



Case Reference: EA/2022/0269
Neutral Citation Number: [2024] UKFTT 00979 (GRC)

First-tier Tribunal
General Regulatory Chamber
Information Rights IC-143220-F2G9

Heard by: CVP

Heard on: 15 May, 3 July, 25 September 2024
Decision given on: 31 October 2024

Before

TRIBUNAL JUDGE CHRIS HUGHES
TRIBUNAL MEMBER ANN CHAFER
TRIBUNAL MEMBER AIMEE GASSTON

Between

PAUL HOPKINS

Appellant

and

(1) INFORMATION COMMISSIONER
(2) CHIEF CONSTABLE OF STAFFORDSHIRE POLICE

Respondents

Representation:

For the Appellant: in person

For the First Respondent: did not appear

For the Second Respondent: Robert Cohen

Decision: The appeal is Allowed

Substituted Decision Notice: Further searches conducted during the course of the hearing have disclosed further information falling within part 3 of the request. The tribunal does not require the Second Respondent to take any further steps

REASONS

1. This decision may be the coda to a lengthy story of conflict within the Northumbria Constabulary. As such it is nearly two decades after what may have been the triggering issue and concerns the record keeping of an entirely separate police force in a period 10-15 years later. As such it is at best a form of very remote satellite litigation and will be of negligible interest to those involved in the earliest stages and give little or no satisfaction to any of those involved in the later stages. The question before the tribunal is whether or not specific information is held by Staffordshire Police arising out of a substantial investigation it carried out. The investigation may have been of significance for the governance of the Northumbria force. Issues around the retention of information about the management of that inquiry appeared to raise issues as to the information governance within the Staffordshire force.
2. Following the resolution of Employment Tribunal proceedings in 2016 brought against Northumbria Police, the then Police and Crime Commissioner for Northumbria Dame Vera Baird QC PC concluded certain matters of concern needed clarification and the Second Respondent was commissioned to do so. In October 2021 the report of Operation Eustace was published:

“Independent investigation on behalf of Northumbria Police and the Office of the Police and Crime Commissioner for Northumbria following allegations of an alleged incident involving senior officers in 2007 and subsequent testimony provided to the Employment Tribunal of a former employee and Northumbria Police.”

3. The investigation and report took several years to conclude and hundreds of witnesses (largely police officers) were interviewed. The report was published in 2021.

The Information request and the Information Commissioner’s investigation

4. The Appellant, who was concerned at aspects of the conduct of the investigation sought information from the Staffordshire force on 18 October 2021:

“Operation Eustace was set up as an “Independent Investigation” which Staffordshire Police, led by Deputy Chief Constable Nicholas Baker, have conducted on behalf of Northumbria Police (NP) and the Office of the Police and Crime Commissioner for Northumbria (OPCC). Operation Eustace was specifically set up to investigate whether an Incident occurred at a senior NP Officer’s home in 2007 and whether details of the Incident may have been covered up.

The Investigation also sought to examine information presented to [name redacted] Employment Tribunal in May 2016 and “any allegations that may have arisen during the course of the evidence or in the way in which it was presented, particularly those considered criminal in nature”

(Reference – Press Statement by Chief Constable [name redacted] – 5th August 2016)

“1. When were the original Terms of Reference agreed? Who approved them? What were they?

2. How many versions (from Interim to Final) of the Operation Eustace Report have been created. For each version please list: -
 - a) Version number, Date created
 - b) Number of pages
 - c) Who was it sent to within NP and/or OPCC

3. During the Investigation, have there been significant changes to the Terms of Reference which have altered the focus/direction of the Investigation – e.g. changes which have named specific individuals and either added or removed them from the Terms of Reference? If so, then in each case,
 - a) Who suggested the changes to the Terms of Reference?
 - b) Who was consulted and/or agreed with the changes?
 - c) Who approved the changes – and on what date?

4. Have any of the persons who have been specifically named within any of the Terms of Reference been “interviewed under caution” by Staffordshire Officers?”

5. Staffordshire responded on 16 November to this and another request and crucially (dn paragraph 5) *“Within its response, Staffordshire Police provided him with a redacted copy of the Terms of Reference (ToR) and stated that “the terms of reference were not changed during the investigation.”* On 27 November the Appellant complained to the Information Commissioner about the handling of the request, in particular he disputed the assertion by Staffordshire Police that there had only been one set of ToR throughout Operation Eustace, and which he believed to be incorrect.

6. During the course of the investigation Staffordshire clarified that terms of reference which were subsequently published on line were not a different version but a version with names redacted; and a version which had been sent out in response to another information request in 2019 had been provided in error and was an early draft version which was supplied to the FOI team without the realisation that it would be published.

7. The Appellant argued that consideration of the terms of reference must have created emails recording contact between officers of the two forces to establish the terms of reference. He argued that the two versions he had seen were distinct and that the issues were:
 - “1. When were the original Terms of Reference agreed? Who approved them? What were they?
 2. During the Investigation, have there been significant changes to the Terms of Reference which have altered the focus/direction of the Investigation – e.g. changes which have named specific individuals and either added or removed them from the Terms of Reference? If so, then in each case,
 - a) Who suggested the changes to the Terms of Reference?
 - b) Who was consulted and/or agreed with the changes?
 - c) Who approved the changes – and on what date?””

8. The Appellant argued that it was an inquiry of great significance involving former chief constables and he drew attention to the College of Policing Guidance on the conduct of investigations which involved the maintenance of Policy Documents and other key documentation throughout any investigation. The Terms of Reference of an investigation was one of the primary documents as it defined the scope of the entire investigation. Operation Eustace lasted for more than 3 years – with the final report only being published in December 2021. It had cost the taxpayer many hundreds of thousands of pounds and involved interviewing over 400 Northumbria Police and Staff.
9. Staffordshire explained the detailed searches it had carried out, that it was hampered by the fact that the two senior officers responsible for the inquiry had left the force. It confirmed that it retained records for seven years from the last action recorded.
10. The Commissioner concluded on the balance of probabilities that Staffordshire did not hold information relating to requests 1 and 3, noting in so doing:

32. Staffordshire Police confirmed to the Commissioner that it does not hold information to questions 1 and 3 of this request. Having considered the revised response from Staffordshire Police and its answers to questions relating to information held/not held, there is no contradictory evidence presented to the Commissioner that indicates its position is incorrect. However, the Commissioner does find it unusual for substantial changes to have been made to an important document, and for there not to be an audit trail or a decision-making process.

11. The Appellant in challenging the Commissioner's decision emphasised the record keeping duties under the Criminal Procedure and Investigations Act 1996 and its codes of practice which meant that the information requested should be held. He stated:

Staffordshire Police informed the Commissioner (para 26) that "...searches had been conducted on the email archive system" but that their searches had been hampered because the "senior officer leading the investigation no longer works for the organisation". Stafford Police do not refer to any search of the Investigation records which must, as a matter of law, contain this information.

12. In resisting the appeal the Commissioner relied on the decision notice and the jurisprudence of the tribunal:

Councillor Jeremy Clyne v IC and London Borough of Lambeth EA/2011/0190 held that the 'issue for the Tribunal is not what should have been recorded and retained but what was recorded and retained.' (§38, emphasis added). The Tribunal was satisfied that a gap in the public authority's documentary records reflected 'inconsistent and poor administrative practice' but this did not amount to a breach of FOIA.

13. Staffordshire supported the Commissioner's approach citing Linda Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072; 31 August 2007 ('Bromley')):

“There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records.

The test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner's findings of fact are reviewed. We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.”

14. Staffordshire further argued that the Appellant's reliance on CPIA was incorrect:

[Staffordshire] denies that CPIA gave rise to a requirement to record information responsive to requests 1 and 3, because nothing in the CPIA or the associated Codes of Practice requires information responsive to those requests to have been recorded/stored.

15. On the first day of this case the tribunal examined Ms Cantrell, the Central Disclosure Unit Manager for Staffordshire who had provided a witness statement signed 20 January 2023 which listed steps she had taken in response to the appeal including:

“12/07/2022: I contacted the Major Investigations Department (MID) to ask if there was a designated disclosure officer still in post that could assist with answering the questions posed. MID confirmed that there had not been a dedicated disclosure officer and that if I provided the questions being asked someone would review the box files. The questions being: [FOIA request]

19-21/07/2022: I searched the email archive system using the below search terms: Op Eustace, Operation Eustace, Operation Eustace and Terms of Reference, Operation Eustace and TOR (using just the term Eustace returned 4,767 emails, an excessive amount to review)

....

The selection criteria used was for all emails, internal, outgoing, incoming, outmix and unknown.

Wider date searches were done to establish if there were any email trails at a later or earlier date containing the data requested. The data requested was not located.

I investigated further in response to the First Tier Tribunal, as detailed below:

25/10/22 I retrieved the boxes from MID storage and reviewed them. The box files contained no records regarding the ToR to enable the questions to be answered.

28/10/22 I visited the executive office and waited whilst the office staff established if there were any paper files left by the, now retired, Operation Eustace Senior Investigating Officer Deputy Chief Constable Nicholas Baker. The result was that no paper files relating to Operation Eustace were found. I also waited whilst the office staff investigated the electronic files and the result was that nothing relating to Operation Eustace was found.

04/01/2023 I asked the Information Security department to search the electronic file storage location for any files relating to Operation Eustace. The reply on 19/01/2023 was that no electronic files had been located relating to Operation Eustace.

16. The Appellant described inconsistencies between versions of the terms of reference for the Inquiry which included a version released as a result of a FOIA request in 2019 which was inconsistent with the version in the final report. The tribunal also heard from a former officer of Northumbria who had been interviewed (not under caution) and in a version of the report immediately prior to publication was identified in terms which would have required an interview to be conducted under caution. The tribunal directed:

"The tribunal directs that the Second Respondent conduct further searches using the wide range of sources of relevant information available to it and files a witness statement detailing the steps it has taken and the results of those efforts"

17. After the May hearing the Appellant on examining records in his possession found an email from Staffordshire making reference to the "Northumbria Enquiry". In the light of the direction and the further information Ms Cantrell prepared another witness statement which detailed further searches and inquiries revisiting both physical and electronic stores. While these were largely unsuccessful:

"Interrogation of the deleted personal electronic storage locations has located a personal file of DCI [officer conducting the inquiry] titled 'Northumbria Enq'. Within this file there are documents relating to the investigation with a variety of titles. These documents contain mention of the ToR but do not answer the FOI questions specifically. Locating this file had led onto further legacy email searches which have located emails with a variety of titles and mention of the ToR as detailed below, again none specifically answering the FOI questions.

....

"The Terms of Reference document supplied in FOI request 10818 was physically handed to the FOI team by a member of staff in the Major Investigations Department. This document is not in the hard copy investigation box files nor has the same version been located in any of the electronic files or attached to the emails located that are referred to above. The metadata associated with this document is that of the FOI team who scanned it to provide it electronically in response to the FOI request.

18. In her witness statement Ms Cantrell commented:

It would be impossible to second guess all of the names that could be used if employees do not follow good records management principles in labelling information in line with an operation name. The whole point of giving an investigation an operation name is to enable information to be stored together in line with retention schedules. One of the strategy documents located above does state that the investigation would be run using Holmes 2, this clearly did not happen resulting in the significant effort that has had to go into trying to locate information. It is only due to the Appellants assistance in providing more detail that further searches have drawn out more information.

19. On 25 September the tribunal heard evidence from the most senior officer involved in the investigation who is still with the Staffordshire force, D.I. Ian Fitzgerald. He explained that he had led a team of officers conducting interviews on behalf of the Inquiry however he was not at the time an accredited Senior Investigating Officer (SIO). He stated:

"9. I can confirm that as I was not the SIO for Operation Eustace, I do not know where any policy file would be stored, that is the responsibility of the SIO. At the conclusion of any investigation or as each policy book was completed by the SIO these would normally be stored with all other documents retained during the investigation. I do not [sic] and have not been handed any policy books.

10. Fiona Cantrell has shared with me her witness statements from this appeal, and has briefed me on the steps that she has taken to identify the possible location of any other information that would fall within the scope of the Appellant's request. I cannot think of any other locations that she should consider or I identified other possible locations which were searched and at which the following was found.

11. I am aware that a draft investigation strategy suggested that Operation Eustace would be run on HOLMES. However, I can confirm that it was not, in fact, a HOLMES investigation. Material gathered during the investigation was either stored electronically or in hard copy. I would expect any and all relevant information to be found in the locations which have already been searched."

20. In oral evidence he confirmed that he had interviewed the individual mentioned in paragraph 16 in the course of the investigation. That individual was not the subject of the inquiry and accordingly had not been interviewed under caution.

Consideration

21. The conduct of a major inquiry by a police force has significant implications; not least for the rights and freedoms of those who are, or may be, the subject of the inquiry. The governance of such an inquiry, to ensure its lawfulness and accountability, is a matter of significance. In order to ensure that governance, clear structured record keeping is necessary. In this case, either Northumbria or Staffordshire initially specified that the Holmes system would be used to achieve this. The evidence of Ms Cantrell and DI Fitzgerald confirms that it was not. The Appellant has argued that the statute controlling criminal investigations CPIA 1996 would require the keeping of records detailing the scope of the investigation and responsibility for changes to

that scope. While Staffordshire dispute this interpretation of CPIA it would be surprising if any properly run public authority would dispute the assertion that the identity of those responsible for significant decisions should be recorded.

22. Following repeated searches Staffordshire have identified a storage location - a personal storage device formerly used by the officer with day-to-day conduct of the inquiry (see paragraph 17 above) - which holds some related information concerning the ToR but does not identify who was responsible for any changes. The evidence suggests that the ToR supplied in response to a previous FOIA request may not have at any time been the approved ToR and no identifiable individuals are associated with it beyond the identity of the Deputy Chief Constable and Detective Chief Inspector who had conduct of the Enquiry.
23. The Information Commissioner found on the balance of probabilities that no information was held and expressed concern at the quality of record keeping, which the tribunal shares.
24. During the course of this case further information has been found, of minimal significance or value to the Appellant, which exemplifies the difficulties of the search. The tribunal is satisfied that on the balance of probabilities more information exists within Staffordshire's systems. However, it further considers that it would be disproportionate to make further directions to the Second Respondent which has expended considerable effort on largely unavailing searches. In the circumstances of a major current criminal investigation different considerations would apply, but the issues raised by a FOIA request, within the statutory framework of the 2000 Act, do not justify further searching.

Signed Judge Hughes

Date: 12 October 2024

Promulgated

Date: 31 October 2024