



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50899215**

Appeal Reference: EA/2020/0221P

Considered on the papers

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

MALCOLM CLARKE & KATE GRIMLEY EVANS

Between

DONNA MCCLEAN

Appellant

and

INFORMATION COMMISSIONER

First Respondent

COMMISSIONER OF THE METROPOLITAN POLICE SERVICE

Second Respondent

DECISION AND REASONS

Introduction

1. This case arises out of the activities of undercover police officers of the Metropolitan Police Service (MPS). These officers for a long period of time had concealed their occupations and reasons for being involved in a protest movement, had assumed false identities and while living those identities had sometimes entered into relationships with individuals who were committed to the protest movements which the undercover officers were investigating. There have been investigations proceeding for a number of years. The first interim report of Operation Herne was written by the Chief Constable of

Derbyshire and published in July 2013. There have been further reports since then. The Undercover Policing Inquiry (UCPI) opened in July 2015 and its current chairman, a retired High Court Judge (Sir John Mitting), is conducting hearings. On 22 May 2018, a solicitor acting on behalf of one of the individuals complaining about an officer wrote to the MPS, raising the following questions:

“The questions relate to ‘Carlo Neri’ an undercover officer and are, please confirm:

- 1. When Neri went on long term sick leave and what steps if any were taken to support him to return him to work.*
- 2. On what date Neri applied to retire on grounds of ill health.*
- 3. That appropriate medical evidence was provided in support of the officer’s claim for ill health retirement.*
- 4. Whether his request for ill health retirement was expedited.*
- 5. Whether Neri would have been permitted to retire were Operation Herne aware before its authorisation that our client would now assist their investigation.*
- 6. That Neri was interviewed for the purposes of your investigation before he retired on the basis of the publicly available allegations made by ‘[name removed]’ including on the basis of the [television] interview in [date removed] referred to below. If not, please explain why he was not.*
- 7. What assurances were sought from and provided by Neri regarding his cooperation with your investigation and/or that he would not leave the jurisdiction pending its conclusion.*
- 8. What stage your investigation was at before our client indicated her intention to assist.*
- 9. That gross misconduct proceedings against Neri will still be considered by virtue of Regulation 5.*
- 10. That the Assistant Commissioner [name removed] you refer to as authorising the retirement is [name removed].*
- 11. How many officers who will be witnesses for the purposes of Operation Herne and / or the Undercover Policing Inquiry have sought and been granted early or ill health retirement”.*

Please provide a copy of the internal MPS policy on ill health retirement. In our view this query, and question 10, are answerable in the context of our client’s complaint. If you do not agree, the answers are otherwise sought under the Freedom of Information Act”.

2. The MPS responded promptly referring a previous response it had made to point 10 and providing a link to the policy. A year later it responded to the balance of the request not providing information. The solicitors complained to the Information Commissioner. During the course of the investigation the MPS confirmed that no information was held with respect to ground 11. With respect to the other parts of the request the Information Commissioner found that exemptions relating to personal data meant that information could not be supplied. The requester appealed and the Information Commissioner resisted

the appeal. In its reply to the Information Commissioner dated 8 September 2020 the Appellant narrowed the grounds of the appeal:-

"2. Upon consideration, save for item 11, the Appellant no longer pursues, through means of this Appeal, the requests for disclosure set out at paragraph 4 of the Commissioner's Response. They will be pursued instead by way of a Data Protection Act Request to the MPS.

3. This appeal therefore only now applies to the request for item 11 i.e. 11. How many officers who will be witnesses for the purposes of Operation Herne and / or the Undercover Policing Inquiry have sought and been granted early or ill health retirement".

The position of the MPS

3. During the course of the Information Commissioner's inquiry the MPS stated with respect to item 11:-

"No Information Held. To date the MPS do not have a list of police officers that will be giving evidence on behalf of Op Herne or in connection with the Undercover Policing Inquiry".

4. In the light of this statement the Appellant responded to the Information Commissioner:-

"The request is not how many officers who are on the witness list for Operation Herne and / or the Undercover Policing Inquiry have sought and been granted early or ill health retirement but to know :

(a) how many police officer witnesses in Operation Herne have sought and been granted early or ill health retirement. Firstly, it would be extremely surprising if Operation Herne did not have a list of police witnesses who assisted their investigation. That list must exist unless something is remiss with the investigation. However, if there really is no list of police witnesses, then the statements are available so the information provider must establish, with reference to the relevant personnel records, which of those who gave statements to Operation Herne sought and were granted early or ill health retirement.

(b) Similarly, it would be very surprising if the police did not hold a list of police witnesses to the Inquiry. (The Inquiry has, incidentally, released the cover names of 69 undercover officers from the SDS on the Undercover Policing Inquiry website). Whether or not a list exists, however, is not relevant. The Metropolitan Police Service is a Core Participant in the Inquiry proceedings and the Metropolitan Police Service's Designated Lawyer team is representing around 80 of what are known as the police witnesses. The majority if not all of these witnesses represented by the MPS Directorate of Legal Services have already given evidence to the inquiry in the context

of their anonymity applications. Others will also have given a formal statement to the inquiry or be about to. The MPS holds all of this material and the identities of these individuals in its role as a Core Participant to the Inquiry and a representative of the majority of the individuals in question so the information provider must establish, with reference to the relevant personnel records, which of those individuals sought and were granted early or ill health retirement”.

5. During the course of the Information Commissioner’s work the MPS explained to her that:-

“The MPS is not the decision maker of who the UCPI will be calling to give evidence. It is for the chair of the Inquiry to determine this. Therefore, the MPS does not hold the information. The information being requested is in the future tense therefore we are unable to predict which officers will be called as witnesses. Our understanding is that the UPCI is currently not at a stage of deciding which witnesses will be called”.

6. In her decision notice (paragraph 22) the Information Commissioner reasoned *“that the crux of this part of the request is knowing which officers ‘will be’ witnesses for Operation Herne and / or the UCPI. Knowing whether or not an officer has asked for, or been granted, ill health retirement is therefore irrelevant until it is first established whether or not that officer ‘will be’ asked to be a witness.”*

7. The Information Commissioner concluded (dn paragraph 24) that the wording of the request was clear. FOIA dealt with information held at the time of the request, what the request sought was a list which would only be compiled in the future.

8. In the appeal the solicitors argued:-

“It is wrong to suggest, as the MPS does and the ICO decision accepts, that a witness is someone who is called to give oral evidence. In our submission the MPS has attempted, unfortunately successfully, to mislead the decision maker in this regard. A witness is not necessarily someone called to give evidence (i.e. something in the future in this case therefore not falling under the FOI remit). A witness is someone who has knowledge about a matter. It is someone who provides evidence/an account, either oral or written, of what he or she knows or claims to know.”

Consideration

9. The starting point of responding to a request for information is the wording of the request in its context. Sir John Mitting is appointed under the Inquiries Act 2005 and conducts the Inquiry in accordance with the Inquiries Rules 2006. Those rules provide the framework within which Sir John controls the process, notably rule 2 (Interpretation) which defines witness:-

“witness” means any person to whom the inquiry panel has sent a written request for a written statement under rule 9(1)

and rules 9 (evidence) and 10 (oral evidence) which deal with the procedure for evidence, most relevantly:-

“9. – (1) The inquiry panel must send a written request for a written statement to any person from whom the inquiry panel proposes to take evidence.”

and

10. – (1) Subject to paragraphs (2) to (5), where a witness is giving oral evidence at an inquiry hearing, only counsel to the inquiry (or, if counsel has not been appointed, the solicitor to the inquiry) and the inquiry panel may ask questions of that witness.

10. The request is

How many officers who will be witnesses for the purposes of Operation Herne and / or the Undercover Policing Inquiry have sought and been granted early or ill health retirement”.

The request therefore has a number of component parts:-

How many officers

Who will be witnesses for the purposes of Operation Herne and/or the Undercover Policing Inquiry

have sought and been granted early or ill health retirement

11. In order to know “how many officers” it is necessary to have information about the individuals’ retirement status, but also their status as “*witnesses for the purpose of Operation Herne and/or the Undercover Policing Inquiry*”. Whatever the procedure for the gathering of evidence for reports under Operation Herne there need to be criteria for the MPS to identify “*witnesses for the purposes of...the Undercover Policing Inquiry*”, those criteria can only be derived from the Inquiry Rules since it is the Inquiry which determines who shall be witnesses before it. Unless and until the Inquiry has decided to whom it will send a written request and has communicated that information to the MPS, there is no basis for the MPS to determine whether or not any of the (probably) thousands of officers who have over the years “*have sought and been granted early or ill health retirement*” also meet the criterion of the status of someone who “*will be a witness for the purposes ... of the Undercover Policing Inquiry*”.

12. The MPS has a large amount of information which concerns police officers and retired officers. Some of those officers had some connection with undercover policing activities. In these circumstances in order to make a request feasible there need to be clear criteria delineating information of interest from other information. Those criteria determine whether a piece of information is within the scope of the request or not. The request sought information about retired officers *who will be witnesses*. The determination of who those officers are is a

matter for the Inquiry. At the time of the Information Commissioner's investigation the MPS did not hold the information. It has taken a significant period of time for this to be explained to the solicitors; the year's delay between the request and the substantive reply is a matter of concern.

13. The decision of the Information Commissioner is clearly correct, and the appeal is dismissed.

Signed Hughes

Judge of the First-tier Tribunal

Date: 21 December 2020