



Neutral Citation Number : [2024] UKFTT 90 (GRC)

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

Appeal Reference: EA/2022/0100
Decision given on: 30 January 2024

Heard via CVP on 8 January 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL
(SITTING AS A JUDGE OF THE FIRST-TIER TRIBUNAL)
TRIBUNAL MEMBER A GASSTON

Between

RABBI GABRIEL KANTER-WEBBER

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

HAMPSHIRE CONSTABULARY

Second Respondent

Representation:

| | |
|----------------------------|------------------------|
| For the Appellant: | not present |
| For the First Respondent: | Mr L Davidson, Counsel |
| For the Second Respondent: | Mr D Goss, Counsel |

DECISION AND REASONS

Decision

For the reasons set out below the Tribunal dismisses the appeal

Preliminary matters*Abbreviations*

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|------------------|--|
| 2012 Regulations | The Police (Conduct) Regulations 2012 |
| Decision notice | Decision notice IC-94049-Q4D7 dated 5 April 2022 |
| DPA | Data Protection Act 2018 |
| 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 |
| Hampshire | Hampshire Constabulary, the Second Respondent in this appeal |
| ICO | Information Commissioner, the First Respondent in this appeal |
| PMP | Police Misconduct Panel |

Chronology

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|------------------|---|
| 2020/2021 | Police misconduct hearing |
| 18 January 2021 | Request by the appellant for information relating to the misconduct hearing |
| 3 February 2021 | Notice of Outcome produced by PMP |
| 19 February 2021 | Hampshire Constabulary's initial response |

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|-------------------|--|
| 15 March 2021 | Hampshire Constabulary's response on review |
| 14 September 2021 | ICO contacts Hampshire Constabulary |
| 29 September 2021 | Hampshire Constabulary issues a revised response |
| 1 October 2021 | Appellant responded to the revised reasons |
| 5 April 2022 | Decision notice issued |
| 26 April 2022 | Appeal lodged |
| 19 August 2022 | Hampshire joined as a party |
| 8 January 2024 | Hearing of this appeal |

Mode of hearing

1. The proceedings were held via the Cloud Video Platform. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way, and no objections were made to that. Although there were at times minor problems with connections, these were resolved at the time.
2. The appellant did not attend the hearing. He explained in an email that he was not able to do so but that he consented to the hearing going ahead in his absence, and was content for the Tribunal to rely on his written submissions and skeleton argument.
3. The Tribunal considered the updated bundle of material, and the authorities bundle. It also took into account skeleton arguments from Rabbi Kanter-Webber, Mr Goss and Mr Davidson as well as the submissions previously provided.

Closed Proceedings

4. 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. In the normal way, a copy of this decision was sent to the ICO, and Hampshire for them to check that the draft does not inadvertently disclose closed material and to make representations as to whether any parts of the decision should therefore be omitted.

Introduction & Background

5. Between 19 October 2020 and 8 January 2021, a substantial police misconduct hearing took place pursuant to the Police (Conduct) Regulations 2012 ("the 2012 Regulations"). The PMP considered allegations of gross misconduct against six police officers based

within Hampshire's Serious and Organised Crime Unit based on covert recordings of homophobic, racist and sexist remarks. For the reasons set out in the Panel's decision, a document which runs to 72 pages, 3 of the officers were dismissed without notice for gross misconduct, two would have been so dismissed had they not ceased to be members of a police force, and one officer was given a final written warning.

6. The hearings were reported in the media, and, as is recorded in the panel's decision at [6], the hearing was held in public, albeit that, due to the need to maintain "social distancing" as a result of the Covid-19 pandemic, it was "fed" by live link to another venue where members of the public attended; and, certain members of the public, principally members of the media, were permitted to attend "remotely".
7. On 18 January 2021, the appellant sent a request for information to Hampshire Constabulary in respect of the hearing, stating:
 - Please disclose an electronic copy of:
 - the written outcome,
 - the decision on sanction, and
 - the transcript or, if there is no transcript, the audio recording of the disciplinary proceedings reported
8. On 19 February 2021, Hampshire replied, sending a link to a short summary of the written outcome and the decision on the sanction. It refused to disclose the transcript or audio recording, relying on the exemption set out in section 31 (1)(g) of FOIA by operation of section 31 (2)(a) and (b) of FOIA. The appellant sought a review of that decision which Hampshire upheld.
9. The appellant contacted the ICO which wrote to Hampshire on 14 September 2021. Hampshire then issued a revised response relying on sections 32 and 40 of FOIA in addition to section 31. The appellant replied to that, disputing the applicability of these sections.

Procedural History

10. The appellant appealed against the Decision Notice on 26 April 2022. The ICO replied to that on 16 June 2022 to which the appellant responded on 29 June 2022. Hampshire responded on 9 September 2022 subsequent to Case Management Directions issued on 19 August 2022, joining it as the Second Respondent.
11. Although the appeal was initially listed for determination without a hearing, the panel took the view that the issues surrounding section 32 in particular required ventilation at an oral hearing.

The consideration of the request

12. In summary, Hampshire initially relied upon section 31 of FOIA on the basis that disclosing the transcripts into the public domain would harm its investigatory functions when dealing with allegations of misconduct and that the legitimate public interest in misconduct hearings had been met by the attendance of the public, with

press allowed. The ICO's preliminary view was that this was not supported by sufficient evidence.

13. In its response of 27 September 2021, Hampshire explained that the detailed decision of the PMP had been provided, and that they were neither confirming nor denying the existence of a transcript since to do so would breach data protection principles, the constabulary seeking to rely on section 40 in addition to section 31 of FOIA, given not least that some of the data in audio recordings or, if held, in transcripts would incorporate the personal data of very many different people, and that some of it would be likely to be special category data.
14. It is at this stage that Hampshire sought to rely on section 32 of FOIA on the basis that the document sought fell within the ambit of section 32 (1)(c) of FOIA on the basis that the PMP was a court or tribunal as defined. This exemption is relied upon also in the response of 29 September 2021.
15. The appellant responded to that in an email dated 1 October 2021, arguing that police disciplinary tribunals did not fall within section 32 as they did not exercise the judicial power of the state. He also argued that neither section 31 nor section 40 applied.

The Decision Notice

16. In the Decision Notice, at [38-42], the ICO upheld the argument that section 31 applied and that it was plausible that disclosure of the withheld information would be likely to cause prejudice to Hampshire Constabulary's ability to carry out its functions. It was also satisfied that the public interest in this case did not favour disclosure, noting the media interest in the case which had been widely reported at the time. The notice does not substantively address sections 32 or 40 of FOIA.

Grounds of Appeal

17. In his grounds of appeal, the appellant avers [1.9] that all of the requested information has been placed into the public domain and the transcript will not record anything except that which was said at the public hearing, and thus it is difficult [1.10] to credit the Hampshire's argument that witnesses would be deterred from coming forward, not least as there had been significant media interest. It is also averred [2.4] that neither section 32 or 40 of FOIA apply.

The ICO's Response

18. Having set out the background and the law at length, the ICO submitted in its response [30] that while the fact of the misconduct hearing, its outcome and the press reports were in the public domain, that did not apply to the transcript which is not realistically accessible to the public, it did not remain there indefinitely, as was the case with information disclosed in court, and that it was correct to conclude that the withheld information was not reasonably accessible to the public at the time of the response.
19. The ICO did not address section sections 32 or 40 but averred that it would be appropriate to invite Hampshire to be joined as a party.

20. The appellant replied to that, submitting that the principles of open justice applied, irrespective of whether the hearing before the PMP was a court or not, and required disclosure.

Hampshire's Response

21. Having been joined as a party, Hampshire submitted a response, relying on three exemptions: sections 31, 32 and section 40 of FOIA. It is, in particular, argued that a PMP is a tribunal or body which exercises the power of the state, being a body separate from the Chief Constable himself, and is chaired by a legally qualified chair who must meet the judicial appointment criteria. Unlike the regulators of professions such as the General Medical Council, they decide whether an individual – a constable – who exercises the power of the state should continue to hold that office.
22. Attention is also drawn to the powers that a PMP has to regulate its own procedure.

The Hearing on 8 January 2024

23. Having considered the email from the appellant, the panel were satisfied that he had consented to the appeal being determined in his absence, and that it was fair and in the interests of justice to do so.
24. The panel indicated that it wished to hear submissions on the section 32 exemption first as, given the nature of that exemption, if it applied then it would not be an efficient or proportionate use of court time to hear detailed submissions on the other two possible exemptions. Both representatives were in agreement with that approach.

The Law

25. The provisions of FOIA are well known and there is no need to set them out in full. It is not in dispute that the exemptions provided for in section 32 and 40 are absolute, or that the exemption set out in section 31 is qualified.
26. Section 32, so far as is relevant, provides:

32 Court records, etc.

(1) Information held by a public authority is exempt information if it is held only by virtue of being contained in –

(a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,

(b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or

(c) any document created by –

(i) a court, or

(ii) a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter.

[...]

(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 this section.

(4) In this section –

(a) “court” includes any tribunal or body exercising the judicial power of the State,

(b) “proceedings in a particular cause or matter” includes any investigation under Part 1 of the Coroners and Justice Act 2009, any inquest under the Coroners Act (Northern Ireland) 1959 and any post-mortem examination,

27. We have applied sections 50, 57 and 58 of FOIA in considering this appeal.

Discussion

28. We begin our discussion with whether the audio recordings are “documents” for the purposes of section 32. Having had regard to the principles set out in Edem v ICO and MOJ [2015] UKUT 0210, we are satisfied that that they are. We conclude that “document” is not confined to a written document, and we note also that “document” is defined in the 2012 Regulations to include “anything in which information of any description is recorded and includes any recording of a visual image”.

29. There is, in our view, no real dispute that the transcript and recordings were created by the administrative staff of the PMP, and for the purposes of proceedings in a particular cause or matter, in this case the disciplinary proceedings against the six officers. We note also, in passing, that rule 37 of the 2012 Regulations in force at the time of the hearings (and reproduced as reg 44 of the Police (Conduct) Regulations 2020, the successor to the 2012 Regulations) requires a verbatim record to be taken, and that a copy can be supplied to the officer concerned, if so requested.

30. The question then arises whether the PMP is a court as defined in section 32 (4) (a). The appellant argues that it is not, as it does not exercise the judicial power of the state; the respondents argue that it does, and that it is a court for the purposes of FOIA.

31. The appellant submits that the Court of Appeal has twice held that a PMP is not a Court, and while that may be in respect of the Contempt of Court Act 1981, there is no principled reason why section 57 of that Act which uses wording identical to that of FOIA should be interpreted differently.

32. We turn then to the cases cited by the appellant. In Leary v BBC (unreported)(1989), the issue concerned an injunction sought by Mr Leary who was a witness in the proceedings. In that case, the Master of the Rolls stated:

But Mr Leary is not the subject of any criminal proceedings. He is not the subject of any police disciplinary proceedings, and so far as disciplinary proceedings were concerned, if he was, we should then have to consider two further matters: first, whether they were active, and secondly whether the tribunal which hears police proceedings is a court at all. That would turn on section 19 of the Contempt of Court Act which defines a court as

including “any tribunal or body exercising a judicial power of the State”. I express no view about whether a police disciplinary tribunal is a court within that definition. There is an obvious distinction between such a tribunal and a Mental Health Tribunal in that mental patients do not voluntarily submit to the jurisdiction of a Mental Health Tribunal, whereas police officers do voluntarily submit to the jurisdiction of a police disciplinary tribunal in the sense that nobody is compelled to become a police officer, and it is a part of the incidence of police service.

But as I say I express no view about that. That may have to be decided in some future case where it arises as a matter essential to the decision.

33. This demonstrates that the Court of Appeal expressly declined to reach any finding as to whether a police disciplinary panel is a court.
34. In GMC v BBC [1998] 1 WLR 1573, the Court of Appeal considered whether a disciplinary panel General Medical Council was a court for the purposes of the Contempt of Court Act 1981. The GMC was created by statute, and its procedural rules are established by Statutory Instrument. Its procedures (at least in 1998) were modelled on criminal trials. The Court noted also the distinction drawn in earlier cases between administrative functions and judicial functions, but it did observe that the test set out in the 1981 Act reflects the common law. It was noted also that, certainly by 1981, the courts had recognised that some tribunals had acquired the characteristics of courts. A PMP is no longer held in private by a Chief Constable was the case when Leary v BBC or GMC v BBC were heard. We note also that, as was held in R (Chief Constable of Thames Valley Police) v PMP [2017] EWHC 923 a PMP is now seen as a separate entity from a Chief Constable.
35. The legal landscape has changed significantly since 1998, and the authorities were reviewed in R (Bailey v Secretary of State for Justice [2023] EWHC 821 at [27] ff. The Divisional Court noted that some tribunals are courts for the purposes of the 1981 Act. Whether a body does exercise the judicial power of the state is an issue to be considered holistically and, as was observed in Bailey at [48], the proposition that the touchstone for determining whether a body is a court should be its ability to deprive a citizen of his liberty was rejected.
36. We note that in his skeleton argument at [11], the appellant seeks to rebut Hampshire’s submission that certain features of a PMP indicate that it carries out a judicial function.
37. We accept that a PMP must sit in public and must be chaired by a legally qualified chair, as is the case with First-tier Tribunals. That is not so with the GMC where there may be a legal assessor to advise the panel as used often to be the case with lay magistrates. It also has clearly laid out rules of procedure, detailing how examination and cross-examination is to be carried out. There is, we find, no meaningful or substantive difference between those and many First-tier Tribunals.
38. As Mr Goss submitted, a PMP has the right to control its own procedure when it comes to making decisions on anonymity, as can be seen from the decision issued by the PMP in this matter – see for example regs 35 and 36 of the 2012 Regulations. As with Courts

and Tribunals the extent to which matters are disclosed is a matter for the chair of the panel.

39. Some support for Hampshire's position can be derived from R (IPCC) v Chief Constable of West Mercia [2007] EWHC 1035 at [21] where the High Court proceeded on the effective basis that a PMP was Tribunal but without deciding the issue.
40. As the appellant submits, much of this is also true of the regulators like the GMC. But, there is a crucial difference in the case of police officers which, in our view, sets PMPs apart from other professional regulators. The GMC decides who is, or is not, entitled to practise as a doctors registered with it; it determines who has a license to practice. A PMP has the power to decided, as Mr Goss submitted, who is entitled to be a constable.
41. We accept that, as was submitted, a constable is an office holder under the Crown as opposed to an employee as is set out in R(Victor) v Chief Constable of West Mercia [2023] EWHC 2119 (admin). The appointment of a constable is an act of the state and constables must swear an oath or attestation to carry out their office. They are entrusted with the direct exercise of the coercive powers of the state. Constables, as a matter of law, have powers of arrest, and to compel others to do things or conduct searches which would, if carried out by an ordinary person, be unlawful. That is not the case with doctors or similar regulated professions. Absent the narrow area of compulsory detention under the Mental Health Acts, they can only operate on the basis of consent. If that is not extant, then a court order is needed.
42. A further area of difference is that a GMC hearing may have the effect of making it impossible for a doctor to get employment in that capacity, and while its panels may investigate matters of conduct which could also fall within the remit of Employment Tribunals, they do not decide on issues such as whether a dismissal or other sanction was justified. In contrast, a PMP does in part address these issues, officers being unable to bring claims of unfair dismissal to an Employment Tribunal.
43. We do not accept that, as the appellant submitted, PMPs' functions are administrative rather than judicial. While it is correct to submit that both functions required fairness, impartiality and so on, the rules for courts are different; a key issue is transparency, and control over its proceedings and fairness.
44. Taking all of these factors into account holistically, we find that a PMP is a body which, when constituted with a legal chair, is a court for the purposes of section 32 of FOIA. Accordingly, on that basis, we are satisfied that that absolute exemption conferred by that section applies.

Exemptions under section 31 and 40 of FOIA.

45. We have considered whether we should consider the possible applicability of these provisions in the alternative. We have concluded that it would not be an appropriate use of court time to do so, or consistent with the overriding objective.

46. The effect of concluding that a PMP is a court for the purposes of FOIA is binary. A clear policy decision is evident in the scheme of the Act in that matters falling within the jurisdiction of the Courts (as defined) are matters for them. Applications for material held by them can be made, outwith the scope of FOIA; in effect a different regime applies. That is not the same with the other exemptions under consideration here. Similarly, wide exemptions particular to the processing of material by courts apply also under DPA. In particular in Schedule 2, Part 1 to the DPA at paragraph 14:
- (2) The listed GDPR provisions do not apply to personal data processed by –
- (a) an individual acting in a judicial capacity, or
- (b) a court or tribunal acting in its judicial capacity.
- (3) As regards personal data not falling within sub-paragraph (1) or (2), the listed GDPR provisions do not apply to the extent that the application of those provisions would be likely to prejudice judicial independence or judicial proceedings
47. We observe also that to consider whether section 31 or section 40 applies would require us to consider a hypothetical directly contradictory to our conclusion on section 32. We would also add that, in passing, the individuals whose personal data would be processed by the publication of the transcript or the audio recording are not a homogenous group. It includes witnesses, not just the officers who were dismissed.
48. Finally, we note Hampshire’s argument that the transcripts “comprise special category data of those who were the subject of the misconduct proceedings as the material reveals the ‘political opinions [...] or philosophical beliefs’ of each of those officers, in that it records their discriminatory and/or inappropriate and offensive behaviour, from which (as the Misconduct Hearing held at §60 [E157]) ‘the public could reasonably perceive [their behaviour] to have been, for example, racist, sexist or homophobic’.
49. We note also that while the Chief Constable does not share those views and deplores the conduct, it follows that, had we not decided that we were concerned with Court proceedings, those offensive views would prima facie benefit from the strong protections which apply to special category data.
50. Whether article 9 (2)(e) or (f) of the GDPR would in any event apply is not however a matter that need now concern us, given our findings with respect to section 32.

Conclusion

51. For these reasons, we dismiss the appeal.

Signed *Jeremy K H Rintoul* Date: 29 January 2024
 Upper Tribunal Judge Rintoul
 (sitting as a judge of the First-tier Tribunal)