



**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
[INFORMATION RIGHTS]**

**Case No. EA/2012/0236**

**ON APPEAL FROM:**

**Information Commissioner's  
Decision Notice No: FS50456429  
Dated: 22 October 2012**

**Appellant: Miguel Cubells**

**First Respondent: The Information Commissioner**

**Second Respondent: Greater Manchester Police**

**Heard at: Manchester**  
**Date of hearing: 8 May 2013**

**Date of decision: 2 August 2013**

**Before**  
**CHRIS RYAN**  
(Judge)  
and  
**MALCOLM CLARKE**  
**SUZANNE COSGRAVE**

**Attendances:**

For the Appellant: Alison Gurden  
For the First Respondent: Heather Emmerson  
For the Second Respondent: Jennie Powsney

**Subject matter:**

Public interest test s.2  
Investigations and proceedings conducted by public authorities s.30

## DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed

### REASONS FOR DECISION

#### Background to the Appeal

1. The Appellant appeals a Decision Notice of the Information Commissioner (FS50456429) dated 22 October 2012 (“the Decision Notice”). The Information Commissioner decided that the Greater Manchester Police (“GMP”) had been entitled to issue a “neither confirm nor deny” response to a request for information made by the Appellant on 28 May 2012.
2. The information request read:

*“Under the provisions of the FOIA/DPA could you please release to me the instruction given to Police commissioned medical expert [name redacted] in respect of the investigation of my Mother’s death [name redacted]”*

The background to the request is that the Appellant had raised with the GMP certain concerns he had about the treatment his mother had received in hospital immediately before her death.

3. As the request indicated, it was made under the Freedom of Information Act 2000 (“FOIA”). FOIA section 1(1)(a) imposes on any public authority to whom it applies an obligation to state whether or not it holds requested information. However, if the information is categorised as “exempt information” under one or more of the statutory provisions set out in Part II of FOIA, the duty to confirm or deny may not apply to that information. The exemptions are categorised as either absolute or qualified. If absolute the “neither confirm nor deny” response may be given without further enquiry. However, if the exemption is a qualified one, a “neither confirm nor deny” response may only be given if, pursuant to FOIA section 2(1)(b):

*“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 public authority holds the information.”*

4. GMP relied on a number of exemptions to justify its response. However, as the case came before us (on appeal from the Information Commissioner’s rejection of the Appellant’s complaint about the GMP’s handling of his information request), it was only FOIA section 30 that we were asked to consider. That is a qualified exemption and, although the Appellant originally argued that the section was not engaged, it was conceded at the hearing that it was and that the right to issue a “neither confirm nor deny” response was therefore dependent upon the operation of the public interest balancing exercise under FOIA section 2(1)(b).

#### The Decision Notice under appeal

5. In the Decision Notice the Information Commissioner balanced the public interest in GMP being accountable to the public for the manner in which it carried out its investigatory work at public expense against the public interest in the investigative process being protected. He concluded that it was important that the GMP maintained a consistent response to information requests because the existence of information might otherwise be revealed to anyone studying the pattern of responses given over a period of time. That consideration created a public interest in maintaining the refusal to either confirm or deny that outweighed that in favour of the GMP issuing a confirmation or denial.
6. Some of the arguments in support of GMP’s case were set out in a confidential annex to the Decision Notice. This consisted of seven paragraphs. The first six set out short extracts from correspondence between the GMP and the Information Commissioner articulating very general arguments in support of the public interest in not confirming or denying that the requested was held. The seventh paragraph included more specific information.

#### Procedural issues arising from the Decision Notice and Confidential Annex

7. Two issues arose from the Decision Notice and Confidential Annex:
  - a. Should the first six paragraphs of the Confidential Annex be disclosed to the Appellant and his counsel, under terms of confidentiality, for the purpose of the appeal hearing? For the reasons set out in Confidential Annex 1 to this Decision we decided that it should.
  - b. In view of the content of the Confidential Annex, should we see certain additional information in the possession of the GMP? We heard submissions in a closed session and decided, as a

result, that we should. Our detailed reasons for reaching that decision are set out in Confidential Annex 2 to this decision

8. We accordingly ruled that the first six paragraphs of the Confidential Annex to the Decision Notice should be made available to the Appellant and his Counsel on terms that this was not a disclosure under the FOIA (which would have left the Appellant free to disclose it to the world) but a disclosure made solely for the purpose of the hearing (where it would be debated in a session that would be closed to all other members of the public) and on the basis that it would not be used for any purpose other than the conduct of the hearing. On that basis copies were made available to the Appellant and his Counsel under terms of confidentiality. They were retrieved at the end of the hearing.
9. We are happy to confirm, as requested by the Information Commissioner, that we regard this method of proceeding as being very unusual. It is unlikely to be appropriate in other cases unless the detailed background facts create a situation such as this one, in which, for the reasons set out in Confidential Annex 1, the conduct of the hearing would otherwise be unfair to the Appellant and unhelpful to the Tribunal in its attempt to reach the correct overall conclusion.

Public Interest Arguments under section 2(1)(b)

10. The public interest in the GMP being permitted to give a “neither confirm nor deny” response to the Appellant’s information request, as set out in the Decision Notice and reiterated by the Information Commissioner’s counsel, is that it prevents the public from determining a pattern from responses made over a period of time. If, to put it at its most simple, the GMP denied that it held information when it did not do so, but issued a “neither confirm nor deny” response when it did, the public would very quickly discern that the second of those responses signalled that it did indeed hold the information. The GMP’s case, therefore, is that it must be permitted to maintain consistency if it is to retain confidentiality about the way in which it approaches a particular type of enquiry. On the facts of this particular case that means that the public (including those who may be the subject of an enquiry) will not be able to determine the circumstances when the GMP is likely to decide that it should seek a medical opinion and when it should not.
11. Counsel for the Appellant argued that the emphasis on consistency meant, in effect, that there would be no circumstances in which a public authority would be required to either confirm or deny that it held information, an outcome which she said amounted to a denial of a fair hearing, contrary to the European Convention on Human Rights. That might be the case if consistency were to be elevated to an inflexible rule (which it is not) and if the Information Commissioner’s decision were not open to be appealed to an appeal tribunal which took account of all relevant facts and arguments. In reality, the importance of

consistency is no more than a public interest factor that must ultimately be weighed in the balance against factors in favour of the public being informed whether or not the information exists.

12. The Appellant's counsel's criticism of the emphasis placed on consistency led her to argue that it had caused the Information Commissioner to give no, or no sufficient, consideration in the Decision Notice to the public interest factors in favour of the GMP disclosing whether or not it held the requested information. We regard that as a harsh criticism because the Decision Notice clearly acknowledged the importance of accountability in respect of publicly funded criminal investigations. It was an acknowledgement that was repeated in the hearing by counsel for, respectively, the Information Commissioner and the GMP.
13. It is evident from the background to this case that the Appellant clearly has a powerful private interest in pursuing his request. His Grounds of Appeal made it very clear that he sought, not only confirmation that the GMP held the requested information, which he believed it did, but that the information should be disclosed to him. However, his Counsel acknowledged that it is the public interest that must be put into the balance and she argued that this lay in the public being assured about the effectiveness of the police investigation of suspicious death complaints, in particular the issues on which the police seek medical opinion and the manner in which they pose questions to those instructed to provide it. Although she conceded that those considerations had particular relevance to any decision as to whether the requested information should be disclosed, she maintained that they were also relevant to the possible obligation to confirm or deny that it was held.
14. Counsel for the Information Commissioner invited us to set against the Appellant's argument the fact that there was no suggestion in this case of the GMP, or the police generally, performing inadequately in the conduct of either the investigation with which the Appellant is concerned or suspicious death enquiries generally. We certainly see no grounds for concern on the basis of our review of the facts and materials in this case. Counsel invited us to conclude that, in those circumstances, the weight to be applied to the public interest in transparency was relatively small. She was supported on this point by counsel for the GMP.
15. Counsel for the Information Commissioner went further, discouraging us from attempting to second guess the GMP's assessment that disclosing whether or not it held the information would have an effect on the overall consistency of its responses and hence the effectiveness of its investigatory activities. In particular, it was said, a pattern might easily emerge disclosing those cases, or categories of case, where the GMP decided to instruct a medical expert and those in respect of which it might decide that the nature of the allegations did not justify it. This,

it was said, comfortably outweighed the limited public interest that might be served by the GMP revealing whether or not it held the requested information.

#### Our decision on the public interest balance

16. We do not accept the Appellant's argument that there is a public (as opposed to private) interest in the GMP disclosing whether or not it held the requested information at the relevant time. We expand on our reasons for having reached that conclusion in Confidential Annex 3 to this decision. Although we do not believe that the public interest in retaining consistency in respect of investigations into suspicious deaths in hospitals is as great as the GMP and Information Commissioner have argued, we accept that it does exist in respect of investigations as a whole and that there must be a good reason for ordering any disclosure that might begin to dilute it. We found no such good reason in this case. We therefore conclude that the public interest in GMP being entitled to issue a "neither confirm nor deny" response outweighed the public interest in disclosing whether it held the information. The GMP was, therefore, justified in responding to the Appellant's information request as it did. The Appeal should therefore fail.

#### A final issue

17. The Appellant also criticised the Decision Notice for having failed to address an issue arising out of the Data Protection element of his original information request. We confess to have had difficulty following the point, notwithstanding at least one attempt by the Appellant's Counsel to clarify it. To the extent that it was raised in support of a general criticism of the manner in which the Information Commissioner carried out his investigation and recorded the outcome in his Decision Notice, we do not think it adds anything to the public interest arguments which we have attempted to summarise above. And to the extent that it amounted to an invitation to us either to address a Data Protection point that had not been included in the list of agreed issues we were asked to consider or to remit it to the Information Commissioner for further consideration, we believe that we do not have jurisdiction to do either.
18. Our decision is unanimous
19. The three Confidential Schedules to this decision should remain confidential unless or until disclosure is ordered in the course of any direct or indirect appeal from this decision.

Chris Ryan (Judge)  
2 August 2013