



ON APPEAL FROM

**THE INFORMATION COMMISSIONER'S DECISION NOTICE
No:FS50583580**

Dated: 19th, August 2015

Appeal No. EA/2015/0185

Appellant: Samson MacNab

First Respondent: The Information Commissioner ("the ICO")

Second Respondent: The Commissioner of the Metropolitan Police
("the CMPS")

Before

David Farrer Q.C.

Judge

and

Stephen Shaw

and

Henry Fitzhugh

Tribunal Members

Date of Decision: 29th, February, 2016

Subject matter: FOIA s.30(1) and (3)

Whether the Metropolitan Police (“the MPS”) was under a duty to confirm or deny that it held information, which it had at any time held for the purposes of an investigation to ascertain whether a person should be charged with an offence.

The Tribunal’s decision

The appeal is dismissed. The CMPS is not required to confirm or deny that he holds such information.

Abbreviations (in addition to those above)

The DN The ICO’s Decision Notice

The DPA The Data Protection Act, 1998

FOIA The Freedom of Information Act, 2000

The Reasons for the Tribunal's Decision

The Background

1. Many years ago, Cyril Smith, formerly a prominent politician in the Liberal Party, later the Liberal Democrats, was the subject of police investigations into allegations of child sex abuse. In the course of such investigations a substantial quantity of property, evidently believed to belong to Mr. Smith, was seized .
2. Mr. Smith was never charged with any criminal offence arising from such investigations. He died in 2010.
3. Fresh investigations began quite recently into (a) possible child sex offences allegedly committed by Mr. Smith and others and (b) the conduct of police officers in relation to the original investigations. Category (b) focused on the question whether police officers who were not assigned to those original investigations had interfered with and frustrated them by acts amounting to criminal offences.
4. These fresh investigations were widely reported in the media. The reports, evidently based on "leaked" information, whether accurate or false, included assertions that relevant material seized from Mr. Smith's home had been removed from the investigators by senior officers and possibly destroyed.
5. On 20th. March, 2015 Mr. MacNab made the following request for information to the MPS –
 - “(a) Did senior officers from the Metropolitan Police (or another agency) take possession of video, photographic and documentary evidence relating to the arrest of the late Cyril Smith after his release, and if so where is that evidence stored; or was that material destroyed ?*
 - (b) If part (a) has occurred, under what and whose authority did this take place ?*
 - (c) Who were the senior officers, allegedly from the Metropolitan Police, who had the meeting with the investigative team concerning the criminal investigation into the*

activities of Cyril Smith; and convinced that team to hand over all investigative material ?

(d) I also seek disclosure of all intelligence and the investigative material that the Metropolitan Police may hold on the activities of Cyril Smith concerning that criminal investigation, e.g., intelligence logs, pocket book entries, pictures, videos, witness statement(s) or ROTI (Taped interview records) of Cyril Smith himself, officers' reports and similar material."

6. The CMPS, in his response of 8th. April, 2015, refused to confirm or deny holding any of the information requested. He relied on several exemptions from the duty to state whether he held it, of which those argued in this appeal were founded on FOIA s.30(3) (criminal investigations) and 40(5) (protection of personal data). He provided a very full statement of his case. The latter exemption fell to be determined only if, or to the extent that the former was not upheld. He maintained that response following an internal review.
7. He acknowledged that investigations of the kind referred to in the request were being conducted.
8. Mr. MacNab complained to the ICO on 28th. May, 2015.

The Decision Notice

9. The ICO readily concluded that the request was for information relating to a police investigation into whether one or more persons should be charged with criminal offences. Section 30(3) was therefore engaged. That much was common ground on the appeal.
10. As to the balance of public interests, he acknowledged the significant interest in transparency, specifically as to the fact of such investigations, which had been disclosed. He judged, however, that disclosure of any of the details of such investigations, as sought in the request, could seriously undermine the current inquiries concerned and that the public interest in avoiding any such prejudice to those inquiries outweighed the interest in disclosing whether the requested information was held. Mr. MacNab appealed to the Tribunal.

The Appellant's case

11. Mr. MacNab put his case clearly and succinctly, both orally and in his careful and realistic preceding written submissions. They may be summarized as follows –
- (i) There has been extensive speculation in the media as to the inquiries to which these requests relate. Much of it has been sensationalist and may be factually inaccurate
 - (ii) The issues involved in these investigations are of great public importance, having regard to the position of Cyril Smith, the extreme gravity of the conduct alleged and the allegation of improper police interference with the conduct of an earlier investigation.
 - (iii) Controlled disclosure of or relating to the matters identified in the requests, especially the first request, would correct false perceptions created by lurid media coverage.
 - (iv) It would promote public confidence in the MPS and its role in getting to the truth. This is especially necessary where a police force may be investigating itself or its own members.
 - (v) It would be less damaging to the current investigations than continuing surmise generated by newspaper headlines.
 - (vi) It would encourage potential witnesses to contact the police to assist in revealing the full truth as to what occurred in relation to both categories of investigation.
 - (vii) Home Office guidance, contained in a paper entitled “The Effective Use of the Media in Serious Crime Investigations” advises that the police service is publicly accountable and that the public is entitled to accurate information as to serious crime and responsible reporting and comment on such information from the police.
 - (viii) Accordingly, the balance of public interest favours disclosure of the information requested and, initially, whether the MPS holds it.

The Respondents' case

12. Following joinder of the MPS as Second Respondent the ICO played only a limited role in this appeal. He did not attend the hearing, having made written submissions, which were expressly adopted by the MPS. His case did not materially diverge from that of the MPS.
13. There being no issue as to the engagement of s.30(3), the evidence and the submissions were directed to the public interest.
14. DI Dan Setter submitted a witness statement on behalf of the MPS, which dealt in an open section with general factors bearing on the public interest and in a later closed section with factors specific to these requests.
15. The open section referred to the particular sensitivity of investigations into alleged historical child sex abuse by public figures, which frequently involve allegations of police corruption, in a general sense, that is to say suppression of inquiries evidently designed to frustrate any prosecution.
16. The position of a police officer suspected of such misconduct is unlike that of most suspects since he/ she may be in an unusually favourable position to intimidate or wrongfully influence former and/or junior colleagues. Furthermore, the original investigation into abuse may continue to involve surviving confederates of those who have since died.
17. DI Setter gave evidence in the closed part of his statement as to relevant factors in the particular investigations in this case. They are briefly recited and assessed in the Closed Annex to this Decision. The Tribunal questioned DI Setter in closed session as to those particular factors. They did not, by their nature, permit any really useful disclosure by the Tribunal to Mr. MacNab when the open hearing was resumed. He was told simply that the matters adduced and questioned were specific examples of the general considerations canvassed before the closed evidence was considered.
18. The CMPS acknowledged the importance of public knowledge of and trust in the actions of the police, so far as consistent with the integrity of their vital role as investigators. He accepted that further reliable information as to the state of its investigations could encourage further witnesses to come forward and assist inquiries.

19. However, answering the point that the public was already informed by media publicity, albeit on a speculative basis, as to the existence of these investigations, he distinguished press claims from official police confirmation that particular inquiries were afoot. He submitted that compliance with requests (b) and (c) would require breaches of the first data protection principle, hence bring into play s.40(5), quite apart from the engagement of s.30(3).

The relevant law

20. FOIA s.30(1) and (3) read –

“(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 authority has a duty to conduct with a view to it being ascertained-

(i) Whether a person should be charged with an offence,

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2).

21. This is a qualified exemption so that it can be relied on by the public authority only if the public interest in withholding the requested information outweighs the public interest in disclosing it.
22. It is to be observed that the public interests under consideration are not those which would be involved in saying as to each of requests (a) – (d) “yes, we have that” or “no, we do not have that.” The authority, the ICO and now the Tribunal must assume for the purposes of s.30(3) that the MPS holds responsive information. The interests to be weighed are those at

stake in a decision whether or not to disclose the substantive information requested, assuming it to be held.

The reasons for our decision

23. Regrettably, these must be consigned to the Closed Annex to a substantial extent.
24. We recognize the force of Mr. MacNab's argument as to the advantages of "putting the record straight", if that would be the result of disclosure and of encouraging possible victims of abuse to assist the police. We further endorse the general desirability of a vital public service, such as the MPS, which is accountable to the public, maintaining the maximum possible public transparency in the interests of securing public confidence and trust.
25. However, even those laudable objectives must make way for the need to preserve the integrity of major investigations. Such integrity demands that potential suspects do not get wind of the fact that they personally are under investigation at a stage when they could materially obstruct it. They must not be given the opportunity to destroy evidence, to interfere with potential witnesses or to otherwise forestall and frustrate a proper inquiry. We do not interpret the Home Office guidance of 1999 as encouraging disclosure of vital information as to the targets of an investigation whilst it is still in progress. Its thrust is that controlled disclosure of matters designed to generate information from the public should promote rather than impede the investigation.
26. These requests go to the heart of the investigations. If the events assumed by these requests occurred, what is requested is the entire current file showing every significant detail of the evidence. Request (d) leaves no small pebble unturned. It should be added that Mr. MacNab, in a characteristically moderate and reasonable oral submission, appeared to accept that this request might be exorbitant but the significance of what is sought in (a), (b) and (c) can hardly be overstated. We do not doubt that disclosure would wreck these important investigations by tipping off their objects and putting possible witnesses at risk or, at least, in fear of possible repercussions.
27. Therefore, whilst respecting the reasoning underpinning these requests, we have no doubt that the public interest favours a refusal to confirm or deny.

28. This is a unanimous decision.

David Farrer Q.C.

Tribunal Judge

29th. February, 2016

Promulgated 9th March 2016