



Edward Williams v Information Commissioner
[2023] UKUT 142 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA-2023-000258-GIA**
(ADMINISTRATIVE APPEALS CHAMBER)

BEFORE UPPER TRIBUNAL JUDGE WEST

Appellant EDWARD WILLIAMS

and

Respondent THE INFORMATION COMMISSIONER

APPEAL AGAINST A DECISION OF A TRIBUNAL

DECISION OF THE UPPER TRIBUNAL

Decision date: 21 June 2023

Decided on the papers

UPPER TRIBUNAL JUDGE WEST

ON APPEAL FROM

Tribunal: First-tier Tribunal (Information Rights)

Tribunal Case No: EA/2022/0224

Tribunal Hearing Date: 1/2/2023

DETERMINATION

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) (which sat on 1 February 2023) dated 20 February 2023 under file reference EA/2022/0224 does not involve an error of law. The appeal against that decision is dismissed.

This decision is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

Representation: the Appellant in person (written submissions)

**Mr Harry Gillow, counsel, for the Respondent
(written submissions)**

REASONS

Introduction

1. This is an appeal, with my permission, against the decision of the First-tier Tribunal (Judge Sophie Buckley, Tribunal Members Susan Wolf and Kate Grimley Evans) which sat to consider the matter on the papers on 1 February 2023 and reached its decision on 20 February 2023.

2. The Appellant is Mr Edward Williams. The Respondent is the Information Commissioner (“the ICO”). The appeal is against the decision of the ICO IC-125998-K0S6 dated 16 August 2022 that the Independent Office for Police Conduct (“the IOPC”) was entitled to rely on s.30(1)(a)(i) of the Freedom of Information Act 2000 (“FOIA”) and that it was not required to take any steps.

The Factual Background

3. As the Tribunal explained at the outset of its decision:

“2. The requested information relates to the death of an individual in custody of Devon and Cornwall Police in 2012. The matter was referred to the IOPC under police complaints legislation and the IOPC investigated the

case in line with its functions under the Police Reform Act 2002.

3. The conduct of staff and officers was investigated by the IOPC, and a file of evidence submitted to the CPS for them to determine whether criminal charges would be brought. The investigation also considered if the officers had cases to answer for misconduct. A file of evidence was submitted to the Health and Safety Executive for the consideration of corporate charges.

4. The CPS decided in December 2014 that three officers should face criminal charges of unlawful act manslaughter, gross negligence manslaughter and misconduct in a public office.

5. In January 2016 the IOPC gave its opinion that seven officers had cases to answer for gross misconduct.

6. In March 2016 the jury was discharged without delivering a verdict and in 2017 all officers were acquitted following a six-week retrial. Disciplinary charges were still under consideration and the IOPC was examining corporate decision making.

7. In February 2018 the IOPC directed the force to bring disciplinary hearings for gross misconduct against six officers.

8. In April 2018 the CPS decided to charge the Office of the Chief Constable of Devon and Cornwall Police with offences under the Health and Safety at Work Act 1974, following the IOPC investigation. This resulted in a conviction and a fine after health and safety breaches were admitted in May 2019.

9. After a preliminary hearing in July 2019 an independent panel decided to dismiss the misconduct case against the four of the officers and in October 2019 the IOPC announced its decision to withdraw the decision to direct misconduct hearings for the two remaining officers. The IOPC indicated at the time that there was a possibility of a future inquest and stated its commitment to make a publication decision on its reports once all associated proceedings had concluded.

10. At some point between August 2021 and July 2022 the Coroner indicated that there would be an inquest into the death. The IOPC anticipated that this would take place in 2023. Following the inquest, there is a possibility

that the CPS may conduct a further review of the evidence relating to the death, of which the investigation report would be a part.”

The Request

4. On 26 July 2021 Mr. Williams made a request to the IOPC:

“Disclose the IOPC full report into death of [name redacted], died [date redacted] 2012”.

The Response

5. The IOPC replied to the request on 23 August 2021, stating that it was withholding the requested information under s.30(1)(a)(i) and s.40(2) of FOIA. Mr Williams requested an internal review, which the IOPC refused to provide in the absence of any grounds put forward by him. Mr Williams complained to the ICO on 24 August 2021. In his decision notice dated 16 August 2022 the ICO concluded that the IOPC was entitled to rely on s.30(1)(a)(i) to withhold the requested information. He required no steps to be taken. As summarised by the Tribunal in its decision

“16. In relation to section 30(1) the Commissioner stated that he considered that information can be exempt if it relates to a specific ongoing, closed or abandoned investigation. The Commissioner set out his guidance on section 30 which states that section 30(1)(a)(i) can only be claimed by public authorities that have a duty to investigate whether someone should be charged with an offence and that although the police are the most obvious users there may be other public authorities who have a duty to investigate offences which may lead to a suspect being charged. The Commissioner was satisfied that the withheld information was held in relation to a specific investigation conducted by the IOPC of the type described in section 30(1)(a)(i).

17. In relation to the public interest balance, the Commissioner held that the purpose of section 30 is to ensure the effective investigation and prosecution of offences. It is not in the public interest to jeopardise the ability of the IOPC to investigate serious complaints and incidents involving police effectively. Set against this the Commissioner recognised the importance of the public

having confidence in public authorities which will be increased by allowing scrutiny of their performance and may involve examining the decisions taken in particular cases. He acknowledged the public interest in promoting transparency, accountability and public understanding with regard to decisions made by public authorities. The Commissioner was mindful of the sensitivity of the matter under consideration and recognised the IOPC's commitment to publish information about this case, if appropriate, in the future.

18. The Commissioner acknowledged that the IOPC stated that despite the length of time that has passed since the death occurred this remains an open case. He took into consideration that at the time of the request further proceedings were being considered by the Coroner. He acknowledged that at the time of writing the decision notice the Coroner had not set a date for the inquest.

19. Taking all the above into account, the Commissioner concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.”

6. Mr Williams appealed to the Tribunal, but his appeal was dismissed.

The Decision of the Tribunal

7. So far as material, the Tribunal held that

“Issues

31. The issues we have to determine are:

31.1. Does the IOPC have a duty to conduct an investigation with a view to it being ascertained whether a person should be charged with an offence?

31.2. Was the information at any time been held by the authority for the purpose of any such investigation?

31.3. In all the circumstances of the case, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

Evidence

32. We have read and taken account of a closed and open bundle of documents.

Discussion and conclusions

Does the IOPC have a duty to conduct an investigation with a view to it being ascertained whether a person should be charged with an offence?

33. Mr. Williams relies on the meaning of ‘ascertain’ as discussed in *DVLA v Information Commissioner and Williams* [2020] UKUT 334 (AAC) (‘DVLA’). That decision concerned section 31(1) which provides materially as follows:

31 Law enforcement

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

...

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

...

(2) The purposes referred to in subsection (1)(g) to (i) are—

(a) the purpose of ascertaining whether any person has failed to comply with the law,

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

...”.

34. To the extent that the Upper Tribunal in *DVLA* gave any view on the meaning of the word ascertaining, we think there was at least some approval of the analysis of the First Tier Tribunal in *Foreign and Commonwealth Office v Information Commissioner* EA/2011/0011, at para 69 *DVLA*:

Much more persuasive (albeit again not determinative) is the First-tier Tribunal’s analysis in *Foreign and Commonwealth Office v Information Commissioner* (EA/2011/0011), where it expressed the view that “the word ‘ascertain’ connotes some

element of determination with regard to non-compliance with the law or responsibility for conduct which is otherwise improper” (at paragraph 33).

35. The wording in section 31(2)(a) and (b) is different to that in section 30(1)(a)(i). Under section 31 the body must be exercising its functions for the purpose of ascertaining something. Under section 30 the investigation must be conducted with a view to it being ascertained whether a person should be charged. The latter formulation lends itself more easily to an interpretation that allows for the ascertaining to be conducted by a body other than the public authority. For those reasons we do not find *DVLA* of assistance in relation to the interpretation of section 30(1)(a)(i), other than we agree that the word ‘ascertain’ connotes some element of determination.

36. We do not accept that it is necessary under section 30(1)(a)(i) that the investigation be conducted with a view to it being ascertained by the IOPC whether a person should be charged with an offence.

37. The words ‘by the authority’ could have been included, as they have been in section 30(1)(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...’ Alternatively, the formulation used in section 31 could have been used. Section 30(1)(a) could have read ‘Any investigation which the public authority has a duty to conduct for the purpose of ascertaining – (i) whether a person should be charged with an offence’.

38. As those words have not been used, in our view there is no requirement under section 30(1)(a)(i) for the IOPC to be the body that will ascertain whether or not a person should be charged with an offence. It is sufficient if the investigation is conducted by the IOPC with a view to it being ascertained by the CPS whether a person should be charged with an offence.

39. Does the IOPC have a duty to conduct such an investigation? Having reviewed the Police Reform Act 2002 (PRA) the tribunal’s view of the duties of the IOPC is as follows.

40. Under section 10(4) PRA it is the duty of the Director General of the IOPC to exercise and perform the powers

and duties conferred on him in the manner that the Director General considers best calculated for the purpose of securing the proper carrying out of the Director General's functions under subsections (1) and (3). Under section 10(1) the Director General's functions include:

(a) to secure the maintenance by the Director General and by local policing bodies and chief officers, of suitable arrangements with respect to the matters mentioned in subsection (2);

(b) to keep under review all arrangements maintained with respect to those matters;

(c) to secure that arrangements maintained with respect to those matters comply with the requirements of the following provisions of this Part, are efficient and effective and contain and manifest an appropriate degree of independence;

(d) to secure that public confidence is established and maintained in the existence of suitable arrangements with respect to those matters and with the operation of the arrangements that are in fact maintained with respect to those matters;

(e) to make such recommendations, and to give such advice, for the modification of the arrangements maintained with respect to those matters, and also of police practice in relation to other matters, as appear, from the carrying out by the Director General of the Director General's other functions, to be necessary or desirable.

41. The 'matters' in subsection (2) are:

(a) the handling of complaints (within the meaning given by section 12);

(b) the recording of matters from which it appears that there may have been conduct by persons serving with the police which constitutes or involves the commission of a criminal offence or behaviour justifying disciplinary proceedings;

(ba) the recording of matters from which it appears that a person has died or suffered serious injury

during, or following, contact with a person serving with the police;

(c) the manner in which any such complaints or any such matters as are mentioned in paragraph (b) or (ba) are investigated or otherwise handled and dealt with.

42. Under Schedule 3 PRA (Handling of Complaints and Conduct Matters etc.) it is the duty of the Director General to determine whether or not it is necessary for a complaint or matter referred to it to be investigated.

43. If the Director General determines that it is necessary for the complaint or matter to be investigated, it is the duty of the Director General to determine the form which the investigation should take, including determining that the investigation is to take the form of an investigation by the Director General.

44. Where the Director General determines that the Director General should carry out the investigation of a complaint or matter, paragraph 19 applies, under which the Director General designates a person to take charge of the investigation.

45. Under paragraph 20(1), no criminal or disciplinary proceedings shall be brought in relation to any matter which is the subject of an investigation in accordance with Schedule 3 until the conduct to which the investigation relates has been certified under paragraph 20A¹ or, where the Director General has personally carried out the investigation, a report has been completed by the Director General. These restrictions do not apply where it appears to the DPP that there are exceptional circumstances which make it undesirable to delay the bringing of proceedings.

46. Under paragraph 23 on receipt of the report by the IOPC or on its completion by the Director General, the Director General shall determine whether the report indicates that a criminal offence may have been committed and whether it is appropriate for the matters

¹ Under paragraph 20A, in the case of an investigation being conducted by the IOPC, where, at any time before the completion of the investigation, the Director General believes or determines that the appropriate authority would, on consideration of the matter, be likely to consider that there is sufficient evidence to establish on the balance of probabilities that conduct to which the investigation relates constitutes gross misconduct and it is in the public interest whose conduct it is to cease to be a member of the police force without delay.

dealt with in the report to be considered by the DPP or that any matters in the report fall within any prescribed category of matters. If so, the Director General shall notify the DPP of the determination and send him a copy of the report. The DPP shall notify the Director General of any decision of his to take or not to take action.

47. Considering those provisions as a whole, including in particular the general duty under paragraph 10(4), the functions under paragraph 10(1) and the matters under paragraph (2), once the Director General has determined that the Director General should carry out the investigation of a complaint or matter, we consider that the IOPC is under a duty to carry out that investigation and was therefore under a duty to carry out the investigation in issue in this appeal.

48. In considering whether there was a duty to conduct the investigation with a view to it being ascertained whether a person should be charged with an offence, we have taken into account the provisions as a whole, including in particular the restriction in paragraph 20 on criminal proceedings until the investigation is completed or the conduct certified and the duty in paragraph 23 to determine whether the report indicates that a criminal offence has been committed and whether it is appropriate for the matters to be considered by the DPP, and if so, to notify the DPP of that determination. We have also considered the specific facts of the case, including the fact that this was a death in custody, and that a file of evidence was ultimately submitted to the CPS for them to determine whether criminal charges would be brought and to the Health and Safety Executive for the consideration of corporate charges.

49. Taking all those matters into account we consider that in this case there was a duty to conduct the investigation with a view to it being ascertained, ultimately by the CPS, whether a person should be charged with an offence.

50. The report consists of information held by the IOPC for the purpose of that investigation. The exemption is therefore engaged.

Does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

51. We accept that there is a very strong public interest in transparency in relation to the handling of matter arising out of a death in Police custody. In our view this public interest in transparency can normally be satisfied by the publication of the report after the related proceedings are completed. We do accept in this case that there is some public interest in releasing the report before the inquest takes place, because of the extensive period of time that has passed since the incident.

52. However, even though 8 years had passed since the individual's death in police custody, we still take the view that the public interest balance favours maintaining the exemption while proceedings have not been completed. At the date of the request, further proceedings were being considered by the Coroner. Once any inquest has concluded, it is possible that the CPS may conduct a further review of the evidence, of which the investigation report would be a key part. In those circumstances we accept that there is a clear risk of undermining those proceedings by the premature release of the IOPC report. There is a very strong public interest in ensuring that the inquest and any following proceedings can operate properly. In our view this outweighs the public interest in publishing the report before the proceedings have concluded.

53. On this basis we conclude that the IOPC were entitled to withhold the report under s 30(1)(a)(i).

54. For the reasons set out above this appeal is dismissed.”

8. The Tribunal refused Mr Williams permission to appeal against its decision on 2 March 2023. He applied to the Upper Tribunal for permission to appeal.

9. On 13 March 2023 I granted Mr Williams permission to appeal against the decision of the Tribunal.

The Legislation

10. So far as material, FOIA provides that

“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.

...

58 Determination of appeals

(1) 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.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based”.

11. S.30 is a class-based exemption. There is no requirement for a public authority to demonstrate prejudice for s.30(1)(a) to (c) to be triggered. Those provisions are subject to a public interest test.

The Grounds Of Appeal

12. Mr Williams argued that paragraphs 36 and 49 of the Tribunal's decision were wrong in law.

13. He submitted that the IOPC was not under a duty to conduct an investigation with a view to it being ascertained whether a person should be charged with an offence. He agreed with the ICO published guidance, Version: 1.0, which stated that

"11. Section 30(1)(a) can *only* be claimed by a public authority that has *a duty to investigate offences*. As discussed above, a duty imposes an obligation to carry out the investigations as opposed to a discretionary power to do so. Public authorities should be able to demonstrate to the Information Commissioner how this obligation arises. Usually it will be by statute."

14. In ***R (Ladkin) v IOPC*** [2021] EWHC 122 (Admin) May J said at [21] (with emphasis added):

"The IOPC Statutory Guidance (May 2015) which was in force at the material time ("the IOPC Guidance") describes the purpose of a DSI Investigation and deals with the outcomes. Guidance as to the outcomes of DSI investigations is to be found at paragraphs 11.49 to 11.51:

"11.49 The outcomes of a DSI investigation will reflect the fact that *it is not an inquiry into any criminal conduct* or complaint allegation against any person serving with the police.

11.50 *The purpose of a DSI investigation is to establish facts*, the sequence of events and their consequences. Its role is to investigate how and to what extent, if any, the person who has died or been seriously injured had contact with the police, and the degree to which this caused or contributed to the death or injury."

15. He also relied on the explanatory notes to s.30 FOIA which stated:

“Section 30: Investigations and proceedings conducted by public authorities

108. Subsection (1) exempts, as a class, any information held at any time by a public authority *for the purposes of a criminal investigation* or criminal proceedings conducted by it”.

16. Mr Williams also submitted that paragraph 48 was wrong in law where it said that

“In considering whether there was a duty to conduct the investigation with a view to it being ascertained whether a person should be charged with an offence, we have taken into account the provisions as a whole, including in particular the restriction in paragraph 20 on criminal proceedings until the investigation is completed or the conduct certified and the duty in paragraph 23 to determine whether the report indicates that a criminal offence *has* been committed and whether it is appropriate for the matters to be considered by the DPP, and if so, to notify the DPP of that determination.

17. The correct test, as set out in *Ladkin*, was “may have been committed”.

18. Moreover, s.31(1)(g) FOIA clearly showed that Parliament was aware of the need to discriminate between *the* authority holding the information and *any* (other) authority, in this case the CPS:

“31 Law enforcement

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

...

(g) the exercise by *any* public authority of its functions for any of the purposes specified in subsection (2)”.

19. The following exemptions clearly applied to an IOPC investigation. S.31 excluded s.30, so it was one or the other:

“31 Law enforcement

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

...

(g) the exercise by *any* public authority of its functions for any of the purposes specified in subsection (2)".

(2) The purposes referred to in subsection (1)(g) to (i) are—

(a) the purpose of ascertaining whether any person has failed to comply with the law,

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,

(d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,

(e) the purpose of ascertaining the cause of an accident,

...

(j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work".

20. The 2015 IOPC statutory guidance made numerous reference to the word "improper", for example the box at 9.4:-

"Mandatory referral criteria

The appropriate authority must refer complaints and recordable conduct matters that include allegations of conduct which constitutes:

- a serious assault
- a serious sexual offence
- serious corruption, including abuse of position for a sexual purpose or for the purpose of pursuing an improper emotional relationship

- a criminal offence or behaviour which is liable to lead to disciplinary proceedings and which, in either case, is aggravated by discriminatory behaviour on the grounds of a person's race, sex, religion or other status identified in paragraph 9.24 of this guidance
- a relevant offence
- complaints or conduct matters arising from the same incident as one where conduct falling within the above criteria is alleged; or
- any conduct matter relating to a chief officer (or the Deputy Commissioner of the Metropolitan Police Service) and any complaint relating to a chief officer (or the Deputy Commissioner of the Metropolitan Police Service) where the appropriate authority is unable to satisfy itself, from the complaint alone, that the conduct complained of, if it were proved, would not justify the bringing of criminal or disciplinary proceeding".

The ICO's Submissions

21. Mr Gillow for the ICO began by quoting the whole of paragraph 21 of *Ladkin*

"21. The IOPC Statutory Guidance (May 2015) which was in force at the material time ("the IOPC Guidance") describes the purpose of a DSI Investigation and deals with the outcomes. Guidance as to the outcomes of DSI investigations is to be found at paragraphs 11.49 to 11.51:

"11.49 The outcomes of a DSI investigation will reflect the fact that it is not an inquiry into any criminal, conduct or complaint allegation against any person serving with the police.

11.50 The purpose of a DSI investigation is to establish facts, the sequence of events and their consequences. Its role is to investigate how and to what extent, if any, the person who has died or been seriously injured had contact with the police, and the degree to which this caused or contributed to the death or injury."

In a highlighted box following paragraph 11.50 is this instruction:

“At the end of a DSI investigation, the investigator must submit a report to the [IOPC] and send a copy to the appropriate authority. The [IOPC] must determine whether the report indicates that a person serving with the police may have committed a criminal offence or behaved in a manner justifying the bringing of disciplinary proceedings. If the [IOPC] decides that it does, it will notify the appropriate authority. The appropriate authority must then record the matter as a conduct matter and consider whether it should be referred to the [IOPC]. Subject to any decision by the [IOPC] to re-determine the form of the investigation, the investigator of the DSI matter must investigate the conduct matter.”

Where there is no such indication, the [IOPC] may make recommendations or give advice [relating to satisfactory/unsatisfactory performance] as it considers necessary or desirable.”

22. He noted that in that passage the Court only recited the contents of the IOPC Guidance. Whilst he accepted that such guidance might be useful in the matter, the Court did not make any pronouncement on the effect of such guidance or the actual scope of the IOPC’s powers and the passage was consequently of limited, if any, precedential value (notwithstanding that in its entirety it supported the ICO’s submissions as to the role of IOPC investigations in ascertaining criminal conduct). For completeness, Mr Gillow also noted paragraph 17 of *Ladkin*, which stated:

“If, during the investigation of a DSI matter, the designated investigator finds an indication that a person serving with the police may have committed a criminal offence or behaved in a manner that would justify the bringing of disciplinary proceedings the Director General of the IOPC (DG) is required to notify the Appropriate Authority ("AA") and the AA is required to record the matter as a conduct matter. If such an indication is found then the IOPC investigation will continue as a conduct matter: see paragraphs 21A (2C), (5) and (6) of Schedule 3 to the 2002 Act.”

23. As to the question whether a public body could rely on s.30(1)(a)(i) in circumstances where it was not the body ultimately responsible for deciding

whether to charge a person with an offence, the ICO agreed with and adopted the reasoning of the Tribunal at paragraphs 33-38. As noted there, the case cited by Mr Williams, ***Foreign and Commonwealth Office v Information Commissioner*** (notwithstanding that it was not binding on the Upper Tribunal) was of very limited assistance as, being concerned with the s. 31 exemption, it provided no guidance on who could be the responsible body for the “ascertaining” in the context of the s.30 exemption.

24. While the ICO accepted that the exemption should be construed in a manner consistent with its purpose and not given unduly wide effect, he nevertheless submitted that, where a body had a statutory duty to investigate a potential offence with a view to deciding or assisting in the decision as to whether charges should be brought, the exemption could apply, even where the ultimate decision on whether to bring charges was made by a different public body. Any alternative finding would risk undermining the purpose of the exemption, to protect the integrity of the decision-making process whereby criminal charges might be brought. It would be unprincipled and against the purpose and intention of the relevant FOIA exemptions to provide a back door which could allow requestors access to such information even where disclosure might prejudice that process. Furthermore, s.30 was not an absolute exemption, such that insofar as it was in the public interest for such information to be disclosed, the exemption would not prevent disclosure.

25. That was moreover consistent with the wording of the statute, as the Tribunal noted. S.31 made explicit that the authority carrying out the investigation must be the same as the body making the decision (i.e. the body doing the ‘ascertaining’); the same was true of s.30(1)(b). It was a fundamental principle of statutory interpretation that the Courts should seek to give effect to the precise wording used by Parliament: see e.g. ***Cab Housing Ltd v Secretary of State for Levelling Up, Housing and Communities*** [2022] EWHC 208 at [67]:

“[t]here are presumptions that every word in an enactment is to be given meaning; that where the same word is used more than once it has the same meaning,

and that different words have different meanings unless the context indicates otherwise (Bennion at Sections 21.2 to 21.3) ...”

26. On that basis, the ICO requested that the Upper Tribunal uphold the decision below on the point.

27. The ICO then turned to the question whether the functions of the IOPC when conducting the investigation at issue included conducting that investigation “with a view to it being ascertained whether a person should be charged with an offence”.

28. Given the approach which the ICO invited the Upper Tribunal to take to the question of whether, in principle, separate bodies could be responsible for investigating and ascertaining whether a person should be charged with an offence, he submitted that, as found by the Tribunal, it was clear that the IOPC’s investigation in this instance did fall within the scope of an investigation “with a view to it being ascertained” whether a person should be charged.

29. As set out at paragraphs 39-49 of the Tribunal’s decision, the Director General of the IOPC was under a duty to investigate where he deemed it necessary to do so. Following such an investigation, the Director General would consider whether an offence has or may have been committed (with respect to Mr Williams, nothing turned on that distinction, as in either case it would be the DPP who would make the decision whether in fact to bring charges and ultimately it would be for the courts to decide whether an offence had been committed). If the Director General took the view that an offence has or may have been committed, he would provide the report to the DPP, who would take the ultimate decision on whether to bring charges. Unless exceptional circumstances applied, the DPP would not bring charges prior to completion of the Director General’s report or the Director General had certified the matter under Schedule 3, paragraph 20A of the 2002 Act.

30. In light of that procedure, it was in the ICO's submission clear that the investigation was conducted "with a view to it being ascertained" whether a person should be charged with an offence, albeit that the ultimate decision would not be taken by the IOPC itself. Accordingly, the Commissioner invited the Upper Tribunal to uphold the Tribunal's findings on that point also.

Discussion

31. Neither side sought an oral hearing and I am satisfied that it is not necessary to hold one to determine the matter.

32. I accept that Mr Williams is correct that in paragraph 48 of the decision the Tribunal should have said that the duty in paragraph 23 of Schedule 3 of the 2002 Act was to determine whether the report indicated that a criminal offence "may have been committed" rather than "has been committed", although that emerges from the language of paragraph 23 of Schedule 3 itself, to which ***Ladkin*** simply refers. The Tribunal had, however, accurately referred to the statutory provision in paragraph 46, namely whether the report indicates that a criminal offence "may have been committed". In addition, I accept the ICO's submission that nothing turns in this context on the distinction between "may have been committed" rather than "has been committed", as in either case it would be the DPP who would make the decision whether in fact to bring charges and ultimately it would be for the courts to decide whether an offence had been committed. In those circumstances the slip in paragraph 48 was not material to the outcome of the appeal and I dismiss it as a ground of appeal.

33. The exemption in s.30(1), so far as material for present purposes, provides that

"30(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purpose 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
...”.

34. By contrast, the exemption in s.31 provides that

“(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

...

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)”.

(2) The purposes referred to in subsection (1)(g) to (i) are—

(a) the purpose of ascertaining whether any person has failed to comply with the law,

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper”.

35. The essence of Mr Williams’ argument is that s.30(1) only exempts, as a class, any information held at any time by a public authority *for the purposes of a criminal investigation* (or criminal proceedings) *conducted by it*. He says that the IOPC does not conduct a criminal investigation and that the criminal investigation is not conducted by the IOPC itself, but by the DPP (as per the explanatory notes to s.30), or that the IOPC does not have a duty to investigate offences (as per the guidance notes), so that the exemption is not engaged.

36. The wording in s.30(1)(a)(i) is very different from the wording in s.31(2)(a) and (b). Under s.31 the public authority body must be exercising *its own* functions for the purpose of ascertaining any of the purposes in subsection (2). By contrast, under s.30(1)(a)(i) the investigation must be conducted pursuant to a duty *with a view to it being ascertained* whether a person should be charged. The phrase “with a view to it being ascertained” strongly suggests that the ascertainment of whether a person can be charged with an offence can be conducted by a body other than the public authority which is under a

duty to conduct the investigation. There is no necessary community of identity between the two bodies.

37. If the construction for which Mr Williams contends were the correct one, one would have expected s.30(1)(a)(i) to read

“30(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purpose of –

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained *by the authority [itself]* ...

(i) whether a person should be charged with an offence ...”

38. Such a formulation would have been familiar to the draftsman, who had used just such a formula in s.30(1)(b), namely that information is exempt if it has at any time been held by the authority for the purpose of

“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”.

39. Alternatively, the formulation used in s.31 could have been used, with the result that s.30(1)(a)(i) would have read

“any investigation which the public authority has a duty to conduct *for the purpose of [itself] ascertaining in the exercise of its functions* –

(i) whether a person should be charged with an offence”.

40. Like the Tribunal below, I do not find **DVLA**, which was decided in the context of s.31, to be of assistance in relation to the interpretation of s.30(1)(a)(i), other than that the word “ascertain” connotes some element of determination.

41. In addition, I accept the argument by the ICO about the risk of undermining the investigatory and decision-making process involved in

deciding whether criminal charges should be brought in any particular case. That risk does not arise if the exemption is construed such that it applies where one public authority has a statutory duty to investigate a potential offence with a view to assisting in the decision as to whether charges should be brought, even though the ultimate decision on whether to bring charges is made by a different public body. Any alternative finding would risk undermining the purpose of the exemption, namely to protect the integrity of the decision-making process whereby criminal charges might be brought. It would undermine the purpose of the exemption to provide a means whereby a requestor could access the investigatory information which is a necessary preliminary to the ultimate decision whether or not to charge, even where disclosure might potentially prejudice that process. Moreover, as the ICO also argued, s.30 is not an absolute exemption; insofar as it is in the public interest for such information to be disclosed, the exemption would not prevent disclosure.

42. Accordingly, I am satisfied that there is no requirement under s.30(1)(a)(i) for the IOPC to be the body which will ascertain whether or not a person should be charged with an offence. It is sufficient if the investigation is conducted by the IOPC, pursuant to its statutory duty under the 2002 Act, with a view to it being ascertained by the DPP whether a person should be charged with an offence. It is not necessary under s.30(1)(a)(i) that the investigation be conducted with a view to it being ascertained *by the IOPC* whether a person should be charged with an offence. In short, a public body can rely on the exemption in s.30(1)(a)(i) in circumstances where it is not the body ultimately responsible for deciding whether to charge a person with an offence.

43. What, then, of the explanatory notes to s.30 ((a) that the information must be held for the purposes of a criminal investigation (b) conducted by the authority itself) and the guidance of the ICO himself (that the exemption could only be claimed by an authority which had a duty to investigate offences), when as per paragraph 21 of *Ladkin* the purpose of a DSI inquiry was not an

inquiry into criminal conduct, but was only an inquiry to establish facts? Mr Williams noted that the ICO seemed to be arguing against his own guidelines.

44. The modern approach to statutory interpretation was summarised by Lord Hodge in ***R(O) v SSHD*** [2022] UKSC 3, [2023] AC 255 at [29]-[31] (with emphasis added):

“29. The courts in conducting statutory interpretation are ‘seeking the meaning of the words which Parliament used’: *Black-Clawson International Ltd v Papierwerke* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated:

‘Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context’ (*R v DETR, Ex p Spath Holme* [2001] AC 349, 396).

Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, p 397:

“Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.”

30. External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation,

thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty ... *But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity.*

31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme* 396, in an important passage stated:

“The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the ‘intention of Parliament’ is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House ... Thus, when courts say that such-and-such a meaning ‘cannot be what Parliament intended’, they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.”

45. The position therefore is that explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions

“But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity.”

46. In the light of the conclusion which I have reached about paragraph 30(1)(a)(i) of FOIA, the explanatory note to s.30 cannot displace the meaning conveyed by the words of the statute. In the light of the policy underlying the

exemption, they are clear and unambiguous and do not produce an absurd result.

47. The guidance of the ICO is just that: guidance. It cannot affect or alter the meaning of the statute. It does not therefore avail Mr Williams to seek to rely on the ICO's guidance to the extent that it conflicts with the interpretation of the Act which I have reached.

48. Subject to the slight caveat about paragraph 48 which I have mentioned above (but which in any event was not material to its decision), I am therefore satisfied that the Tribunal was correct to conclude that

“49. Taking all those matters into account we consider that in this case there was a duty to conduct the investigation [as set out by the Tribunal in paragraphs 39 to 47] with a view to it being ascertained, ultimately by the CPS, whether a person should be charged with an offence.

50. The report consists of information held by the IOPC for the purpose of that investigation. The exemption is therefore engaged.”

(The reference to the CPS should be to the DPP, but nothing turns on that point.)

49. Mr Williams did not maintain on appeal his contention that the public interest in disclosing the information outweighed the public interest in maintaining the exemption and it is not therefore necessary to consider that matter.

50. For the sake of completeness, I should add that I did not derive any assistance from the decision of Upper Tribunal Judge Church in *Williams v ICO* [2023] UKUT 57 (AAC) which concerned the different question, albeit arising out of the same subject matter (but where Mr Williams had made a request for information of Devon and Cornwall Police), as to whether the Tribunal was entitled to find that the anticipated inquest proceedings fell within

s.31(1)(g), read with s.31(2)(b) of FOIA. S.30 was not under consideration and was not the subject of any argument.

Conclusion

51. The Tribunal made its findings of fact and gave adequate reasons for reaching the conclusion which it did. I can see no error of law in the way in which it went about its task or in the decision which it reached or in the adequacy of the reasons which it gave for that decision. The function of the First-tier Tribunal is to assess whether the Information Commissioner's decision notice "against which the appeal is brought is not in accordance with the law" (s.58 of FOIA). That the First-tier Tribunal has done. I can detect no error of law in its decision.

52. For these reasons I am satisfied that the Tribunal was correct in the conclusions which it reached and that the appeal should be dismissed.

Mark West
Judge of the Upper Tribunal

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