appellant then in late 2012 asked Northumbria to re-open the case and investigate it further. In the appellant's view this was not conducted properly, and a formal complaint made was upheld by Northumbria's Professional Standards department. Following this, the appellant asked for the case to be re-investigated again. This was refused but a 'review' was promised, this was concluded in 2019. (Appellants Final Submission pg 2)
10. The appellant considers that what he has been told by Northumbria is inconsistent and at times contradictory. He considers also that no proper explanation has been provided for the delay in conducting further investigations, and that despite assurances, no one from Northumbria has met with him to discuss the case.
11. The appellant wished to pursue his investigations and on 12 April 2022 wrote to Northumbria as follows:

"Please may I get a copy of the Northumbria Police case file of the investigation into my mother's sudden and unexpected death. Her name was Joanna Fairbairn and she died in a localised fire in the Charlotte Straker Hospital in Corbridge on 30th May 1977.
12. On 9 May 2022 the appellant wrote again to Northumbria. He wrote (the First Request):

I made an FOI request several weeks ago and have heard nothing since. Could you please update me as to progress. The request was for a copy of the police case file regarding my mother's (Mrs Joanna Fairbairn) sudden and unexpected death on 30th May 1977 in a fire at the Charlotte Straker Hospital in Corbridge.

13. It is this query that has been treated as the request by Northumbria and by the ICO, not what has been asked on 12 April 2022, although they are clearly related.

14. On 26 June 2022 (the Second Request) the appellant wrote:

Could you please provide the Northumbria Police Roster Records for Hexham, Prudhoe and Corbridge police stations showing which officers attended the Charlotte Straker Hospital in Corbridge between the 20th May 1977 and the 30th June 1977. I have been informed in writing by current Northumbria Police officers that these records exist, that there is no outstanding investigation, that no charges are envisaged and that I should make this FOI request

15. On 1 July 2022, Northumbria sought the name of the officers who had written to him, and he replied stating:

It was a DS Paxton who wrote to me saying that he had located the roster records and that their content would be discussed at an upcoming meeting which my solicitor and I attended. Without referring to my files I believe that this was in mid 2016. The information was not discussed at that meeting so my solicitor wrote asking for the information. No written reply was received but I was subsequently told by DS Paxton and DCI Fairlamb that it could accessed via an FOI request.

16. On 23 September 2023 (the Third Request), the appellant wrote:

Could you please provide me with a copy of the Police Case Review file relating to my mother's sudden and unexpected death in the Charlotte Straker Memorial Hospital on 30 May 1977. This review file was opened in 2012 by a DS Jeffrey Brown following a request from myself that Northumbria Police re-open their 1977 investigation. DS Brown was replaced by DS Ian Paxton and DCI Andy Fairlamb in 2014/2015 and the review and the file were closed in 2019/2020.

The initial response from Northumbria

17. On 18 October 2023 Northumbria wrote to the appellant stating that they apologised for the delay in providing a response but that since the incident had occurred in 1977 they had undertaken extensive research to ascertain what/if any information held was specific. They acknowledged that they had not met the legislative timescale causing frustration and concern but that given the nature and remit of the application they had no option but to respond as follows:-

"In order to potentially aid and assist you further, we would suggest that you make contact with this office to facilitate further discussion in respect of possible alternative options.

In the meantime, Northumbria Police can neither confirm nor deny that it holds the information you requested as the duty in Section 1(1)(a) of the Freedom of Information Act 2000 does not apply, by virtue of the following exemptions.

Section 40(5) Personal information

Section 30(3) Investigations

Section 31(3) Law enforcement

Section 38(2) Health and safety”.

18. It is then explained that Section 40 is a class based absolute exemption and that neither confirming nor denying new information exists is the appropriate response; and, that Sections 31 and 38 are prejudice based qualified exemptions and any prejudice or harm that confirming or denying information is held must be articulated as well as the public interest consideration.

19. In respect of its reliance on the exemption in Section 30, Northumbria explained that, under FOIA, information that is disclosed is released to the public as a whole and not just the individual applicant and as such would not wish to confirm or deny to the public at large whether information is held about any individual. This is then followed by generic justifications setting out the public interest test and setting out their conclusion that the balance in this case is for neither confirming nor denying that any further information is held is the appropriate response.

The appellant’s request for a review and further developments

20. On 4 December 2022 the appellant sought a review of the matter pointing out that he had contacted them for discussion but had received no reply and pointing out that the time which elapsed between his request and the decision to refuse it is 131 working days well in excess of the time permitted for compliance under Section 10(1) of FOIA. It is also pointed out the requirement under Sections 10(3) and 17 to give notice of their intention to rely on the exemptions within the stipulated timeframes, and that these timeframes were failed in relation to Sections 31 and 30. Also, their failure to notify their reliance upon the public interest test or Sections 38 and 40(5); and, that their failures to meet the stipulated timeframes were such that he had sent them four written reminders.

21. On 27 February Northumbria responded that the exemptions applied were appropriate given the content of such files, noting also the time that has elapsed since the initial incident and the initial investigation had been concluded. It is said also that the information if it were held would not fall to be considered

as disclosable as a historical record and that the exemption was appropriately applied. That is because the file has been reviewed on several occasions as so is not a historical record. An apology is offered but the officer responsible had not contacted the appellant, and no details had been passed on to the head of crime to allocate a relevant and suitably experienced officer to make contact with him.

22. On 28 February 2023 the appellant responded to Northumbria, requesting that the officer appointed to contact him should email him no later than 10th March 2023.

23. On 21 April 2023 the appellant referred all three FOIA Requests to the ICO pointing out the level of non-compliance and the failure of Northumbria to contact the appellant which he considered as further evidence of bad faith on the part of Northumbria setting out in detail his reasons for reaching that conclusion. The ICO then wrote to Northumbria.

Northumbria's formal response

24. On 14 June 2023 Northumbria replied to the ICO in respect of all three requests stating, in a heavily redacted letter, that the appellant had been kept up to date with police investigations in accordance with the Victims Code for Policing and that to confirm or deny whether any further information is held beyond the Victims Code would undermine such investigations and/or proceedings. The exemptions relied upon are restated in almost the same terms as stated previously, in particular the harm in complying with Section 1(1)(a) of FOIA.

25. Northumbria wrote to the appellant in effectively identical terms in respect of each of the three requests.

The ICO's Response

26. The ICO's response in all three cases is effectively identical. Having to deal with three effectively identical documents as notices of decision caused the panel and no doubt the appellant significant extra work.

27. The salient parts of all three of the decision notices are as follows:

"21. The Commissioner understands the complainant's personal interest in the request for information. However it is important to reiterate that confirmation or denial under FOIA is confirmation or denial to the world at large, not just a private communication between the public authority and the applicant.

22. The Commissioner recognises that there is a very strong public interest in protecting public authorities' investigative capabilities. He considers that the appropriate weight must therefore be afforded to the public interest inherent in the exemption – in this case, the public interest in Northumbria Police being able to carry out the investigations effectively.

23. The Commissioner is satisfied that the public interest in Northumbria Police being able to carry out effective investigations outweighs the public interest in transparency and in meeting the requirements of Section 1(1)(a) of FOIA, in this case”.

28. The notices then go on to explain that Northumbria was correct to rely on Section 30(3) of FOIA and as such it had not been necessary to consider the remaining exemptions that Northumbria had applied to the requests. It is said also that “nothing in Northumbria Police’s correspondence with the complainant or in this decision notice should be taken as an indication that the requested information is or is not held”.

29. The ICO does, however, acknowledge the apparent failures to facilitate further discussions and Northumbria’s oversights in this respect and that they should consider contacting the complainant to discuss matters outside of FOIA since it has already suggested that this was an option.

Grounds of Appeal

30. In respect of the first decision the appellant set out the failures of Northumbria to meet the legislative timeframe stating that he believes the decision to be wrong in law and that a proper construction of Sections 10 and 17 of FOIA negates Northumbria’s ability to rely on the FOIA Part 2 exemptions and that the response from the ICO does no more than repeat the arguments in favour of the exemptions employed by Northumbria. It concludes as follows:

“Finally, although in this case I do not argue the substance of the Part 2 exemptions NP [Northumbria] and the ICO rely upon I nevertheless believe that substance to be lacking – and to the extent the Tribunal deems them pertinent those arguments are made in my appeal to the Tribunal that relate to my request of [Northumbria] for the police review file of the case, referring to the (third Decision Notice)”.

31. The grounds of appeal in respect of the second decision notice set out the background and are materially no different from those put in respect of the first decision notice.

32. The grounds of appeal in respect of the third decision notice set out the background but accept that there was no violation of the legislative timescales. It is said also that although the exemptions in Sections 30(3) and 30(1) involve

public interest tests, nonetheless these can be exercised capriciously to seek to withhold information that would demonstrate that a public authority has acted or not acted in accordance with the law and its Code of Conduct. The appellant states that his objective has always been to ascertain whether or not his mother's sudden and unexpected death was investigated and if so was the investigation conducted in accordance with prevailing practice and if not that the case should be reopened. He repeats what he had said in the earlier letters that any reasonable person would conclude that Northumbria had been dealing with those requests in bad faith for many years.

The ICO's Reply to the grounds of appeal

33. Taking these responses together, the ICO considers that the delays do not invalidate Northumbria's grounds for neither confirming nor denying whether the requested information is held in the refusal notices. It is submitted that public authorities have a right to claim any exemption for the first time before the ICO or the Tribunal, relying on McInerney v IC and the Department for Education [2015] UKUT 0047. It is maintained that Section 30(3) of FOIA is engaged as the requested information would clearly fall within Section 30(1) of FOIA and that the public interest test under Section 2(1)(b) is met as the balance of the public interest (as opposed to the private interest of the appellant) favours maintaining the exemption for the reasons set out in the decision notices.

Procedural Matters

34. Directions were issued in this case on 22 August 2023. On 19 October 2023 Case Management directions were made joining the three appeals and joining the Chief Constable of Northumbria Police as the second respondent. The second respondent was given 28 days to reply to the notice of appeal and the appellant a further fourteen days after that response to respond.

35. On 19 October 2023 a direction was made pursuant to Rule 14(6) preventing disclosure of the disputed information.

36. Northumbria responded to the directions on 22 November 2023.

Northumbria's response

37. Having set out the background and legal principles, Northumbria adopts the submissions made by the ICO, accepting [16] that its responses in each of the first two appeals were late, but it submits that it can nonetheless rely on exemptions, giving primacy to section 30. It is submitted also [22] to [24] that modern policing is intelligence led, and at times the force shares information with other law enforcement agencies; and, to confirm or not whether it held the

requested information could hinder the prevention and detection of crime, and undermine partnerships with other agencies. It is submitted also that confirming or denying would mean that investigations would be less effective, and may lead to lack of information being provided, and may reduce public confidence in the police if the information is made public.

The Law

38. The provisions of FOIA are well known and there is no need to set them out in full.
39. The duty to say what information is held that matches the description in an information request is found in section 1(1)(a) of FOIA. This is known as the duty to confirm or deny: section 1(6). Section 30(3) provides, among other things, that the duty to confirm or deny does not arise in relation to information which (if it were to be held) is exempt information by virtue of section 30(1). This is subject to a public interest balance.
40. We have applied sections 50, 57 and 58 of FOIA in considering this appeal.

The closed material

41. As in *Barrett*, these are appeals determined without a hearing, and where the Registrar has made an order pursuant to rule 14 (6). As in *Barrett*, the appellant was not given a gist of the closed material, but he was informed that he could apply for the registrar's decision to be considered afresh, although it was not expressly stated that this would be by a judge. Nor was he informed that he could challenge the respondent's application.
42. We accept that, based on the decision in *Barrett*, these are procedural errors which may in some cases amount to unfairness. But, what amounts to procedural unfairness is inherently fact-specific. In this case, we have for the reasons set out below determined the appeals on the basis that they are limited to a determination of the duty to confirm or deny and do not involve the duty to disclose. We do not consider that a fair determination of the duty to confirm or deny in these appeals is a decision that turns on the nature or content of the closed material. In the circumstances, and in view of the successful outcome of the appeals, we also do not consider that the appellant has been prejudiced by not receiving a gist of the closed material. On the other hand, the duties arising from *Barrett* in relation to procedural fairness (particularly in relation to the provision of a gist of closed material) is likely to be relevant in any future appeals brought by the appellant in the event that Northumbria withholds the requested information in reliance on exemptions (other than the exemption in Section 30(3) of FOIA).

Delay

43. We address first the issue of the delay on the part of the second respondent, Northumbria. We accept that Section 10(1) of FOIA imposes a duty to reply promptly and in any event no later than twenty working days after receipt of a request for information. That is, however, subject to sub-section 10(3) to the extent that the duty under Section 1(1)(a) would not apply if Section 2(2)(b) is satisfied, that is whether the duty to either confirm or deny arises. That does not, however, affect the time by which a notice under Section 17(1) of FOIA applies. But this is dependent on the time given for complying with Section 1(1).

44. Further, it is established law that, as was set out in McInerney and in Information Commissioner v Home Office [2011] UKUT 17, Section 17(1) does not prevent the late reliance on an exemption and indeed it can be raised even before the First-tier Tribunal. It is therefore clear that a failure to comply with the time limits does not debar an authority from raising an exemption later nor does it follow from a failure to make a decision under Section 10 that that decision is in itself unlawful in such a manner that an appeal would be allowed.

45. While as a matter of law the delay has been in breach of the law, given our findings below we see no need to take further action in response to this finding.

The duty to confirm or deny and the public interest balance

46. It is evident that, if it were held, the information requested would be covered by the exemption in Section 30(1) of FOIA.

47. The focus of our enquiry is on Northumbria's reliance on the exclusion of its duty to confirm or deny whether such information is held, and whether in all the circumstances of the case the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the requested information is held (not the public interest in *disclosure* of such information).

48. This requires us to consider the type of information requested; the public interest in knowing whether such information is held; and the public interest in confirming or denying whether it is held.

49. Northumbria recognises that there is a public interest in transparency and accountability in respect of the matters and events addressed in the appellant's requests, and in respect of its responses to such enquiries. We agree.

50. In this case, the explanation from Northumbria in its response of 27 February 2023 (and accepted in the Commissioner's Decision Notices) for excluding its duty to confirm or deny is generic and fails to identify any factors of harm or prejudice relevant to the case-specific information requested. Nor does it adequately explain why or how, in this case, confirmation or denial of whether the requested information is held would cause any harm. It also fails to take into account that the information (if it exists) would be very old, and fails to consider whether in light of the passage of time (and of the nature of the information) the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the information is held.
51. We consider also that the same criticisms apply equally to the response to the grounds for the appeals. The response adds nothing of substance to what was said in the response of 27 February. As noted above, nearly 50 years has passed since the tragic death of Mrs Fairbairn and the subsequent investigation and inquest.
52. Further, there is here no proper evidence that, on the facts of this case, effective policing would or would be likely to be adversely affected given the passage of time. Or that public confidence would be undermined by confirming that material relevant to the requests is held. On the contrary, in view of the factual and historical background there is a significant interest in the public having knowledge that information relevant to the requests is held.
53. Given the factual history of this case, the nature of the information requested and the age of any documents or information that may be held within the scope of the requests, and having had regard to the public interest factors, we are not persuaded that in this case the public interest in excluding the duty to confirm or deny outweighs the public interest in disclosing whether the information is held. That applies equally to Northumberland's reliance on sections 30, 31 and 38.
54. Finally, we note that despite what Northumbria wrote on 18 October 2023 (see [17] above), there is no indication that it has taken steps to meet with the appellant. Again considering the sensitive factual background and the procedural history between the parties, such an approach is to be encouraged and Northumbria may wish to take this forward with the appellant with a view to resolving matters.

Conclusion

55. For these reasons, we consider that the Decision Notices involved an exercise of discretion by the Commissioner that ought to have been exercised differently and we allow the appeal. Northumberland is required to issue a fresh response to the appellant's information requests in compliance with its duty to confirm or deny under section 1(1)(a) of FOIA and to disclose the information requested unless it seeks to rely on any exemptions under FOIA.

Signed

Date: 16 August 2024

Jeremy K H Rintoul

Upper Tribunal Judge Rintoul

(sitting as a judge of the First-tier Tribunal)

Promulgated on 4 September 2024