



Neutral Citation Number:

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

**Appeal No: EA/2015/0134**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50554067  
Dated: 16 April 2015**

**Appellant: Omar Stephens**

**Respondent: The Information Commissioner**

**Heard at: Snaresbrook Crown Court**

**Date of Hearing: 15 October 2015**

**Before  
HH Judge Shanks  
Judge  
and**

**Pieter de Waal and Alison Lowton  
Tribunal Members**

**Representation:**

**Appellant: In person**

**Respondent: Heather Emmerson**

**Date of Decision: 19th October 2015**

**Subject matter:**

Freedom of Information Act 2000

s.30	Qualified exemption: <i>Investigations and proceedings conducted by public authorities</i>
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s.40	Absolute exemption: <i>Personal data</i>
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**DECISION OF THE FIRST-TIER TRIBUNAL**

For the reasons set out below the Tribunal allows the appeal in part and issues the following substituted decision notice.

**SUBSTITUTED DECISION NOTICE**

**Public authority:**                    **The Crown Prosecution Service**

**Name of Complainant:**        **Omar Stephens**

**The Substituted Decision**

- (1) On request (A) the public interest in maintaining the section 30(1)(c) exemption did not outweigh the public interest in disclosure of the information and the CPS ought to have informed Mr Stephens whether it held the information and, if so, supplied it to him;
- (2) On request (B) the information was properly withheld under section 30(1)(c) and no further action is required;
- (3) On request (C) the information was exempt from disclosure under section 40(1) of FOIA.

**Action Required**

The CPS is required to locate and supply the information the subject of request (A) to Mr Stephens by 16.00 on 13 November 2015.

HH Judge Shanks

19th October 2015

## **REASONS FOR DECISION**

### **Factual background**

1. On 6 December 2005 the Appellant, Omar Stephens, was convicted at the Old Bailey of a murder committed on 13 October 2004. He remains a serving prisoner. Although he has already brought an unsuccessful appeal in the Court of Appeal (Criminal Division) and applied unsuccessfully to the Criminal Cases Review Commission (CCRC) to review his case, he continues to maintain that he is innocent and was wrongly convicted.
  
2. On 20 April 2009 Mr Stephens made a wide ranging request under FOIA for information about his case to the Crown Prosecution Service (CPS) with a view to obtaining information to assist him to establish his innocence. That request ultimately came before this Tribunal (HH Judge Shanks, Mr de Waal and John Randall) and, following a hearing at Snaresbrook Crown Court attended by Mr Stephens and representatives of the Information Commissioner and the CPS, the Tribunal issued a decision dated 20 December 2012 ruling that the information requested was exempt under section 30(1)(c) of FOIA (“information held by a public authority for the purposes of any criminal proceedings which the authority has power to conduct”) and that the public interest in maintaining the exemption outweighed the public interest in the disclosure of the information. The Tribunal recorded in its decision at paragraph 16, when discussing the public interest in disclosure of the information, that the CPS had indicated that they were able and willing to provide any information to Mr Stephens which he might reasonably require in relation to a further appeal outside the terms of FOIA (ie subject to suitable undertakings by Mr Stephens as to its use).
  
3. On 14 May 2014 Mr Stephens made a much more focussed FOIA request for information from the CPS seeking:

**(A) The precise time 999 operator received the phone call from [a named witness] on 13/10/14**

**(B) All material or information that [another named witness] disclosed to the police and what was disclosed from the police to [the witness] including witness statements, audios, dialogue, welfare visits and DVDs**

**(C) The end cell ... site postcode of [his own mobile telephone]**

He told us in the course of the hearing of this appeal at Snaresbrook Crown Court on 15 October 2015 that the information he was seeking under requests (A) and (C) was relevant to his contention that he was not present at the scene of the murder on 13 October 2004 but that for some reason it had not featured in the evidence at his criminal trial (in relation to request (C) this appeared to be confirmed by a passage in the judge's summing up which he showed us). The information sought under request (B) was relevant to attacking the credibility of the prosecution witness in question. He also told us in the course of the hearing (and he referred us to a letter at page 60 of the bundle which tended to support his account) that he had requested the same information from the CPS under FOIA in January 2013 and that the CPS had refused his request in reliance on section 30(1)(c) but that, although they had said that CPS London would be in touch with him in order to consider whether the information should be disclosed outside FOIA, he had not heard any more from them.

4. The CPS's response to the request of 14 May 2014 in an email sent on 29 May 2014 was simply to refer to the Information Tribunal's decision of 20 December 2012 which, they said, found that section 30(1)(c) applied to all the information "... you requested from your case ..." and to say that there was nothing further the writer could add and that he was unable to correspond further with Mr Stephens on the matter. It is noteworthy that the CPS did not expressly state whether they held the information requested on 14 May 2014 as required by section 1(1)(a) of FOIA, although it seems that it has been tacitly assumed throughout the case that such information is likely to be available on the CPS files, and we are satisfied on balance that it will be.
5. Mr Stephens applied to the Information Commissioner under section 50 and he upheld the CPS's position in a decision notice dated 16 April 2015. Mr Stephens appealed against that decision notice and we have held a hearing at Snaresbrook Crown Court.

Mr Stephens represented himself in a restrained and sensible way and the Commissioner was ably represented by Ms Emmerson. It seems that the CPS did not apply to be joined to the appeal and we have not heard directly from them on this occasion.

### **Our conclusions on the appeal**

6. Although Mr Stephens seemed at one point to be trying to persuade us otherwise, we have no doubt that any information held by the CPS which comes within the terms of his request is covered by section 30(1)(c) of FOIA. The only matter for us to consider in relation to that exemption is therefore whether in all the circumstances the public interest in maintaining the exemption outweighed that in disclosure of the information.
7. We were referred to paragraphs 11 to 18 of the decision of 20 December 2012 where the Tribunal discussed the public interest balance in relation to section 30(1)(c) in the context of the requests for information made by Mr Stephens in 2009 and we see no reason to revise the general remarks made in those paragraphs, which can be read into this decision. However, in the (very) particular circumstances of this case, having regard to the terms of the requests and the circumstances as they were in May 2014, we have come to the view on this occasion that the public interest balance fell in favour of disclosure of the information which was the subject of requests (A) and (C), although not in the case of the information the subject of request (B).
8. The factors which have led us to that conclusion in relation to requests (A) and (C) are these:
  - (1) Obviously, a wrong or unfair conviction for murder would be a matter of great *public* disquiet, as well as disquiet to Mr Stephens. Although we are no nearer to being able to conclude that there really is any basis for saying that there may have been a wrong or unfair conviction in this case than we were in 2012, we cannot help but note Mr Stephens's continuing persistence in protesting his innocence. Further, on this occasion, he has at

least identified some specific material which he says will undermine the jury's implicit finding that he was present when the murder took place. This factor therefore weighed more heavily in 2014 than it did in 2012.

- (2) The existence of the CPS's undertaking to supply information outside FOIA if appropriate was a factor which tended to lessen the public interest in disclosure under FOIA. However, as we have mentioned, at least on Mr Stephens's account of events, it does not appear that he in fact received much co-operation from the CPS between 2012 and 2014.
- (3) The information requested is very focussed. It will not undermine the position of any witness. If available it will be as near to objective fact as can be. We cannot see any reason why the information should be sensitive. All these are points which tend to lessen the public interest in maintaining the exemption in relation to the specific information requested.
- (4) By the time of the refusal to supply the information with which we are concerned 8 ½ years had passed since Mr Stephens's trial (as opposed to 5 ½ years the last time): the public interest in maintaining the exemption inevitably lessens over time.

9. Although we therefore conclude that section 30(1)(c) did not entitle the CPS to withhold the information the subject of request (C), we also noted that it appears to be tacitly assumed all around that if this information is held by the CPS it must comprise Mr Stephen's personal data since it is information as to his whereabouts (or the whereabouts of his mobile phone) at a certain time. It would therefore be absolutely exempt from disclosure under section 40(1) of FOIA and should probably have been dealt with as a subject access request under the Data Protection Act 1998. We therefore substitute a finding to this effect.

10. As to request (B), different considerations apply. The information requested relates to a specific witness who Mr Stephens seeks to discredit. It seems to us that the public interest in maintaining the section 30(1) exemption is substantially weightier in relation to such information because its disclosure is likely to be contrary to the

witness's expectations, may create real danger for the witness and would have had a seriously deterrent effect on other witnesses in future. In our view, these considerations tipped the balance in favour of maintaining the exemption in relation to request (B) and the CPS and the Commissioner were right to so conclude.

**Disposal**

11. We have therefore concluded that request (A) was not dealt with in accordance with FOIA and that request (C) ought to have been refused on the basis of section 40(1) rather than section 30(1)(c) FOIA (and probably considered as a subject access request under the Data Protection Act 1998). To that extent we allow the appeal and we issue a substituted decision notice reflecting these conclusions.

12. Our decision is unanimous.

HH Judge Shanks

Date: 19th October 2015