

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 May 2017

Public Authority: Crown Prosecution Service

Address: Rose Court
2 Southwark Bridge
Southwark
London
SE1 9HS

Decision (including any steps ordered)

1. The complainant has requested the charging decisions made by the Crown Prosecution Service in relation to Robert Black and the alleged murder of Genette Tate in 1978. The Crown Prosecution Service refused to disclose the information relying upon section 42(1) (legal professional privilege) of the FOIA.
2. The Commissioner's decision is that the Crown Prosecution Service has applied section 42(1) of FOIA appropriately.
3. The Commissioner does not require the Crown Prosecution Service to take any steps as a result of this decision.

Request and response

4. On 12 January 2016 the complainant wrote to the Crown Prosecution Service (CPS) and requested information in the following terms:

"* Please provide copies of all charging decisions by the CPS about Robert Black and the murder of Genette Tate. I understand the CPS was asked to make a decision following Black's arrest in 2005 (the CPS reportedly decided not to charge in 2008) and also again in 2014;

*Please provide copies of all MG3s or similar submitted in relation to the charging decisions."

5. The CPS responded on 5 February 2016, explaining that it did not hold the requested information and confirmed that information was held by Devon and Cornwall Police. It provided him with a document which showed all of the case papers relating to Robert Black held by the police. The CPS also advised the complainant of his right to submit a request to the police for that information.
6. Following an internal review the CPS wrote to the complainant on 6 June 2016. It confirmed that the information had been returned to it on 10 February 2016. The CPS also explained that it had carried out an initial review of the information to ascertain what information came within scope of the request. It confirmed that it was withholding the information under section 42(1); the CPS also confirmed that it had carried out a second review and upheld its application of section 42(1).

Background

7. Robert Black was a convicted child murderer who died in prison on 12 January 2016. He was a key suspect in the disappearance of 13 year old Genette Tate, who disappeared in August 1978. However, he was never formally charged in connection with her disappearance.

Scope of the case

8. The complainant contacted the Commissioner on 15 June 2016 to complain about the way his request for information had been handled.
9. He explained that his request relates to the failure to prosecute Robert Black before his death, over the unsolved murder of a young girl. The complainant pointed out that the police had presented files to the CPS on several occasions but Robert Black was not charged. He also explained that the CPS had changed its policy regarding providing charging advice in relation to dead suspects.
10. The complainant went on to explain that he considered that the CPS had failed to appreciate the compelling public interest in transparency regarding this case.
11. During the Commissioner's investigation, the CPS explained Robert Black died (on 12 January 2016) before any charging decision had been made. It also confirmed that the police had requested a posthumous decision, as had been done in the past in similar cases. However, the

CPS explained that a charging decision was not made as on 18 March 2016, it had published a policy stating that charging decisions would not be made about deceased suspects.

12. The Commissioner will consider the CPS's application of section 42(1) and the length of time taken to deal with the request.

Reasons for decision

Section 42 - (Legal professional privilege)

13. Section 42(1) provides that information where a claim to legal professional privilege could be maintained in legal proceedings is exempt from disclosure. It is a class based exemption which means that any information falling within the category described is exempt from disclosure. As section 42 is a qualified exemption, it is subject to the public interest.
14. Legal professional privilege is a common law concept that protects the confidentiality of communications between a lawyer and client. In *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006) the Information Tribunal described it as:

" ... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and third parties if such communication or exchanges come into being for the purpose of preparing for litigation."
15. There are two types of legal professional privilege – litigation privilege and legal advice privilege.
16. Litigation privilege will apply where litigation is in prospect or contemplated and legal advice privilege will apply where no litigation is in prospect or contemplated.
17. In this case litigation privilege is the relevant privilege. For information to be covered by litigation privilege, it must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between third parties so long as they are made for the purposes of the litigation.

18. The CPS explained that the withheld information, including the MG3 form, was provided for the purposes of litigation, including communications with third parties, as the dominant purpose of the communication was to assist in the preparation of litigation. The information in question relates to whether to charge Robert Black with the abduction and murder of Genette Tate.
19. Litigation privilege applies to a wide variety of information, including advice, correspondence, notes, evidence or reports. The Commissioner has reviewed the withheld information and is satisfied that it consists of communications made for the dominant purpose of litigation, as it refers to the possible charging of Robert Black with the abduction and murder of Genette Tate. The Commissioner is therefore satisfied that the information is held for the dominant purpose of assisting in proposed litigation and that it attracts legal professional privilege.
20. Taking everything into account, the Commissioner considers that section 42(1) is engaged. She will go on to consider the public interest considerations.

Public interest test

21. The Commissioner will consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of maintaining the exemption

22. The CPS argued that the public interest in maintaining section 42(1) outweighed the public interest in disclosure. It explained that it considered that it is vital for the effective conduct of the prosecution process that confidential communications between the CPS and third parties can take place.
23. In addition, the CPS argued that the prosecution process would be severely prejudiced if such communications were hindered by the fear of subsequent disclosure.
24. The CPS also explained that it considered that the risk of prejudice occurring is more likely in a situation where the matters concerned were considered recently, as in the present case.

Public interest in favour of disclosure

25. The Commissioner considers that some weight must always be given to the principles of accountability and transparency, through the disclosure of information held by public authorities. Disclosure of information can assist the public in understanding how public authorities reach decisions, which in turn can help build trust in public authorities and may also allow greater public participation in the decision making process.
26. The complainant argued that the CPS failed to appreciate the compelling public interest in transparency about this case. He explained that his request relates to the failure to prosecute Robert Black before his death, over the unsolved murder of a young girl. The complainant also pointed out that the police had presented files to the CPS on several occasions but Robert Black was not charged.
27. In addition, the complainant explained that the Commissioner would be aware from a recent decision notice that the CPS has recently changed its policy of providing charging advice in relation to dead suspects.¹ He pointed out that therefore, despite the work of the police in trying to determine whether Robert Black was the offender, the CPS will not now confirm whether there was sufficient evidence to charge him.
28. The complainant also argued that there is a compelling public interest in understanding why Robert Black was not charged while still alive and also why the CPS will not now provide the requested information. Furthermore, the complainant argued that this particular case demands maximum transparency and that disclosure would be capable of informing the public why Robert Black was not prosecuted for a crime that the police were convinced he had committed.

Balance of the public interest arguments

29. The Commissioner considers that there is an inbuilt public interest in withholding information which is subject to legal professional privilege. Therefore, the Commissioner's approach, backed by successive tribunals, is to afford an initial weighting in favour of maintaining the exemption. Only in very clear cut cases will the public interest in disclosure outweigh the public interest in protecting the principle of LPP, ie safeguarding openness in all legal communications to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624177/fs50619149.pdf> (para 25)

30. As well as the inherent public interest in the principle of legal professional privilege, the Commissioner will also take into account the particular circumstances of the case. For example, where the information is live or recent there will be a stronger case for withholding the information.
31. The Commissioner notes the complainant's argument regarding the police presenting files to the CPS on several occasions regarding whether to charge Robert Black or not.
32. The Commissioner also acknowledges that in the 37 years since Genette Tate disappeared a lot of information about the case has been released into the public domain; however, she notes that the requested information has not been released into the public domain.
33. The Commissioner considers that the information was created with the dominant purpose of litigation. She is also satisfied that the CPS's role is to decide who should be prosecuted.
34. The Commissioner also notes the complainant's arguments regarding the need for transparency in this particular case, not least because Robert Black died before it was decided whether he would be charged or not.
35. The Commissioner accepts that that there is a public interest in knowing whether there was enough evidence to either charge Robert Black or not. However, she notes that Robert Black died before any possible charges were brought against him and that there is information in the public domain about this.
36. The Commissioner also notes that there is information in the public domain, including the CPS' website, regarding its change of policy about the charging of deceased suspects. The Commissioner considers that this goes some way to meeting the public interest regarding why it is not providing charging advice in relation to Robert Black.
37. The Commissioner further notes that the CPS provided the complainant with links to its change of policy regarding charging advice and dead suspects.
38. The Commissioner accepts that there is public interest in knowing why Robert Black was not charged with the abduction and murder of Genette Tate, before he died.
39. However, she is not persuaded that there is a compelling public interest which overrides the inherent public interest in protecting legal professional privilege.

40. The Commissioner's decision therefore is that the public interest in maintaining the section 42 exemption outweighs the public interest in disclosure.

Other matters

41. The complainant requested an internal review on 5 February 2016. The CPS responded on 6 June 2016.
42. Part VI of the section 45 Code of Practice (the code) makes it good practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information.
43. While no explicit timescale is laid down in the code, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of receipt of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
44. The Commissioner is concerned that in this particular instance it took over 80 working days for the internal review to be completed.

Right of appeal

45. 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

46. 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.
47. 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

Gerrard Tracey
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