IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0057**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:
The Information Commissioner's
Decision Notice No: FS50317438

Dated: **1st. February, 2011**

Appellant: **Paul Breeze**

Respondents : **The Information Commissioner (1)**
The Chief Constable of Norfolk Constabulary (2)
The Crown Prosecution Service (3)

Hearing : **20th.January, 2012**

Date of Decision: **2nd March, 2012**

Before

David Farrer Q.C. (Judge)

and

Michael Hake

and

Richard Fox

Attendances:

The Appellant appeared in person:
For the First Respondent: Laura John.
For the Second Respondent: Andrew Waters.
For the Third Respondent: Alexander Ruck Keene

Subject matter: **Information held for the purposes of an investigation into a possible offence.**

FOIA S.30(1)

Fair processing of sensitive data.

FOIA S.40(2)

Case: Digby – Cameron v ICO and Others EA /2008/0023 & 0025
Taylor v Anderton (1995) 1 WLR 447

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

STEPS TO BE TAKEN

No steps are required to be taken

Dated this 2nd day of March, 2012

Signed: David Farrer Q.C.

Judge

Introduction

1. In about September, 2007 Mr. Andrew Breeze ("AB"), the brother of the appellant, was charged jointly with a fellow director, Dominic Wilson ("DW"), with conspiring to defraud the National Health Service of about £2,000,000 by dishonestly claiming very substantial fees for extra care for patients at the private psychiatric hospital, Cawston Park in Norfolk which they owned and ran. The case had been referred to the police by NHS Counter Fraud Service, a department within the NHS.

2. They were tried in 2009. Several weeks into their trial at Norwich Crown Court the judge directed verdicts of not guilty following acknowledgement by the prosecution that the jury could not properly be invited to convict either of them on the evidence adduced. The judge emphasised that both left the court "with their heads held high". This was clearly not an acquittal based on a legal nicety but on the unambiguous effect of the evidence that emerged at trial.

3. It was subsequently accepted by the Third Respondent ("the CPS") that the case should not have come to court. It eventually apologised. HM Solicitor General made a statement to the House of Commons acknowledging this, apologising to both defendants and repeating the judge`s exoneration. The consequences for AB and DW were disastrous financially and, for a considerable time, in terms of reputation. The wasted financial cost to the exchequer was considerable. There is plainly a substantial public interest in righting such wrongs, if or in so far as that can be achieved and discovering why such a costly mistake occurred. On the other hand, there are substantial public interests involved in the protection of confidential information generated by a criminal investigation and of the identity of witnesses, potential witnesses and, very obviously, patients receiving treatment in any kind of hospital.

4. Both defendants complained to the Second Respondent ("NC") as to the manner in which the police investigation had been conducted. They questioned the good faith of the officers concerned. NC launched an investigation under the auspices of the Independent Police Complaints Commission ("the IPCC") into the conduct of the police investigation ("Operation Meridian"). We were told that it has so far exculpated the officers concerned from any impropriety in their handling of the case but that the inquiry continues.

5. The appellant complained to the CPS which, after a most regrettable delay and lack of response, established its own inquiry as to what had gone wrong after the matter had been referred for a decision as to prosecution. That inquiry was conducted by Elizabeth Bailey, a senior crown prosecutor from Manchester, who gave evidence to us.

The Request and the Complaint

6. The appellant wished to scrutinise further the quality of the police investigation. He made a FOIA request to NC on 24 March 2010 for :

'A copy of the 400 page case report or similar document compiled by Norfolk police for submission to the CPS as part of Operation Meridian'.

7. NC acknowledged that it held such information[1] but refused that request, relying on the exemptions provided by FOIA s.30(1) and s.40(2). It further relied on s.31 for purposes which do not concern us. It maintained that refusal following a review but released some information arising out of the IPCC – supervised inquiry. The report is entitled "Case Summary".

8. The Appellant complained to the ICO on 6th. June, 2010.

[1] The report is, in fact, about 150 pages long.

9. By a Decision Notice dated 1st. February, 2011 the ICO concluded that s.30(1)(a) was engaged and that the public interest in maintaining the exemption prevailed. Since the arguments on either side which he rehearsed featured in the submissions to the Tribunal, they are not recited here. The ICO did not rule on s.40(2). The Appellant appealed to the Tribunal.

The course of proceedings before the Tribunal

10. NC was joined as second respondent to argue any further public interest points. All parties were content that the appeal be determined on the written evidence and submissions and the Tribunal members met for that purpose on 29th. September, 2011.

11. Given the subsequent IPCC involvement, we were minded to uphold the ICO`s decision, which related, of course, exclusively to the public interest issues raised in relation to the performance of NC in Operation Meridian. That focussed on the public interest in protecting the flow of future information to the police by shielding witnesses and potential witnesses from public identification and preserving, where possible, the confidentiality of police inquiries.

12. However, having read the papers, in particular the police "Case Summary", which was the object of the request, we were concerned further, indeed to a greater degree, with the public interest which might be involved in a scrutiny of the performance of the CPS in this matter. The fact that the request was made to NC was, of course, immaterial. We are charged to consider the public interest even where it relates, wholly or partly, to a public authority other than the one to which the request is directed. Should the Summary, redacted as required, be disclosed so that the public could see whether or rather to what extent the CPS had failed in its duty to comply with The Code for Prosecutors, possibly in its initial decision to prefer charges on the strength of the Meridian Summary? Were there lessons to be learned which deserved a wider audience than the CPS staff involved ? The consequences of the course taken by the CPS were grave indeed, especially for the defendants. It could

be that the public should see the material on the basis of which the CPS, evidently on the advice of counsel, had decided to charge and thereafter to proceed to trial.

13. For that reason we directed that the CPS be joined as third respondent. We issued a short memorandum indicating our concerns. We expressed them as follows :

1."We met on 29th. September, 2011 to conduct a "paper" hearing.

2. *It soon became apparent that we would have difficulty in reaching a fully – informed, hence correct decision on the material before us. This is not a purely adversarial jurisdiction. By common consent, we are concerned in this appeal, as with many, with the general public interest – here in the context of the s.30 exemption.*

3. *The argument on all sides focussed on the public interest in so far as it related to the conduct of the police investigation and the issues that arise when the requester seeks information which will or may identify witnesses or potential witnesses and vulnerable third parties, here patients. This is hardly surprising, since the request for the police report was directed to the Norfolk Constabulary.*

4. *However, we formed the provisional view that, in relation to the decision whether this report should be disclosed in any form, there may be a significant public interest in knowing the role of the CPS in the investigation and the evidential basis on which the CPS took the decision to charge, given the failure of the prosecution before the intended close of its case. We assume that the evidence available when that decision was taken was, in general terms, the evidence described in the requested report. A flawless police investigation may result in a case which does not justify charging. We emphasise that we have formed no judgement on this point; indeed, we could not do so without further fairly basic information, which we summarise in a series of questions below.*

5. *If we are to consider this question and the additional information referred to, CPS must be joined as third respondent, pursuant to Rule 9 of the 2009 Rules. The power of joinder continues for the currency of the appeal up to the decision. No doubt, the second respondent could assist on some of the matters raised but CPS is the best party to explain its position and should certainly have the opportunity of doing so if there is any chance of adverse comment on its conduct appearing in our decision. We reiterate that we do not assume that to be the case, notwithstanding the apology tendered to the acquitted defendants.*

6. *We are mindful of the fact that this request could equally have been directed to the CPS and that it would still be open to the Appellant to do so, seeking further information as to this prosecution.*

7. *Accordingly, I direct that the Crown Prosecution Service be joined as third respondent and that this memorandum and directions be served on it. It may be wise to contact the Treasury Solicitor to ask whether service should be effected upon him at the outset in the interests of prompt progress. He will be provided with any necessary papers relating to this appeal to assist in the preparation of any submission.*

8. *As indicated above, there are a number of matters which remain unclear to us. We list them in paragraph 9. If we have missed an answer available from the bundles served upon us, we apologise.*
9. *Our queries are these :-*

- *How was the indictment framed ?*
- *Did the prosecution adduce significant evidence which is not referred to in the report ?*
- *Did the prosecution take the decision to abandon its case on its own initiative or at the behest of the judge ?*
- *Was this to any extent the result of a witness or witnesses changing his/their evidence to a significant degree ?*
- *If so which witness(es) and in what respects ?*
- *Was the case stopped by the judge because he considered the evidence insufficient for convictions, regardless of any change of story by a witness ?*
- *Was the CPS review of the case published ? If so, can we see it as part of the open bundle? If not, can we see it, for the time being, as a closed document ? Any published review may be highly relevant to the question of further disclosure in the public interest.*
- *Was the prosecutor`s code breached ? If so, in what respect(s) ?*
- *What was the role of Mr. Tarrant of CPS in the police investigation ? Did he advise on lines of inquiry ? (We are not at this stage asking to see any advice) (see R2 submissions OB p.43 Para.6(b))*
- *Are CPS prepared to waive legal professional privilege as to the advice tendered by independent counsel, whether before or after charge? (p.43 para.6(c))*
- *What information as to the scope of the police investigation, the reasons for the charging of these defendants and the subsequent collapse of the prosecution case has been made public, whether by Norfolk Constabulary or by CPS ?*
- *Is the reference in the witness statement of Dawn Clarke (OB117) to public interest immunity attaching to the requested report a reference to the s.30 exemption claimed or a late assertion of some further exemption ?*

- *Would it be possible to produce a reasonable summary of the report without identifying, directly or indirectly, patients or staff witnesses ?!"*

14. We therefore adjourned consideration of this appeal to an oral hearing, for the purposes of which the CPS submitted open and closed arguments, together with open and closed witness statements from Elizabeth Bailey, which proved to be of great assistance to us. We invited the CPS to consider waiving privilege as to the content of counsel`s advice as to charging and later as to the sufficiency of the evidence. The CPS courteously declined to waive, as it was fully entitled to do. We draw no adverse conclusions from a perfectly legitimate decision.

15. At that hearing the evidence was limited to the issues listed at paragraph 9 of our memorandum, that is to say those arising in relation to the performance of the CPS and the competing public interests concerning that performance, which disclosure of the police case summary would involve. We invited and received after the conclusion of the hearing final written submissions directed to these "CPS – related" issues.

16. Whilst this appeal was therefore procedurally sharply divided between the first paper hearing of the issues initially argued in relation to NC and the later oral and written arguments as to the CPS issues, we remind ourselves that this is a single appeal.

The Issue for the Tribunal

17. That s.30(1) is engaged is indisputable. It reads :

> *"**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."

18. We are therefore confronted with a single issue: having regard to all the interests involved, embracing both those linked to the police investigation and those others attaching to the conduct of the CPS, does the public interest in maintaining this exemption outweigh the public interest in disclosing the requested information in the form of the Summary, presumably redacted, if practicable ? We deal with the problems of redaction at the end of this Decision.

19. With the Appellant`s final written submission we received a significant quantity of further evidence. We have entirely ignored such evidence, which should not have been submitted at that stage, when the respondents had no opportunity to answer it or question its relevance. Moreover, there must be finality in any litigation. The parties had every opportunity to lodge evidence at the right time and an appeal can be reopened for such a purpose only in the most exceptional circumstances, which did not arise here. We emphasise this point, not as a rebuke to the Appellant, who, though he advanced his case most skilfully, is not a professional lawyer, but to explain why we had no regard to such material and to reassure the other parties that this was the case.

The evidence

20. Two witnesses, Dawn Clarke, the manager of Data Protection and FOIA requests and Steven Fernandes, operations manager of the professional standards department gave evidence on behalf of NC. Ms. Clarke made one open witness statement regarding the history of the complaints to NC and their handling and one closed in

which she bravely attempted to produce a version of the Summary which protected personal data. Mr. Fernandes` statement was closed.

21. Of most significance was the evidence of Elizabeth Bailey (see paragraph 4) who gave evidence in open and, at greater length, in closed session. During the latter she was closely questioned by the Tribunal on aspects of the Case Summary and the CPS conduct of this prosecution. We found her an impressive and a painfully frank witness, who made no attempt to cover up any shortcomings in the way the CPS handled this case. Her inquiry evidently formed the basis of the statement of the Solicitor – General to the House of Commons, which, as we shall indicate, is of critical importance to the outcome of this appeal.

22. Following her inquiry, on 28th. June, 2010, she wrote in the following terms to Andrew Breeze :

"*As you are aware, in accordance with our Complaints Procedure, the case was allocated to me for a review of the evidence.*
I have carefully considered the basis for charge and subsequent decision to offer no evidence, and I have concluded that the evidential limb of the Code for Crown Prosecutors was not met.

I apologise for the distress and inconvenience that the original decision in this matter has caused you.

Having reviewed the available evidence, I have concluded that there was admissible evidence that could indicate dishonest conduct by yourself and Mr Wilson but there were issues that undermined a realistic prospect of a conviction, and at the point of charge these were known to the Prosecution. Following charge there was a lack of continuing review that the evidence was reliable and that this limb of the Code was still satisfied.

In my view, this case should never have reached the stage that it did.
Accordingly, I uphold your complaint".

23. This acknowledgement and apology did not satisfy Mr. Andrew Breeze or the Appellant because of its reference to "admissible evidence that could indicate dishonest conduct" but it represented an unequivocal acceptance that the case should never have reached trial.

24. Understandably, the outcome of the case provoked great disquiet, among others in the MPs for the constituencies of the Appellant and his brother, one of the two defendants. Considerable publicity was given in the press to the case and its calamitous results. On 21st. March, 2011 an adjournment debate took place in the House of Commons during which the sorry saga was related by Steve Baker MP.

25. Most importantly, the Solicitor – General, Mr. Edward Garnier replied to the debate. His speaking note was provided to the Tribunal before the oral hearing. It represents a much fuller version of Ms. Bailey`s letter and contains a quite detailed account of the history of the case. It dealt with the decision to charge and stated unequivocally that the case should not have proceeded to court. The Solicitor - General apologised handsomely to both defendants.

The reasoning of the Tribunal

26. The rationale for the s.30(1) exemption is clear. In *Digby – Cameron v ICO and Others EA /2008/0023 & 0025* at paragraph 14, the Tribunal put the matter as follows :

> *"The general public interest served by the section 30(1) exemption is the effective investigation and prosecution of crime, which itself requires in particular (a) the protection of witnesses and informers to ensure that people are not deterred from making statements or reports by the fear that they may be publicised, (b) the maintenance of the independence of the judicial and prosecution processes and (c) the preservation of the criminal court as the sole forum for determining guilt. In assessing where the public interest balance lies in a section 30(1) case relevant matters are therefore likely to include (a) the stage a particular investigation or*

prosecution has reached, (b) whether and to what extent the information is already in the public domain, (c) the significance or sensitivity of the information requested and (d) whether there is any evidence that an investigation or prosecution has not been carried out properly which may be disclosed by the information (see: Toms v Information Commissioner EA/2005/0027 19.6.06 at para 7 and Guardian Newspapers v Information Commissioner, Chief Constable of Avon and Somerset EA/2006/0017 5.3.07 at para 34)".

27. In the context of this appeal we should add as a further requirement of the effective investigation and prosecution of crime – (d) the importance of ensuring that the police and CPS communicate frankly and fearlessly, free of any concern that every recommendation or reservation will be routinely exposed to public scrutiny, if the prosecution fails.[2] In *Taylor v Anderton (1995) 1 WLR 447* Sir Thomas Bingham M.R. was required to consider whether public interest immunity attached to reports compiled in police misconduct cases. He said, at 465G:

"*In very many cases where an investigating officer is appointed, there must be a real prospect of civil, criminal or disciplinary proceedings. I have no difficulty in accepting the need for investigating officers to feel free to report on professional colleagues or members of the public without the apprehension that their opinions may become known to such persons. I can fully accept that the prospect of disclosure in other than unusual circumstances would have an undesirable inhibiting effect on an investigating officer's report. I would therefore hold that the reports of investigating officers in circumstances such as these form a class which is entitled to public interest immunity*".

Translated to the environment of FOIA and acknowledging certain differences[3] in the function of reporting on suspected offences to the CPS, that principle has a prominent role in a case such as this. It is a very significant factor in the weighing of public interests.

[2] Unless that is already included within (a).
[3] E.g., the possible lack of a similar sensitivity as to the disclosure of a police officer`s opinion of the conduct of a suspect as compared with that of a fellow officer or a member of the public who has not been charged with an offence.

28. The protection from prolonged exposure to publicity of witnesses and those who made statements but were not required as witnesses is a further factor in this case, though its importance varies from one witness to another. A significant number of prosecution witnesses had given evidence when the trial collapsed. The apparent fallibility of certain witnesses was a factor in the collapse. Of itself, this consideration might not have determined this particular appeal.

29. On the other hand, the public is entitled to know that the prosecuting process, whether at the stage of investigation or of charging and subsequent management went badly wrong and, within reason, how and why it went wrong. A successful hospital has closed. Two careers have been wrecked. Considerable public funds have been uselessly spent. These dire results have occurred despite a lengthy police investigation, CPS input and advice from experienced independent counsel.

30. In our judgement, publication of the Summary, which each of us has read with care, would shed but a faint light on the conduct of the police investigation, certainly not on the allegations as to bias and closed minds of which the Appellant and his brother complain. A case based on proof that a concept as elusive as "extra care" was a vehicle for fraud, beset with a wealth of conflicting evidence from inside Cawston Hospital, faced obvious problems, even without vacillating witnesses. A police summary portraying an inconclusive case does not of itself indicate a flawed investigation. It may be a fair reflection of the state of the available evidence. If that is so, it is for the CPS and its independent advisers to abandon or discontinue the case, using the summary and applying to it their own expertise and knowledge of what evidence is likely to be needed. As the CPS emphasised in its submissions, a police summary is a guide to the evidence which has been marshalled, not the sole basis on which a decision to charge is taken. If the summary lacks information as to the quality of critical witnesses, where there is reason to question that quality, then the CPS should inquire further of the investigators. If there is a hole which seems capable of being plugged, the same applies.

31. Quite apart from those considerations, we conclude that the inquiry supervised by the IPCC gives a reasonable reassurance that clear failings, let alone misconduct, if

they were present, would be made public much more effectively than by the disclosure of the Summary.

32. We have already indicated our view as to the strength of the public interest in examining the role of the CPS through disclosure of the Summary. Disclosure for the purpose of revealing that the CPS had erred was plainly unnecessary. Albeit belatedly, it had acknowledged its failure through Elizabeth Bailey`s letter and, more publicly, the statement from the Solicitor General. More problematical, in the Tribunal`s view, was the question whether such apologies and acknowledgements of fault had met the public interest in knowing the degree and the nature of that failure.

33. After anxious consideration, we conclude that the Solicitor General`s statement said all that could reasonably be said about the shortcomings of the CPS performance. It summarised most clearly the weaknesses in the prosecution case which had been ignored or underestimated. It highlighted the failure to assess realistically the motives, hence the credibility of witnesses who were suing the defendants and had the most obvious selfish interests to serve. It identified the blindness to the importance of a due diligence report prepared by Price Waterhouse Cooper for the purpose of a possible sale of the hospital. Perhaps most importantly, it emphasised that, whilst the failings of particular witnesses may have been the immediate cause of the collapse of the case, the defendants should not have been charged in the first place.

34. We therefore conclude that, to a very substantial degree the information which might be provided by disclosure of the Case Summary is already in the public domain, in a more readily accessible form, namely, the Solicitor General`s statement, based on Ms. Bailey`s report and Ms. Bailey`s letter.

35. Had we concluded that the public interest under s.30(1) required disclosure of the Summary, we should have faced the daunting task of giving effect to proper protection of personal data for the purposes of s.40(2). Having studied Ms. Clarke`s admirable attempt to redact the Summary and retain some sense in the content, we

doubt whether anything short of a redrafted document would have sufficed. Happily, that problem does not arise.

36. There is no closed annex to this decision.

37. Our decision is unanimous.

Signed

David Farrer Q.C.

Judge

2nd March, 2012

IN THE MATTER OF AN APPEAL TO THE (FIRST-TIER) TRIBUNAL (INFORMATION RIGHTS)

EA/2011/0057

BETWEEN:

PAUL BREEZE

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE CHIEF CONSTABLE OF NORFOLK CONSTABULARY

Second Respondent

The Tribunal's Decision on an application for permission to appeal

1. This application is made pursuant to Rule 42 of the Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) Rules, 2009.

2. The Tribunal declines to review this decision pursuant to Rule 44 because it is not satisfied that an error of law is involved, as required by Rule 44(1)(b).

3. It has considered whether to grant permission to appeal, pursuant to Rule 43(2) but has decided to refuse it.

4. It does so because –

   (a) No question of law is involved in its decision not to admit evidence submitted after the hearing in the form of a final written submission.

   (b) Alternatively, if a question of law is involved, then its decision to exclude such evidence, which had not been disclosed to the respondents, was correct as a matter of principle and on the facts of this appeal.

   (c) If the further evidence was material, there was no sufficient reason for the failure to adduce it in the oral proceedings or indeed at the earlier stage when the appeal was to be determined on the papers.

(d) No request was made to the Tribunal for assistance in deciding whether or how to adduce this evidence.

(e) Its admission would have made no difference to the decision anyway.

David Farrer Q.C.

Tribunal Judge

27. March, 2012