



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2009/0012
Information Commissioner's Ref: FS50140363

Heard at Procession House, London, EC4
On 21 September 2009

Decision Promulgated
5 October 2009

IN THE MATTER OF AN APPEAL TO THE INFORMATION TRIBUNAL

Appeal No: EA/2009/0012

BEFORE

CHAIRWOMAN

Melanie Carter

and

LAY MEMBERS

Gavin Jones

Ivan Wilson

BETWEEN:

MR MICHAEL ALEXANDER FREEBURY

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

THE CHIEF CONSTABLE OF THE DEVON AND CORNWALL CONSTABULARY

Additional Party

DECISION

Heard on the papers

Subject matter:

Investigations and proceedings conducted by public authorities s.30

Cases:

Guardian v The Information Commissioner and Avon and Somerset Police (EA/2006/0017)

Patrick Toms v Information Commissioner ([EA/2005/0027](#))

Decision

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 3 February 2009.

Information Tribunal

Appeal Number: EA/2009/00012

SUBSTITUTED DECISION NOTICE

Dated 3 February 2009

Public authority: Chief Constable of Devon and Cornwall Constabulary

**Address of Public authority: Police Headquarters
Middlemoor, Exeter
Devon, EX2 7HQ**

Name of Complainant: Mr M A Freebury

The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is that the public authority was incorrect in withholding the photographs referred to as IMG 1049 – 49 and 1051--73 on the basis of section 30 of the Act.

Action Required

The public authority shall disclose the photographs within 28 days from the date of publication of this decision.

Dated this 5th day of October 2009

Signed

Melanie Carter
Deputy Chairwoman, Information Tribunal

Reasons for Decision

Introduction

1. This appeal arises from a request by Mr Freebury, the Appellant, for information under the Freedom of Information Act 2000 (the Act) made to the Chief Constabulary of Devon and Cornwall. This arose from a criminal investigation of an incident which took place on the nights of 14 & 15 October 2005 on Dartmoor in Devon and in which six sheep were killed in circumstances suggestive of a ritual context.
2. The incident in question is reported to be one of a number of similar incidents which occurred both before and after the incident which is the subject of this particular request.

The request for information

3. On 16 March 2006, the Appellant wrote to the public authority, in a letter headed *"Sheep Deaths, Moortown, Dartmoor 14th & 15th October 2005 Log No 726/16/10 Crime No JT051439"*, stating that he was researching the sheep deaths specified in the heading of his letter and that he believed the deaths in question may be part of a series. The Appellant requested the *"Tavistock police files ...relating to these attacks"*.
4. The Appellant subsequently wrote to the public authority on the 29 March 2006, stating that he *"would also like to see the information gathered by scene of crime officers who attended the incident, together with any veterinary and forensic reports relating thereto."*
5. The Appellant again wrote to the public authority on the 17 April 2006, adding that *"In addition to the information requested, I would also like to see all the photographs taken at the scene by the officers attending the incident."*

6. On 11 May 2006, the public authority responded to the Appellant, refusing the information request and citing sections 31(1)(a), 31(1)(b), 40(2) and 41 of the Act as grounds for that refusal .
7. On 16 May 2006, the Appellant narrowed down his request to just the photographs together with any forensic reports. He made it clear that he was not seeking any data concerning third parties.
8. The Additional Party, carried out an internal review and finally refused the request on the 4th August 2006.
9. Following further correspondence with the public authority, on 30 October 2006 the Appellant wrote to the Commissioner, pursuant to section 50 of the Act, applying for a decision as to whether his request had been dealt with in accordance with Part I of the Act.

The Decision Notice

10. During the course of the investigation, the exemptions upon which the Additional Party relied were refined down to section 30 (investigations etc.) and 40 (personal data).
11. On 3 February 2009 the IC issued its Decision Notice upholding the decision of the Additional Party. That Decision Notice is the subject of this appeal.

The appeal to the Tribunal

12. The Appellant put forward a number of grounds of appeal most of which were withdrawn during the course of the proceedings. Only grounds 3, 6 & 7 of the Notice of Appeal were live by the time of the hearing. Given the Tribunal's decision to allow the appeal further to ground 3, the Tribunal has not considered the remaining grounds other than its comments at paragraph 42.
13. Ground 3 of the appeal concerned the Additional Party's claim made to the IC that there had been no statements to the press relating to the incident. The Tribunal understood this to be a challenge by the Appellant to the application of the public interest test on the basis that, either the information that appeared in the press

indicated a strong public interest in the matter weighing in favour of disclosure or that this demonstrated that some or all of the information had been put in the public domain by the Additional Party and/or others.

14. During the course of the proceedings, it became apparent from the Appellant's submissions (during an oral telephone directions hearing and subsequently in his written submissions) that he was only seeking disclosure of the photographs. This was on the basis that he had been made aware that there were no forensic or veterinary reports within the police files. The Tribunal was able to confirm that this was the case, such that it proceeded to consider the photographs alone.

15. The Information Commissioner originally requested that the appeal be struck out. The Tribunal declined to do so on the 16th June 2009 and directed that the case be prepared for a paper hearing. It asked at this stage for submissions from the Additional Party as to why, in its view, it would not have assisted in its enquiries to have released the photographs of the dead sheep. The Additional Party, whilst it had sent in written submissions on the appeal, failed to address this point. The IC was asked to specify what steps had been taken by him to ascertain what press interest there was in the incident in question and the submissions in relation to this are referred to below.

The questions for the Tribunal

16. The Tribunal was tasked with considering whether the IC had been correct in upholding the Additional Party's decision to refuse to disclose the photographs. There was no dispute between the parties that section 30 was engaged, such that the only issue was the proper application of the public interest test in section 2(2) of the Act. The question therefore was whether the public interest in maintaining the exemption under section 30 outweighed the public interest in disclosure.

The relevant law

17. This Tribunal's jurisdiction in this appeal is set out in section 58 of the Act. Thus, the Tribunal must consider whether the Decision Notice is in accordance with law. The starting point is the Decision Notice itself but the Tribunal is free to review

findings of fact made by the IC and to receive and hear evidence which is not limited to that which was before the IC.

18. Section 1(1) of the provides that any person making a request for information to a public authority is entitled: (a) to be informed in writing by the public authority whether it holds information of the description specified in the request; and (b) if that is the case, to have that information communicated to him or her.

19. Part II of the Act deals with exempt information. An exemption may be absolute, or it may be qualified. This appeal concerns a qualified exemption, section 30. This provides as follows:

“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.”

As was stated in the Tribunal case of *Toms -v- The Information Commissioner* (EA/2005/0027):

“...it appears from the wording of section 30(1) that if this information is subject to the exemption, it will remain so even if the particular purpose or purposes for which the information was retained for is or are no longer material, justified or required, such as would be the case, for example, with an investigation which had resulted either in a decision not to prosecute or in a prosecution which had been completed.” (para 6).

20. As a qualified exemption, the information may only be withheld where, in all the circumstances of the particular case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information: see section 2(2)(b) of the Act. Thus, where the factors for and against are equally balanced,

then the exemption will not apply and disclosure will be required. In this way, there is a presumption in favour of disclosure.

21. In applying section 2(2)(b) the Tribunal reminded itself that the relevant interest in disclosure is the public interest and that the purely private interests of the requester are strictly irrelevant. On the other side of the balance, the interests to be taken into account are those in favour of maintaining the exemption, in this case that set out in section 30.

22. It is clear from the wording of section 30(1) of the Act that for the exemption to apply, there is no requirement that there be any demonstration that the disclosure sought would cause prejudice to any investigation or criminal proceedings. The question of prejudice may however be relevant to the balancing of the public interest test, as a factor against disclosure. In considering whether disclosure might lead to any prejudice to the investigative function, regard should be had, *inter alia*, to such matters as the stage or stages reached in any particular investigation or criminal proceedings, whether and to what extent the information has already been released into the public domain, and the significance or sensitivity of the information requested (see *Toms v Information Commissioner*).

23. It is well established that the relevant date for the purposes of the testing of the public interest is the date of the public authority's final refusal of the request, that is, in this case, the refusal on review dated 4th August 2009.

Evidence

24. The Tribunal had regard to the disputed information in a closed bundle which was not made available to the Appellant. The information in the closed bundle is essentially that listed as the disputed information sought by the Appellant at paragraph 13 of Decision Notice. This referred to the contents of the police file as the disputed information, listed as:

- log of the initial report of the sheep deaths
- record of the steps taken by the Constabulary in response to this report

- a witness statement
- photographs of dead sheep

The Tribunal noted that this information was far more extensive than that actually requested by the Appellant (at that stage the photographs and any forensic or veterinary reports) and that this misunderstanding, which seems to have run throughout the IC's investigation, may have distorted his consideration of the public interest.

25. In the open bundle was a statement from Louise Fenwick, the Freedom of Information Officer for the Additional Party. She was the officer responsible for the decision making in this case and in her witness statement, she expanded upon the Constabulary's reasoning for the refusal. She told the Tribunal that *"she was cognisant that applications for disclosure of sensitive and confidential information relating to criminal investigations may be made by perpetrators and those directly involved with the crimes they seek disclosure on. Therefore as a general principle [she] would consider disclosure in unsolved crimes to be prejudicial except in very exceptional circumstances."*

26. Ms Fenwick further attested that, in her view, there would be prejudice flowing from disclosure as it would harm any investigation into the crime in particular and subsequent crimes. The disputed information, she claimed, showed the Constabulary's modus operandi for the investigation of this crime and this would be the same for other crime and future complaints of 'sheep deaths'. She claimed that the manner in which the sheep met their death was not released into the public domain and that release of such information *"could seriously jeopardise our ability to detect the offenders for this crime and also to detect any future crime"*.

27. The Tribunal had before it, in the open bundle and provided by the Appellant, an article which appeared in the Western Daily Press on or around the 20 October 2005. This article included the following:

"Six sheep were found with their necks broken and their eyes removed on land at Moortown near the edge of Dartmoor. Four of the their bodies were arranged in a regular square shape, another two were lying next to a pattern of stones."

.....

“Our understanding is that this place used to be some sort of meeting place for Pagans,” said a spokesman for the Devon and Cornwall police”.

.....

The dead sheep, worth £600, were still warm when they were found by their owner..... on Sunday morning.

.....

There were the four sheep and then 10ft or 15ft away there were another two, which were laid next to three stones which had been arranged in a pattern” he said.

The stones looked like a kind of gateway, a similar thing that had been found in January”

.....

In this case, the eyes were completely removed from the sheep, and there were no signs of the messy pecking that could attribute the loss to an attack by birds.

Police confirmed that the animals had their necks quickly broken and there were no indications of a prolonged struggle or suffering.

It is thought that at least two people would have to had to have [sic] been involved, given the sheer physical strength needed for the killing and arranging of the sheep.”

28. It appeared that the IC had not seen this article prior to issuing the Decision Notice and that it had only been provided by the Appellant further to the Tribunal’s directions. The IC told the Tribunal in its written submissions that it had carried out website searches for press articles/interest in the matter. It appears that the IC had not identified the above article.

29. The Appellant had also provided a range of documents which set out to show both the public interest in the matter and his particular expertise in this field. In

particular, the Appellant provided two newspaper articles concerning the ritualistic murder of sheep in the South West. These were published in August 2006 but after the date of the Constabulary's refusal on review, the 4th August 2006. These concerned the killing of sheep in similar circumstances but on different occasions.

Consideration

30. The Tribunal compared the information contained in the photographs with that made public in the Western Daily Press article on or around the 20 October 2005 (see paragraph 27 above). The Tribunal has set out in Rider A, a description of the photographs in question. This Rider is contained in a Confidential Annex pending the possibility of an appeal. If this decision is not appealed, Rider A, should be read into the decision at this point.
31. Having compared the photographs with the information contained in the press article, the Tribunal concluded that almost all of the information contained in the photographs had already been given by the police or the local farmer to a journalist and released thereby into the public domain.
32. The Tribunal considered that there was generally a public interest in rendering the investigations of the police more transparent and accountable, particularly where an investigation was completed and the crimes in question remained unsolved. The Tribunal considered that this factor applied but did not command significant weight as the information contained in the photographs did not materially add to the information already in the public domain. That said, the photographs went some way to confirm the information already released via the newspaper article, thereby supporting the public's understanding of and confidence in the police investigation.
33. With regard to the factors weighing against disclosure, the Tribunal noted that there was a public *"interest in principle, recognised by the exemption applying to s30 (1), in protecting information acquired, often in confidence, in police investigations."* (*Guardian v The Information Commissioner and Avon and Somerset Police (EA/2006/0017)*). Thus, the Tribunal took into account the general importance of preserving the integrity and efficiency of police investigations. The

question was what weight should be applied to this public interest in this particular case.

34. It had been argued by the Additional Party, that there was a likelihood of serious prejudice to the effectiveness and integrity of police investigations if the information was disclosed. The Tribunal recognised that this argument would normally command significant weight as in most cases where a relatively recent crime was left unsolved, it would be of considerable importance that the contents of the police file and in particular the methodology used in the police investigation was not disclosed.

35. The Tribunal concluded however that, given the extent of information already in the public domain, there could not, as asserted, be a serious possibility of prejudice to the integrity and effectiveness of police methodology in this or any future investigations. The Tribunal could not see that there was any particular methodology used in the way in which the photographs had been taken which could possibly give rise to any prejudice. The photographs were simple shots, as far as the Tribunal could see, taken in daylight and without the use of any highly technical equipment.

36. The IC had concluded that the information had not entered the public domain. The Decision Notice states at paragraph 35:

“The public authority has stated that no press release was issued about its investigation and the Commissioner has found no evidence of mainstream media coverage of the sheep deaths. There is no suggestion that any part of the withheld information has been disclosed into the public domain and any public interest there is in disclosure had not, therefore been met through the information that has already been disclosed.”

37. Whilst the Tribunal accepted that a formal press release had not been issued, it was clear from the Western Daily Press article and indeed information contained in the disputed information (see Rider B, which remains confidential whether or not there is an appeal), that the police had actively engaged with the press and placed, given how little information they had, a significant amount of it into the public

domain. The Tribunal accepted that there had not been “mainstream media coverage” at the time of refusal on review, that is, the 4th August 2006 and that the IC had not been aware of the Western Daily Press article at the time of his Decision Notice. As such, no criticism could be levelled at the IC with regard to the Decision Notice.

38. The Western Daily Press article alone did not indicate a strong public interest in this issue and the Tribunal were careful not to take into account, in this regard, the two articles in August 2006 provided by the Appellant, which post-dated the refusal of the request. It did however take these articles into account in assessing the credibility of the Additional Party’s submissions that the police needed to withhold the information, in this case the photographs, in order to preserve the integrity of police methods. These two later articles indicated, within a short period of time, an even higher level of police briefing of the press.

39. The Tribunal accepted that the Additional Party may have refused disclosure and indeed approached this appeal on the basis that it was the log entries and the witness statement that they did not want to be disclosed. Had these been at issue in this appeal, the Tribunal might have accepted the Additional Party’s submission that maintenance of the section 30 exemption outweighed the public interest in disclosure. It was however the photographs alone which were at issue and the Tribunal concluded that the Additional Party could not be said to have carried out a rigorous analysis of the public interest, item of information by item of information. Had they done so and had they properly analysed what information was already in the public domain, the Tribunal thought it likely that a decision to disclose the photographs would have been made. What would not be acceptable, in any circumstances, would be the blanket application of section 30 to all police material in relation to unsolved crimes on the basis of a generalised fear of prejudice. In any event, the Additional Party would have needed to provide some evidence of the alleged prejudice that it was said might arise from disclosure of the particular information. This was notably absent in this case.

40. The IC had come to the view that there was nothing in the disputed information which indicated any investigative techniques which could conceivably cause harm to the ability of the public authority to conduct effective investigations. The IC came

to the conclusion that the balance of public interest lay against disclosure on account of *“the possibility of the investigation being reopened and the possibility of disruption to a reopened investigation as a result of disclosure, the fact of the information having been recorded recently prior to the date of the information request and the significance of the information in question to the investigation”* (paragraph 47 of the Decision Notice). The Tribunal considered each of these factors but noted that there was no evidence before it of the possible impact of disruption to a reopened investigation. It was difficult moreover for the Tribunal to imagine what disruption might be caused by the photographs above and beyond the information already released into the public domain. In the absence of any convincing evidence of possible prejudice to investigations, the Tribunal did not place any material weight upon this factor. The fact that the photographs were relatively recent was a factor which operated both ways, such that this might have increased the public interest in scrutinising the steps taken in the police investigation but also increased the sensitivity of the information were there to be subsequent investigations. In this way, this factor was neutralised. Finally, given that almost all the information contained within the photographs had entered the public domain, the Tribunal did not consider it significant to the investigation or any future investigation.

Conclusion and remedy

41. The Case Tribunal came to the conclusion that the public interest in favour of disclosure were equally balanced with the public interest in favour of maintaining the exemption. Given this, section 2(2) of the Act, and the presumption in favour of disclosure, operated in such a way as to tip the balance in favour of the photographs being released. Thus, the Tribunal was of the view that the IC had made an error of law in upholding the Additional Party’s refusal to disclose the photographs. The Tribunal ordered that they be disclosed to the Appellant, in accordance with the Substituted Notice.
42. As the Tribunal had concluded that Ground 3 of the appeal should succeed, it did not proceed to consider in detail Grounds 6 & 7. It wished to comment however that first, it upheld the Commissioner’s conclusion that it was not his role to determine operational matters properly left to the Additional Party and second, it’s

hope that if the Appellant had valuable information that could assist the police with its enquiries, he would provide this and not insist on being asked to assist or that he work together with the police.

43. Our decision is unanimous.

Signed:

Melanie Carter
Deputy Chairwoman

Date: 5 October 2009

Corrected on 16 October 2009