



Neutral citation number: [2024] UKFTT 1108 (GRC)

Case Reference: FT/EA/2024/0264

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

**Heard by Cloud Video Platform
Heard on: 3rd December 2024
Decision given on: 12th December 2024**

Before

**JUDGE MOAN
TRIBUNAL MEMBER GRIMLEY EVANS
TRIBUNAL MEMBER YATES**

Between

MICHEAL KEENAN

Appellant

and

INFORMATION COMMISSIONER

Respondent

The appeal was listed for an oral hearing – the Appellant did not attend – and the hearing proceeded in the Appellant’s absence.

Decision:

1. The Appeal is Dismissed

REASONS

Decision under appeal

1. This appeal brought under **section 57 of the Freedom of Information Act 2000** (“FOIA”). The appeal is against the decision of the Information Commissioner

("the Commissioner") contained in a Decision Notice dated 28th June 2024 (reference IC-301043-Q0H3).

2. The Appellant has requested, from the Crown Prosecution Service ("CPS"), "a copy of the CPS written decision" relating to a specified investigation. CPS refused to confirm or deny holding information, citing section 30(3) of FOIA.
3. Upon complaint to the Information Commissioner as regards that refusal, the Commissioner's decision was that CPS were correct to cite section 30(3) and neither confirm nor deny (NCND) holding information.

Background to the appeal

4. The request for information concerned whether a charging decision had been made regarding NHS Managers at the hospital where Lucy Letby was employed. Lucy Letby was convicted and sentenced in August 2023 for the murders and attempted murders of a number of children whilst working at the hospital.
5. On 2nd January 2024 the Appellant wrote to CPS and requested information in the following terms:
"In accordance with [FOIA] and in the public interest can you please provide me with a copy of the CPS written decision in relation to the Corporate Manslaughter investigation into the Countess of Chester NHS Managers ..."
6. CPS responded on 30th January 2024. It neither confirmed nor denied holding the requested information, on the basis of section 30(3) of FOIA. The refusal notice also contained the following information:
" ... There is information about this matter already in the public domain given the significant public interest in relation to it, including a website for the independent Thirlwall Inquiry as well as media reports following the announcement from Cheshire Police on 4 October 2023 that they are in the early stages of an investigation into potential corporate manslaughter. It is therefore important to allow the investigation to progress without any prejudice to any

future investigations and proceedings that may arise from disclosures outside of such an investigation "

7. On 19 February 2024, the Appellant requested an internal review stating:

" ... it is in the public interest to know what action if any that you have taken against those NHS Managers who covered up for Lucy Letby which resulted in the deaths of several more baby murders by Lucy Letby. Please note that the ITV Reporter who covered this case has asked to see a copy of your review response "

8. Following the internal review, CPS wrote to the Appellant on 14th March 2024, upholding its original decision and stated:

" ... each section 17 notice sent to you has referred to section 30 of the Freedom of Information Act which says that "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)."

9. Reference was also made to an ongoing police investigation.

"It is clear that if there was information held regarding investigation of possible prosecution then it would be covered by section 30 or if not then by section 31. Factors relating to the public interest are set out in the notice relating to FOI 11820 and I agree with them.

In my view it is self-evident that is not conducive to effective investigations for information to be published to the world at large and further it could prejudice any prosecution that may follow. I am also of the view that bereaved relatives would have priority over any general publication in respect of any communications regarding the matters you ask about.

Furthermore, I understand that there remain live proceedings in respect of the prosecution and appeal. In my view even if material is held in relation to the matters you request, the public interest in maintaining the exemption clearly outweighs the public interest in disclosing the information. It is therefore appropriate neither to confirm nor deny whether we hold such material "

10. The Appellant contacted the Commissioner on 14th March 2024 to complain about the way his request for information had been handled. The Appellant complained

about CPS refusing to provide the requested information and said it was in the public interest for CPS to provide an update. He expressed concern that investigations had been ongoing for over six months and said that “the public could presume this is a public sector cover-up”.

11. The Commissioner considered that section 30(1)(c) applied to the requested information, if held. The Commissioner’s guidance notes confirmed that there was no investigatory element to section 30(1)(c), and that typically it would be applied by public authorities that lack an investigative function but had the power to conduct criminal proceedings; the guidance named CPS as an example. The Commissioner was satisfied that if CPS did hold any information relevant to the request, CPS would hold it for the purposes of (specific) criminal proceedings that CPS had the power to conduct. Such information would be exempt by virtue of section 30(1)(c), and it followed that section 30(3) is engaged.
12. When considering the public interest in maintaining exemption, the Commissioner considered that was necessary to be clear about what the exemption was designed to protect. The section 30 exemptions recognised the need to prevent disclosures that would prejudice either a particular investigation or set of proceedings, or the investigatory and prosecution processes generally, including prejudice to future investigations and proceedings. The exemption could only be maintained if confirmation or denial would interfere with the effective conduct of the proceedings.
13. The Appellant was concerned about a cover up and had submitted that it was in the public interest for CPS to provide an update. CPS had addressed the public interest by stating that there was information about the matter in the public domain already including that on 4th October 2023, Cheshire Police confirmed that they were in the early stages of an investigation into potential corporate manslaughter. CPS considered that it was important for that investigation to progress without any prejudice to any future investigations and proceedings that may arise from disclosures. CPS reiterated that investigative information could prejudice any prosecution; and that whilst prosecution and appeal proceedings are live for a matter,

the public interest in maintaining the exemption outweighed the public interest in disclosing the information. It was appropriate to neither confirm nor deny.

14. In considering the balance of the public interest in this case, the Commissioner recognised that there was a significant public interest in preventing any disclosure (by way of confirmation or denial) that would prejudice a set of proceedings, and prosecution processes generally, including prejudice to future proceedings. This went to the heart of what the section 30 exemption was designed to protect.
15. As the Commissioner's guidance explained: *"whilst investigations and prosecutions were ongoing, public authorities require a safe space in which to operate and premature disclosures could create intense media pressure which could present problems for the judicial processes"*.
16. The Appellant's request for information was made less than three months after the announcement of a police investigation; and CPS told the Appellant that "there remained live proceedings". The Commissioner's guidance noted that the stage of a particular investigation or prosecution will have a bearing on the extent of any harm caused by a disclosure and emphasised that as a general rule, there will always be a strong public interest in maintaining section 30 whilst matters were ongoing.
17. Considerations around safe space were relevant; investigations and proceedings were ongoing, and CPS will have been concerned about prematurely indicating (by way of confirmation or denial) whether it had made a decision regarding the investigation and proceedings in question. The Commissioner considered that confirmation or denial could create intense media pressure, given the high-profile nature of the matter.
18. The Commissioner had not seen any information in the public domain about whether the police or CPS had made a decision regarding the corporate manslaughter investigation announced in October 2023. Nor was the Commissioner aware of any concern about a "public sector cover-up" regarding the investigation and proceedings, other than that expressed by the Appellant in their complaint to the

Commissioner. He did not consider that, at the time of the request (January 2024) relatively soon after the corporate manslaughter investigation was announced by police, that there was any real, compelling public interest in CPS confirming or denying whether it held information about any CPS charging decision.

19. The Commissioner recognised that there was a very strong public interest in protecting CPS's ability to conduct criminal proceedings effectively. The Commissioner was satisfied that the public interest in neither confirming nor denying whether information was held outweighed the public interest in confirming or denying.

Appellant's grounds of appeal dated 10th July 2024

20. The Appellant considered that the CPS were dishonest in refusing to confirm or deny whether they had made a charging decision. He considered that confirming whether a CPS charging decision had been made would not damage an investigation or any criminal proceedings. By comparison, the charging decision was disclosed in the Lucy Letby case.

21. He said that the charging decision should have been made and disclosed within a few months of the initial investigation in October 2023 noting the evidence in the Lucy Letby trial. It was perverse for CPS to refuse to confirm or deny.

22. It was in the public interest in openness and transparency that CPS disclosed the charging decision and that CPS are attempting to protect the NHS.

The Commissioner's response to the appeal dated 16th August 2024

23. The Commissioner confirmed that there was already information in the public domain; namely information about an inquiry set up to examine events at the hospital and the appointment of the chair of that inquiry on 4th September 2023, confirmation in October 2023 that the Cheshire Police were carrying out an

investigation into corporate manslaughter and that this investigation was in its early stages.

24. The Commissioner reiterated that the issue was whether CPS was entitled to neither confirm nor deny in accordance with the exemption, not whether the information should be disclosed. The Commissioner confirmed that the exemption applied to CPS as they have the authority to conduct criminal proceedings. The exemption complimented the protection offered by sections 30(1)(a) and (b) to provide protection throughout the investigate and prosecution stages of criminal proceedings. The exemption was clearly engaged, the only issue was the public interest balancing test which was the Appellant's third ground of appeal.

25. The request was made only three months after the statement of the Cheshire Police. The date for the public interest test is the date of the refusal notice, i.e. 30th January 2024. The Commissioner relied upon the points made by the Commissioner in the complaint process (as per the decision notice dated 28th June 2024) about the public interest and submitted that the appeal should be dismissed.

The Appellant's reply to the Commissioner's response dated 17th August 2024

26. The Appellant said he wanted the Commissioner and the CPS to explain why no charging decision had been made. He wanted to ask further questions of the CPS and Commissioner. He said that this was a deliberate and incompetent failure of the Police.

Procedural matters relating to the determination of the appeal

27. On 2nd August 2024 the CPS indicated that they did not intend to take part in the appeal. In the Commissioner's response dated 16th August 2024, the Commissioner made it clear that he did not intend to attend the appeal hearing or be represented at the appeal. The oral hearing would therefore involve only the Appellant and the bundle of documents filed in the appeal. Noting the issues, there were no factors in

the appeal that demanded the joinder of the CPS or that required the Commissioner or the CPS to attend and actively participate in the appeal hearing.

28. On the 18th August 2024 the Appellant emailed the Court and said – *“I can confirm that I am available anytime for my requested oral hearing as the ICO & the CPS need to provide a verbal explanation to the Court as to why no charging decision has been made or disclosed to the public since the October 2023 investigations the majority of which evidence has already been provided from NHS staff/ doctors witness statements which was produced within the previous Lucy Letby case.*

Depending on the ICO & CPS verbal explanation in court I would like to have the opportunity to ask any further questions of them which may arise from their verbal explanation which will require an oral hearing.”

29. The issue that the Appellant wanted the Tribunal to explore was to explore why a charging decision had or had not been made. That was not an issue that the Tribunal would investigate as part of the appeal process.

30. On 24th October 2024, the Tribunal notified the parties that the appeal had been listed on 3rd December at 2.00 pm by CVP and gave instructions to the parties in the event that either party wished to apply to change the hearing date. Directions dated 31st October 2024 confirmed the appeal hearing date. On 6th November 2024 the Appellant completed his certificate of compliance and confirmed that the case was ready to be heard on 3rd December at 2 pm.

31. On 7th November 2024 the Appellant emailed the Court as follows :

“Unfortunately, something urgent has come up on the 03/12/24 therefore, can I respectfully request an alternative remote hearing date.”

32. On 11th November 2024 the Tribunal notified the Appellant of the procedure that he needed to undertake to apply to change the hearing date and the information required. On 14th November the Appellant notified the Court that he was available on three other dates in December. He did not comply with the instructions about

how to apply to change the hearing date and gave no explanation why he was not available on 3rd December 2024.

33. The Appellant did not attend the appeal hearing. Calls were made to his mobile phone during the hearing but those calls were not answered. He had in effect absented himself from the appeal hearing.

34. The Tribunal considered the bundle (54 pages). The Appellant had been directed to file his evidence no later than 8th November 2024. He had not done so.

35. The Tribunal decided to proceed with the appeal hearing in the absence of the Appellant for the following reasons:

(a) The appeal hearing date had been set and it appeared that the Appellant had become unavailable after the date was set. The reason why he was not able to attend was not known.

(b) The Tribunal does not sit daily but is convened especially to deal with a list of cases. It is not a case that the appeal could simply be relisted on another date; another Panel would need to be convened for another date.

(c) The Appellant had not disclosed the reason why he was unavailable and had not complied with the instructions that had been provided to him on two occasions should he wish to apply to amend the appeal hearing date.

(d) The Appellant had had utilised the opportunity to articulate his grounds of appeal throughout the process and the Tribunal understood the basis of his challenge.

(e) The appellant had been given an opportunity to file evidence and he had not done so. That evidence was due on 8th November 2024. On 6th November 2024 he confirmed he was ready for the appeal. On 7th November 2024 he said he was not able to attend. By 7th November 2024, his evidence should have been ready to file or almost ready as it was due to be filed the following day.

(f) This was not in the view of the Panel, an appeal that was borderline in terms of its likelihood of success such that an oral hearing may be persuasive. The Tribunal considered that this was an appeal with little chance of success.

(g) By adjourning the hearing, Tribunal hearing time would be wasted and further hearing time allocated to hear this appeal. This was a disproportionate allocation of resources in this case, which had the effect of impacting on other appeals which were waiting for Tribunal hearing time.

36. Under Rule 36 of the Procedure Rules, the Tribunal considered that the Appellant had been notified of the hearing date, indeed he had acknowledged the hearing date, and that it was in the interests of justice to proceed to hear the appeal in the absence of the Appellant.

37. The hearing took place remotely via video (CVP). There were no objections to this as a suitable method of hearing.

The Legal Framework

38. The Freedom of Information Act 2000 allows any person to make request of public authorities for information. The right is contained in section 1(1) as follows:

(1) Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

39. Subject to the authority requesting further information from the applicant to identify and locate the information, the Act provides for disclosure of the information (not the documents) unless one or more exemptions in the Act apply.

40. Section 30 of FOIA provides the following exemption -

30 *Investigations and proceedings conducted by public authorities.*

(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,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

(c) any criminal proceedings which the authority has power to conduct.

(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),

(ii) criminal proceedings which the authority has power to conduct,

(iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or

(iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and

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

(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).

41. CPS and latterly the Commissioner relied on section 30(3) which is a qualified exemption. This means that the Tribunal must consider the public interest test and whether the public interest in maintaining the exemption outweighs the public interest in confirming or denying whether the requested information is held.

42. In Montague v Information Commissioner and the Department of International Trade [2022] UKUT 104 (AAC), the Upper Tribunal decided that the public interest balance must be assessed on the basis of how matters stood at the time of an authority's decision on a request.

43. The Powers of the Tribunal are provided by **section 58(1) of the 2000 Act:**

If on an appeal under section 57 the Tribunal considers –

*(a) that the notice against which the appeal is brought is not in accordance with the law, or
(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

44. The powers of the Tribunal were considered by the Upper Tribunal in Information Commissioner v Malnick and the Advisory Committee on Business Appointments [2018] UKUT 72 (AAC) who confirmed that the Tribunal conducts a full merits review of the Commissioner's decision albeit the starting point was the Commissioner's decision. The Tribunal will give such weight as it considers fit to the Commissioner's views and findings; and will determine whether the Commissioner's decision was in accordance with the law. The appeal process is not adversarial, it is inquisitorial by nature.

Analysis of the evidence and findings on appeal

45. Section 30(1)(c) provided that information was exempt if it had at any time been held by the public authority for the purposes of any criminal proceedings which the public authority had the power to conduct. The words 'at any time' means that information could be exempt under section 30(1)(c) if it related to ongoing, closed or abandoned proceedings; however, information must be held for specific criminal proceedings, not criminal proceedings in general.

46. Respectfully, the Appellant has misunderstood the purpose and remit of the appeal. There can be no doubt that that the exemption applies – if held, information is held by CPS for the purpose of a possible prosecution. The type of information requested by the Appellant clearly falls within the remit of section 30(1)(c). In reality, the only issue is the public interest test.
47. The Appellant has not appreciated that he would not be able to question the Commissioner or the CPS, even if they were present at the appeal, about the charging decision and why that information should not be disclosed. The issue is confined to the public interest test. In any event, the CPS are not parties to this appeal. His questions about progress of the charging decision are outside the remit of this appeal.
48. The Appellant has not understood what he could achieve in a substituted decision. Even if this Tribunal allowed his appeal, the CPS would be required to issue a fresh response to his request which may involve them relying on a different exemption.
49. CPS has neither confirmed nor denied whether it held the requested information, by citing section 30(3). The issue is whether CPS was entitled to NCND holding the requested information taking account of the public interest.
50. The process of obtaining a charging decision is one where the police place information before the CPS and the CPS will decide whether the police have sufficient information at that stage to charge or not; the decision may therefore include advice about additional evidence that needs to be obtained prior to charge. There can be back and forth liaison before a charging decision is made. Once CPS make a charging decision in favour of prosecution, the police will charge the suspect accordingly.
51. The subject investigation is a complex investigation, and nor would it be a simple or quick charging decision following the investigation. The charging decision will require a full review of the evidence available as well as public interest information. The investigation of the case against Lucy Letby was itself based on huge volumes of

circumstantial evidence and she was only charged after years of police investigatory work. This investigation involves individuals on the periphery which will have similar complexities. The process may take many, many months or even years to complete. It is unrealistic to expect within three months that CPS would have made a charging decision or that a lack of charging decision infers that the investigation has been completed.

52. The clear basis of the exemption in FOIA is to keep information confidential that might forewarn suspects or prejudice ongoing lines of enquiry. There is an overwhelming public interest in defendants being held accountable by the justice system for their crimes, for them to receive a fair trial by their peers and for guilty defendants to be brought to justice in a speedy and proportionate manner. Equally, there is a significant public interest in maintaining the independence of the investigative and prosecuting authorities and affording them the space to conduct their enquiries.

53. The exemption applies even if the investigation is complete. The public interest balance is the factor that will determine whether disclosure should be made. The public interest may change over time and the timing of a request may be important. This was a relatively new investigation. The public interest considerations outlined in the previous paragraph may diminish over time as an investigation is completed, and the interest in the information involved in the investigation may become of more (or less) public interest.

54. It is recognised that there will be significant public interest in the decision whether or not to charge in high profile cases. Once a charging decision has been made, that decision is often made public although information about the case may be restricted so as not to prejudice any criminal trial and especially any potential jurors hearing such cases. Any prosecution of this nature is a matter likely to be tried in the Crown Court and in such cases, there are automatic reporting restrictions that the media

may not report anything except certain specified facts about the case such as the name of the court, names of the accused and the charges they face.

55. The criminal justice process aims to be as transparent as possible. Transparency in the criminal process is achieved by the criminal courts sitting in public and media reporting albeit within the confines of automatic reporting restrictions. There will at various stages of the criminal process be different levels of information that is withheld for defined reasons. It may not be until the trial or sentencing of an offender, that certain information may be released. The restrictions on releasing information in the criminal proceedings will continue until the end of the criminal process but the release of information in response to a FOIA request will continue to be considered with the public interest balance in mind.
56. The Tribunal also noted that there was some information in the public domain on the website of the Thirlwall enquiry. Information was available in a controlled way whether from the enquiry or press releases from the police. The controlled release of information ensured it was appropriate for *that* information to be released at *that* particular time.
57. The Tribunal were in no doubt that the public interest in ensuring that investigations and charging decisions had a safe space to conclude, without information being publicly disclosed that may latterly impact on a prosecution. Fair trial was more important than keeping the public informed of the progress of an investigation.
58. In this case the CPS have neither confirmed nor denied that they hold the information sought. Section 1(1) of FOIA provides that –
- Any person making a request for information to a public authority is entitled –*
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

59. It is not therefore just a case of whether the information is exempt from disclosure under section 30; FOIA also requires a public authority to confirm whether it holds the information in any event. Section 30(3) confirms that the duty to confirm or deny that the information is held does not apply with regard to this exemption. However, the impact of section 2(1) of FOIA is that -

Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either –

(a) the provision confers absolute exemption, or

(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,

section 1(1)(a) does not apply.

60. Additionally, the Tribunal considered that the public interest was balanced in favour of the NCND response to the request. To confirm that information was held would indicate that the police had approached the CPS for a charging decision, thus indicating the stage of the investigation by default. An indication that CPS had not been approached for a charging decision may be perceived as a premature indication that there would not be criminal charges. Either way, there was a risk of public/media speculation and dissemination of information, accurate or not, which could prejudice any later prosecution.

61. In conclusion, the Tribunal were satisfied that if the CPS held information about a charging decision, the information would be exempt from disclosure under section 30(1)(c) FOIA. Furthermore section 30(3) applied and the balance of the public interest favoured both maintaining the s30(1)(c) exemption and the NCND response.

62. The Commissioner's decision was correct both in the application of the law and the exercise of his discretion, and the appeal is dismissed.

District Judge Moan sitting as a First Tier Tribunal Judge.

9th December 2024