

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 February 2017

Public Authority: Crown Prosecution Service
Rose Court
2 Southwark Bridge
London
SE1 9HS

Decision (including any steps ordered)

1. The complainant has requested copies of correspondence received by the Crown Prosecution Service (the "CPS") relating to a specific case. The CPS initially refused to provide this, citing sections 31(1)(c) (law enforcement) and 40(2) (personal information) of the FOIA. During the Commissioner's investigation this was revised to 30(1)(c) (investigations and proceedings) and 40(2).
2. The Commissioner's decision is that section 30(1)(c) is engaged and the public interest favours maintaining the exemption. No steps are required.

Background

3. The request relates to a specific court case. The CPS has confirmed:
 - The prosecution of Kato Harris was a case in which the jury acquitted the accused of three counts of rape 26 minutes after being sent out to consider their verdict.
 - The merit of the prosecution case brought against Mr Harris has been questioned publicly.
 - Alison Levitt was the principal legal advisor to the Director of Public Prosecutions until 2014. She is now a partner and head of business crime at the private law firm Mischon de Reya.

- In her role at the CPS, Ms Levitt was among its most senior officials, advising the then DPP on sensitive prosecutions.
 - Since the acquittal of Mr Harris, it has become public knowledge that Ms Levitt acted for the family of the alleged victim in the case. It has also been confirmed by the CPS that Ms Levitt wrote to the CPS prior to trial. The defence were aware of this fact before the trial.
4. The Commissioner has previously issued a related decision notice concerning the letters which are the centre of this request. This was dealt with under reference FS50647960.

Request and response

5. On 31 August 2016 the complainant wrote to the CPS and requested information in the following terms:

“Under the Act, I request the following information:

- 1) The total number of times Alison Levitt, of Mischon de Reya, formally corresponded with the CPS by letter and/or email in relation to the prosecution of Kato Harris, both before and after the point of charge;*
- 2) The dates of each and every formal letter and/or email received by the CPS from Ms Levitt in relation to this case, and:*
- 3) A one-line summary of the nature of each and every formal letter and/or email received by the CPS from Ms Levitt in relation to this case”.*

6. The CPS responded on 27 September 2016. It refused to provide the information requested at parts (1) and (2) citing the exemption at section 31(1)(c). It advised that it didn't have to create the information requested at part (3).
7. Following an internal review the CPS wrote to the complainant on 26 October 2016. It maintained its position.
8. During the course of the Commissioner's investigation the CPS revised its view. It disclosed the information requested at parts (1) and (2) of the request but refused to respond to part (3), citing sections 30(1)(c) and 40(2) of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 26 October 2016 to complain about the way his request for information had been handled. He asked her to consider the exemptions cited.
10. Following the partial disclosure, the Commissioner asked the complainant whether or not he was now satisfied with the CPS's response to his request. He said he did not accept the withholding of the summaries requested at part (3) so this will be considered below.

Reasons for decision

Section 30 – investigations and proceedings

11. The CPS has cited section 30(1)(c) in respect of the withheld information.
12. Section 30(1)(c) of FOIA states that:

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of –

(c) any criminal proceedings which the authority has power to conduct.”
13. The phrase “at any time” means that information can be exempt under section 30(1)(c) if it relates to an ongoing, closed or abandoned investigation.
14. Section 30(1) is a class-based exemption, which means that there is no need to demonstrate harm or prejudice in order for the exemption to be engaged. However, information must be held for a specific or particular investigation and not for investigations in general.
15. The CPS has advised that:

“The letters were written to the CPS for the purposes of criminal proceedings. By their very nature consideration would be given as to whether section 30 applies, we consider section 30(1)(c) applies in this instance”.
16. The Prosecution of Offences Act 1985 created the CPS, which is responsible for prosecuting criminal cases investigated by the police in England and Wales. As such, the Commissioner is satisfied that the CPS has the power to conduct criminal proceedings.

17. Turning to whether the information in this case is held by the CPS for the purpose of specific criminal proceedings which it has the power to conduct, the Commissioner notes that the very wording of the request predetermines that any relevant information will fall within the scope of section 30(1)(c). She is therefore satisfied that the information is held for a specific investigation and consequently that the exemption is engaged as regards the information requested.
18. The CPS has added that it is relying on the same arguments which were advanced in the related investigation for case reference FS50647960, which requested sight of the same letters referred to in this case. Therefore, these arguments are necessarily repeated below.

The public interest test

19. Section 30(1)(c) is a qualified exemption and is subject to the public interest test. The Commissioner must consider whether, in all of the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

20. The CPS recognised that disclosure would increase public understanding of the CPS decision making and prosecuting process. It also agreed that transparency could increase public confidence in the CPS.
21. The complainant considers that there is a strong public interest in disclosure because the merit of the case has been questioned following the defendant's quick acquittal. It is his belief that a key factor bringing the prosecution into question is the involvement of Alison Levitt, a partner and head of business crime at the private law firm Mischon de Reya, who acted for the family of the alleged victim in the case and was formerly the principal legal advisor to the Director of Public Prosecutions ("DPP") until 2014.
22. The complainant has argued that: *"The public interest in this case is a high one as it affects the public's faith in the justice system's effective administration"*.

Public interest arguments in favour of maintaining the exemption

23. The CPS has argued that:

"There is a strong public interest in safeguarding the prosecution process. Releasing this information would be likely to prejudice any potential prosecution. It is important for officials to be able to freely justify and maintain their thought process when making decisions on criminal cases, without fear of the routes leading to those decisions later being disclosed into the public domain."

Additionally, it is important to remember that to release correspondence with suspects, defendants, witnesses, complainants and their representatives may dissuade from assisting in future investigations. It is very important maintaining the confidentiality of correspondence. This is so that there can be confidence in the privacy of communication with Prosecutor and between parties as otherwise it would inhibit effective communication. Especially where witnesses are a vital part of the prosecution process it is crucial that they are able to approach the investigative body and provide statements without fear that they may one day be placed into the public domain, save through the court process. Releasing this sort of information would be likely to prejudice future prosecutions”.

24. It has also stressed the importance of maintaining the confidentiality of communications which form part of the prosecution process and that officials must be able to freely justify and maintain their thought processes when considering criminal cases without fear of their deliberations subsequently being placed in the public domain. It added:

“The same level of protection should be offered where a third party is acting as an investigatory body on behalf of the victim's family”.

Balance of the public interest

25. When considering the application of the exemptions at section 30(1), the Commissioner believes that consideration should only be given to protecting what is inherent in that exemption (the effective investigation and prosecution of crime), which requires the following:

- the protection of witnesses and informers to ensure people are not deterred from making statements or reports by fear it might be publicised;
- the maintenance of independence of the judicial and prosecution processes;
- preservation of the criminal court as the sole forum for determining guilt;
- allowing the investigating body space to determine the course of an investigation; and
- information that deals with specialist techniques.

26. The Commissioner considers that there are public interest arguments which touch on the second and fourth bullet points.

27. The Commissioner recognises the wider detriment that could be caused to the CPS by the loss of the ability to consider case options and reach decisions away from external interference and scrutiny. The expectation that recent deliberations could routinely be disclosed could have an

inhibiting effect on free and frank discussions between CPS and legal representatives, and that loss of frankness and candour could damage the quality of advice and deliberation, and lead to poorer decision-making. It could also impede the trial process where the correspondence may have a direct bearing on a criminal prosecution, as is the case here. The Commissioner accepts this prejudice as a possible outcome.

28. Additionally, whilst senior employees of the CPS may have some reasonable expectation that their work may be open to some public scrutiny and it therefore follows that their decision-making of this nature should be sufficiently robust to withstand the possibility of public scrutiny, it must be borne in mind that this request focuses specifically on the correspondence from a lawyer in the private sector where there is considerably less expectation. Whilst Ms Levitt may have previously been a public servant whose correspondence would have more likelihood of disclosure, in a private capacity this is significantly reduced. As an employee of a private law firm, she is not personally subject to the FOIA. It is only because her correspondence is held by the CPS that it is caught within the remit of this request.

29. The CPS has submitted to the Commissioner that:

"Whilst the media has made much of the involvement of Alison Levitt because of her former role as Principal Legal Advisor to the Director of Public Prosecutions of the CPS, the fact is that she is a partner in a well-established law firm which represents clients and needs to correspond to fulfil that role. Any firm which corresponds with the CPS or police needs to be assured that their correspondence is confidential otherwise it will inhibit the way in which the rights of individuals may be asserted.

Whilst the existence of these letters is already in the public domain it should be recognised that the content is not. The attached letters do not include any inappropriate attempts to hinder the ability of the CPS to make impartial decisions in relation to this case and, in my view, the content would not add to public debate. It is also a reasonable assumption that the release of this material would cause distress to the involved individuals, one of which being a vulnerable child. In addition to this release would also undermine the ability to communicate in confidence which is necessary to conduct criminal prosecutions, and therefore more widely, the Criminal Justice System as a whole".

30. The complainant has argued that:

"A one-line descriptive summary of the nature of each piece of correspondence would necessarily be brief. It could not therefore,

be said to reveal details of any actual 'confidential communications' with the CPS.

It would be perfectly acceptable, for example, for the summary to merely state (purely by way of illustration): "Complaint about delay in charging decision".

Such a simplistic one-line description would only provide a very basic description of the communications between Ms Levitt and the CPS".

31. The complainant has also argued:

"The prosecution of Kato Harris was a high profile case in which the jury acquitted the accused in just 26 minutes of three counts of rape. The merit of the prosecution case brought against Mr Harris has been questioned very publicly since and has raised significant questions about why the prosecution was brought.

Key among those factors has been the issue of the involvement of Alison Levitt, the former principal legal advisor to the Director of Public Prosecutions until as recently as 2014. She is now a partner and head of business crime at the private law firm Mischon de Reya.

In her role at the CPS, Ms Levitt was among its most senior officials, advising the DPP on some of the most sensitive prosecutions they dealt with.

Since the acquittal of Mr Harris, it has become public knowledge that Ms Levitt acted for the family of the alleged victim in the case. It has also been confirmed by the CPS that Ms Levitt wrote to the CPS on at least one occasion prior to trial.

In light of Ms Levitt's very senior role at the CPS in recent years, the nature and regularity of her contact with the CPS on this matter is of huge public interest.

Ms Levitt undoubtedly retains friendships and contacts across the CPS after occupying such a senior position there for five years. Her reputation as one of its foremost lawyers must logically endure among its staff to this day. The public might reasonably therefore consider that her choosing to correspond with prosecutors on such a serious matter prior to trial could influence, however subtly, their impartial handling of the case.

Without disclosure in this request, a clear perception issue is created that the CPS 'has something to hide'.

Failure to release will undoubtedly only serve to further damage public faith in the justice system. In December 2015, a poll commission by solicitors Hodge, Jones & Allen of 2,000 people found only 25% felt the justice system was 'fair and transparent'. Refusal of this request will only cause that faith to dwindle still further".

32. The Commissioner notes that this request only seeks a summary of the content of three letters concerned so any details regarding the victim/witnesses do not need to be included. In that respect, any possible distress to the family, child and any other witness is negligible.
33. However, the Commissioner understands that there is a very strong public interest in supporting the protection of the CPS's internal processes, which includes its dealings with legal representatives for the parties concerned in criminal proceedings. These must remain full and frank and without fear of being made routinely available to the public. Were these parties concerned that any content of their detailed deliberative processes could find their way into the public domain then it seems likely that it may serve as a deterrent to the documenting of honest and frank views and findings; the Commissioner believes this argument to be particularly weighty in favour of maintaining the exemption as it could ultimately undermine the right to a fair trial if such advice is not sought and given in a full expectation of confidence. This is not to say that she would never conclude that such information should be made available, but, on this occasion, she is of the opinion that sufficient detail about the case has been made available in order to keep the public fully informed.
34. The Commissioner recognises the complainant's understandable desire to have more information about the content of the letters in order to verify whether or not there was any "inappropriate" contact by Ms Levitt in view of her previous role at the CPS. As was the case in her previous investigation, the Commissioner can advise that she has had full sight of the relevant correspondence and there is nothing in its content to suggest that the contact is anything other than professional; there is no suggestion of inappropriate contact and the correspondence does not support the complainant's suspicions in any way. She can therefore see little public interest in summarising letters which are essentially a formal contact between the parties.
35. Although she notes that there is some limited public interest in disclosure to evidence that the correspondence was appropriate, no pressure was being placed on any party and no preferential treatment was being given, having had full sight of the letters concerned the Commissioner has seen no such evidence. Accordingly, on this occasion the Commissioner finds the public interest arguments in favour of

maintaining the exemption to be more compelling. She therefore concludes that the public interest in maintaining the exemption outweighs that in disclosure.

36. As she has found the exemption at section 30(1)(c) to apply the Commissioner has not gone on to consider section 40(2). However, it is her initial view that section 40 is not engaged as the request does not seek any personal information.

Other matters

37. The CPS was concerned that disclosure of the information at parts (1) and (2) of the request might set a precedent for such disclosure in future requests of this type. The Commissioner would like to assure the CPS that this is not the case and that each case is considered on its own merits.

Right of appeal

38. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

39. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Carolyn Howes
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