EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 34
XA42/21

Lord Malcolm
Lord Doherty
Lord Tyre

OPINION of the COURT

delivered by LORD MALCOLM

in the appeal

by

WILLIAM FREDERICK IAN BEGGS

Appellant

against

THE SCOTTISH INFORMATION COMMISSIONER

Respondent

Appellant: Sloan; Drummond Miller LLP
Respondent: Welsh; Anderson Strathern LLP

29 September 2023

Introduction

[1] The appellant is serving a sentence of life imprisonment for the murder of Barry Wallace in 1999. He maintains his innocence. Since 2010 through requests under the Freedom of Information (Scotland) Act 2002 (FOISA) he has attempted to obtain information which he believes will assist him in establishing that there has been a miscarriage of justice. The most recent application was made in 2018. Police Scotland refused to disclose the information.. It considered that various exemptions under FOISA applied and that the

public interest lay in the information being withheld. The appellant applied to the Scottish Information Commissioner for a decision in terms of section 47(1) of the Act.

[2] On 29 June 2021 the Commissioner upheld Police Scotland's refusal. This is the decision under challenge. The appellant contends, broadly, that the Commissioner erred in that he did not acknowledge and then apply a presumption in favour of disclosure; failed to engage with the specific circumstances of the request; and did not provide adequate reasons for his decision.

The law

[3] A person who requests information held by a Scottish public authority is generally entitled to it (section 1(1)). However section 1(6) provides that section 1 is subject to sections 2, 9, 12 and 14. In terms of section 2(1), if a non-absolute exemption applies the information shall be disclosed only where the public interest in disclosure is not outweighed by the public interest in maintaining the exemption. Where the authority holds the information and refuses a request, it must state the exemptions claimed to apply and provide reasons for this (section 16(1)). In the case of non-absolute exemptions, the authority has to explain why it considers that the public interest lies in maintaining the exemption (subsection (2)). However it is not obliged to provide reasons which would disclose exempt information (subsection (3)).

[4] An applicant can require the authority to review its actions and decisions in relation to a request (section 20(1)). If not rejected as being vexatious or repeated, the authority can confirm or alter the previous decision. If the applicant remains dissatisfied, the Commissioner can be asked for a decision on whether the request was properly dealt with (section 47(1)). Unless the Commissioner is of the opinion that the application is for example

frivolous or vexatious (section 49(1)(a)), he must make a decision within four months or such other period as he considers reasonable in the circumstances (subsection (3)). The authority is given notice of the application and has an opportunity to make comments. The Commissioner has to consider whether the authority has failed to comply with its obligations under FOISA. If it did so fail, the Commissioner must specify the reasons why and the steps required if the authority is to comply with its obligations (subsection (6)). The Commissioner's decision may be appealed to this court, but only on a point of law (section 56).

[5] Section 34 sets out a number of exemptions in relation to information in the category of "Investigations by Scottish public authorities and proceedings arising out of such investigations". This includes information relating to an investigation into whether a person should be prosecuted for an offence (subsection (1) (a) (i)) or whether a person prosecuted for an offence is guilty of it (subsection (1) (a) (ii)). It also exempts information held for the purposes of an investigation which may lead to a report to the procurator fiscal for a decision on whether criminal proceedings should be instituted (subsection (1) (b)). Section 35 exempts information where disclosure would, or would be likely to, substantially prejudice "the prevention or detection of crime" (subsection (1) (a)) or "the apprehension or prosecution of offenders" (subsection (1) (b)). These exemptions are non-absolute and thus are subject to the public interest test in section 2(1). The effect is that the information must be disclosed unless the public interest in withholding it outweighs that in disclosure.

[6] Section 38 covers personal Information and, in most circumstances, including those with which the court is concerned in the present case, confers an absolute exemption. The provision germane to the present appeal is section 38(1)(b) which provides that information is exempt if it constitutes:

> "(b) personal data and the first, second or third condition is satisfied (see subsections (2A) to (3A));"

The first condition is the only one of relevance, and concerns disclosure of information which would contravene any of the data protection principles (subsection (2A)(a)). The data protection principles are set out in Chapter 2 of the Data Protection Act 2018. The first principle provides (section 35(1)):

> "… that the processing of personal data for any of the law enforcement purposes must be lawful and fair."

Article 6 of Regulation (EU) 2016/679 (UK GDPR) prescribes the various circumstances in which the processing of personal data shall be lawful. The only one of significance for the present appeal is in Article 6.1(f) where:

> "processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child."

The background to the 2018 request

[7] In 2010 the appellant requested information from Police Scotland relating to (i) CCTV footage from cameras located in Kilmarnock on the evening of the deceased's murder, and (ii) police investigations into a line of inquiry that arose from certain witness statements. The request was refused. Police Scotland considered that the public interest lay in maintaining the exemptions mentioned above. The appellant applied to the then Commissioner for a decision in terms of section 47(1). In 2011 Police Scotland's decision was upheld.

[8] The Commissioner's decision was appealed under section 56 (see *Beggs* v *Scottish Information Commissioner* [2014] CSIH 10). It was argued that he had erred in the weight attached to various factors and that he approached the application in a generic manner.

Case-specific reasons for upholding Police Scotland's decision were not provided. The court refused the appeal. Since then the appellant has made various applications to the Scottish Legal Aid Board for funding to pursue an appeal against this decision to the UK Supreme Court. Following upon the refusal of those applications the appellant has petitioned for judicial review of the Board's decisions, each of which has been refused (see *Beggs* v *Scottish Legal Aid Board* [2018] CSOH 13 and *Beggs* v *Scottish Legal Aid Board* [2020] CSOH 71, upheld by this court in *Beggs* v *Scottish Legal Aid Board* [2022] CSIH 24).

[9] On 28 February 2018 the appellant submitted a second application for the information to Police Scotland. This was in light of remarks made in the Board's decision on his first application for legal aid funding to the effect that a privately funded individual of moderate means would be expected to make a further request.

The appellant's 2018 request

[10] The 2018 request addressed the background circumstances. The appellant referred to documents that had formed the basis for the Crown's narrative of the events on the night of the murder, in particular regarding the deceased's movements and his last sighting. This included an investigating officer's deposition relative to a request to extradite the appellant. He also referred to the decision in his appeal against conviction in which the Crown's narrative had been endorsed (see *Beggs* v *HMA* [2010] HCJAC 27). The appellant contended that there was evidence which cast doubt on that narrative. Undisclosed information held by the police could shed light on this. Access to CCTV footage and other sources could explain why, in spite of contradictory evidence, the police and the Crown reached certain conclusions relating to the deceased's movements. Statements indicated that another person

had said that they had had sex with the deceased before and had encountered him on the evening of the murder. Police investigations into this line of inquiry were undisclosed.

[11] The appellant sought information falling into two categories. The first related to the deceased's movements around Kilmarnock town centre on the evening of the murder. Particular reference was made to CCTV footage or information derived from it. Secondly, information was requested regarding steps taken by the police to investigate the veracity of claims made in the statements mentioned. The appellant referred to searches of premises and forensic testing of clothing carried out by police officers and the products of those investigations.

[12] Police Scotland initially refused to respond to the request on the basis that it was vexatious. The appellant requested a review. Police Scotland refused, this time indicating that it considered it to be a repeated request. The appellant applied to the Commissioner who ordered Police Scotland to carry out the review. There was insufficient evidence to demonstrate that the appellant was a vexatious applicant. He had submitted only two applications in eight years. While they were similar in content, during that period the balance of the public interest might have changed.

[13] On 25 January 2019 Police Scotland issued its reconsidered decision. It held some of the information requested by the appellant, however the exemptions applied. Disclosure would undermine the expectation of confidentiality that witnesses have when cooperating with police officers in the course of an investigation. The ability to detect crime would be substantially prejudiced. Disclosure of the second category of information would be a breach of the requirement that personal data be processed fairly. On balance, the public interest lay in protecting the integrity of investigative and criminal justice procedures.

[14] The appellant applied to the Commissioner for a review of Police Scotland's refusal. For the reasons discussed later in this opinion he decided that the public interest lay with maintenance of the section 34 and section 35 exemptions. As for the section 38 exemption his view was that disclosure was not necessary and in any event would publicise personal data contrary to the data protection principle in Article 5(1) (a) of UK GDPR.

The submissions of the parties

Appellant

[15] The notice of appeal to this court contained seven grounds of challenge; however at the start of the oral hearing counsel withdrew all but three of them. The following is a summary of the submissions made in their support.

[16] The first ground is based on the proposition that the Commissioner erred in law by failing to have regard to what was described as an inbuilt statutory presumption in favour of disclosure. But for that the outcome might have been different. The Policy Memorandum on the Bill preceding the Act said that a presumption of openness underpinned the Bill (paragraph 2). Counsel recognised that south of the border courts have held that there is no such presumption when the public interest test is being applied, however that was in respect of a separate statute enacted by the Westminster Parliament. A different view should be taken of FOISA.

[17] The second remaining ground of appeal is that the Commissioner erred by approaching the public interest test in a non-specific manner which elevated the sections 34 and 35 exemptions to an absolute status. There was no engagement with the particular circumstances of the request and the case in general. He ought to have applied his mind to whether disclosure of the information sought would have the adverse consequences claimed

by Police Scotland (*APPGER* v *Information Commissioner* [2013] UKUT 0560 (AAC) at paragraph 149).

[18] There was nothing controversial or sensitive about the information. Disclosure would not identify witnesses, informants or undercover officers, nor would it discourage members of the public from cooperating with the police. The application did not seek disclosure of intelligence gathering methods. Review of CCTV footage was commonplace in criminal investigations. Future police matters would not be prejudiced. A general approach to the application was taken. There was no genuine consideration of the specific facts and circumstances of the request (*Guardian Newspapers Ltd and Brooke* v *Information Commissioner's Office and BBC* EA/2006/011 and EA/2006/013). The reasoning did not go beyond reliance on generalities. The requested information was specific and restricted. The second category related to investigations carried out into a single witness.

[19] The final ground of appeal is closely linked with the foregoing. It is contended that the reasons provided for upholding Police Scotland's decision were inadequate. The Commissioner failed to engage with the principal points raised in the application (*South Bucks District Council* v *Porter (No. 2)* [2004] 1 WLR 1953 at paragraph 36). Intelligible reasons, based upon the primary material, were not provided (*Craigdale Housing Association* v *Scottish Information Commissioner* 2010 SLT 655 at paragraph 28).

The Commissioner's submissions

[20] No starting presumption in favour of disclosure applies when an exemption is engaged (*Department of Health* v *Information Commissioner* [2017] 1 WLR 3330 at paragraph 46). For these purposes there is no material difference between the statutes in force on either side of the border. The general entitlement in section 1 of FOISA is expressly

subject to other provisions. The Commissioner operates within a statutory scheme which in respect of the public interest test in section 2(1) (b) requires the weighing and balancing of the competing public interests free of any predisposition to disclosure.

[21] Absent irrationality, weight is a matter for the Commissioner (*Beggs* v *Scottish Information Commissioner* [2014] CSIH 10 at paragraph 15). Each exemption was considered carefully. The Commissioner set out the procedures followed and how the decision was reached. The appellant had argued in the 2014 appeal that the then Commissioner took a generic approach to the application. The current Commissioner was mindful of this criticism and had regard to all the relevant circumstances of the case. He took into account the 2011 determination, the complaints advanced by the appellant in the 2014 court challenge, and the parties' comments obtained in the course of his investigation. These factors were weighed and considered. The appeal amounted to no more than a disagreement with the Commissioner's decision.

[22] The reasons challenge was bound to fail. There is no statutory duty on the Commissioner to provide reasons for the decision (*R (Doody)* v *Secretary of State for the Home Department* [1994] 1 AC 531). Any reasons he can provide are restricted by FOISA itself; he is not obliged to provide information which is itself exempt (*Scottish Ministers* v *Scottish Information Commissioner* 2007 SC 330 at paragraph 18). Even if there is a right to intelligible reasons, which is denied, full reasons for the decision were provided. It was entirely clear why Police Scotland's refusal to comply with the request was upheld.

[23] The Commissioner made a decision on the application of the public interest test to the sections 34 and 35 exemptions which he was entitled to make. He considered the applicable legislation, case law and competing arguments. He also determined that

disclosure would contravene data protection principles and thus he maintained the absolute section 38 exemption. It had not been shown that he erred in law or acted irrationally.

Decision

Is there a presumption in favour of disclosure?

[24] It is plain from the relevant wording in sections 1 and 2 of FOISA that when the public interest test is applied to an exemption there is no presumption in favour of disclosure. The question is simply whether, in all the circumstances of the case, the public interest in disclosure is outweighed by the public interest in maintaining the exemption. This is mirrored in the Policy Memorandum at paragraph 3 which speaks of the need to balance the right of access with the protection of sensitive information. Thus there requires to be a weighing of the competing considerations and an evaluative judgement as to where the public interest lies.

[25] The analysis of the proper approach to the public interest test in the Freedom of Information Act 2000 set out at paragraphs 81-85 of the judgment in *Guardian Newspapers* v *Information Commissioner's Office* (cited earlier) is apposite to the similarly worded Scottish Act and can be summarised as follows. The desired shift towards a culture of greater openness is achieved by an assumption built in to FOISA that disclosure is in itself of value and in the public interest in that it promotes better government through transparency and accountability in relation to the activities of public authorities. The respective strengths of the public interest in disclosure and of any competing public interest reflected in an exemption must be assessed on a case by case basis. If they are equally balanced information cannot be withheld. Only in that sense can it be said that there is a presumption for disclosure.

[26] The Court of Appeal discussed the matter in *Department of Health* v *Information Commissioner and another* (cited earlier). At paragraph 46, in agreement with the judgment of the Upper Tribunal, Sir Terence Etherton MR stated that "when a qualified exemption is engaged, there is no presumption in favour of disclosure". Earlier he noted that neither side had dissented from the passage in paragraph 149 of the *APPGER* judgment (cited earlier) that there should be:

> "an appropriately detailed identification, proof, explanation and examination of both (a) the harm or prejudice, and (b) benefits that the proposed disclosure of the relevant material in respect of which the exemption is claimed would (or would be likely to or may) cause or promote."

[27] In *Common Services Agency* v *Scottish Information Commissioner* 2008 SC (HL) 184, a case concerning the personal data exemption in section 38 of FOISA, similar sentiments were expressed. In his speech at paragraph 4 Lord Hope of Craighead said that it is obvious that not all government can be completely open.

> "So, while the entitlement to information is expressed initially in the broadest terms that are imaginable, it is qualified in terms that are equally significant and to which appropriate weight must also be given. The scope and nature of the various exemptions plays a key role within the Act's complex analytical framework."

At paragraph 7 he rejected the proposition that there is a presumption in favour of the release of personal data under the general obligation laid down by FOISA.

[28] In respect of exemptions and their enforcement there is no good reason to interpret the Scottish legislation differently from that under the 2000 Act. The Commissioner approached the matter in the correct manner and asked himself the appropriate questions. After a consideration of the competing factors, a judgement was made as to whether the public interest in disclosure was outweighed by the public interest in maintaining the exemptions. There is no warrant for inserting a presumption for disclosure into the analysis. The first ground of appeal is without merit.

[29] The remaining grounds of challenge concerning overly general and inadequate reasoning can be taken together. In effect they repeat the contentions rejected in the court's decision in 2014. When preparing his determination the current Commissioner had the opportunity to take on board the criticisms made of his predecessor's rejection of the 2010 request. He took full advantage of that opportunity. The Commissioner dealt separately and at some length with the sections 34, 35 and 38 exemptions. In the first instance this discussion will focus on the treatment of the claimed section 34 exemptions.

The section 34 exemptions

[30] The terms of the request were summarised in the decision notice and then set out in full in an appendix. The Commissioner attended at Police Scotland premises and viewed the information for himself. The respective submissions on the section 34 exemptions were recorded (paragraphs 35-45). The Commissioner's discussion of the matter then spanned 40 paragraphs. Reference was made to the previous Commissioner's refusal of the similar request in 2011, and to this court's decision when it was challenged. It was noted (paragraph 51) that the Commissioner had considered that there was a

> "very considerable public interest in ensuring that the steps taken by the police to conduct a thorough investigation and the identities of the persons who they interviewed should be kept confidential, except where disclosed in the context of judicial proceedings or related processes."

[31] Given this history the appellant and Police Scotland were asked to provide specific reasons in support of their position on the public interest test as applicable to the latest request. The appellant's response included a legal opinion to the effect that the information sought could be of significance in the ongoing challenge to his conviction. The Commissioner recognised that this reflected a public interest in upholding the fairness of

criminal trials and correcting miscarriages of justice. The passage of time since the last decision; the expiry of the punishment part of his sentence; and ongoing adverse comment in the media from persons associated with the criminal investigation were also cited by the appellant in support of his application. The Commissioner considered whether the information could be obtained in other ways which did not result in it being available to the public as a whole.

[32] The Commissioner's reasoning on the section 34 exemptions and the public interest test was set out in paragraphs 70-85. He correctly described his role, namely to determine whether in all the circumstances of the case the public interest in disclosing the information is outweighed by that in maintaining the exemptions. The public interest in protecting the ability of the police to investigate crime was assessed as very strong. Disclosure into the public domain of information given in confidence or gathered in the course of a high profile investigation would be likely to deter the provision of information to Police Scotland in the future.

[33] On the other hand the Commissioner acknowledged that there were factors favouring granting the request. Openness runs through FOISA. In itself it is in the public interest. It increases public confidence in the police, something especially important in respect of serious crimes such as murder. There is also a public interest in revisiting a conviction which the appellant believes was unjustified.

[34] Having weighed the competing considerations, and notwithstanding the passage of time, the Commissioner concluded that the public interest lay in maintaining the exemption. Section 34 exemptions have no time limit, though this did not mean that they must always prevail. Non-FOISA processes had allowed the release of information without making it public. The expiry of the punishment part of the sentence and the ending of the

investigation were not weighty factors in favour of disclosure. The overall conclusion was expressed as follows (para 84):

> "On balance, therefore, and having considered all aspects of the public interest argued by both the Applicant and Police Scotland, the Commissioner is satisfied that the public interest in the disclosure of the information is outweighed by the public interest in maintaining the exemptions".

[35] One only requires to read the Commissioner's decision for it to be apparent that there is no merit in the contention that the Commissioner addressed only generalities, nor in the proposition that he had no regard to the particular circumstances of the case and the specific information requested. Counsel for the appellant's only response when asked to identify what had been left out of account was to say that this was a long-running high-profile case in which the appellant had been steadfastly maintaining his innocence, matters which would have been obvious to the Commissioner, and in any event are referred to in his decision.

[36] In our view it is manifest that the Commissioner approached his task in a thorough and conscientious manner. He viewed the requested material. He obtained the parties' submissions on the public interest test and carefully addressed them. He applied the statutory scheme in a clear and coherent way. Counsel insisted that the Commissioner failed to concentrate on or give adequate attention to the particular information requested, otherwise any concerns as to it being placed in the public domain would have been assuaged. However, not least because he inspected the material held by Police Scotland for himself, it is apparent that the Commissioner will have had the requested information in mind when expressing concern as to the potential harm if it was made publicly available. Contrary to the appellant's submission he did not elevate the exemptions to an absolute

status by considering only generic issues which would apply in all cases. The decision was clearly rooted in the particular request and the specific arguments presented to him.

[37] With regard to the reasons challenge it is argued for the Commissioner that he was under no statutory obligation to explain his decision. However there was a common law duty to give proper and adequate reasons (*Scottish Ministers* v *Scottish Information Commissioner* 2007 SC 330 at paragraph 17). The Commissioner complied with this duty by providing a full justification for all his decisions. There is no merit in the submission that the reasons given for the outcome on these or the other exemptions were insufficient or unintelligible. A reader will be left in no doubt as to why Police Scotland's refusal of the request was upheld.

[38] The Commissioner is a specialist tribunal. He made a decision which was reasonably open to him. There was no need to address the detail of the information sought. No purpose would have been served by it, and to do so would in all likelihood have revealed exempt information, which is prohibited by section 16(3). The appellant has not pointed to anything specific which would override the concerns about the potential impact on the flow of information in future investigations if this material was made public. That the information might be available in ways which would not have that effect was a relevant factor, though clearly not a major one.

[39] We agree with the submission that the appeal amounts to little more than a disagreement with the Commissioner's decision. It is not our function to review its merits. The weight to be attached to the competing factors was a matter for the Commissioner. The court can interfere only if there has been an error of law, and none has been demonstrated. The appeal against maintenance of the section 34 exemptions in respect of the information sought in the application is refused.

The section 35 exemptions

[40] Given the above decision the appeal against the section 35 exemptions cannot change the overall outcome. Purely for completeness the Commissioner addressed them (paragraphs 86-119). The exemptions were engaged. There was merit in Police Scotland's concern that disclosure would be likely to cause substantial prejudice to the prevention and detection of crime and the apprehension and prosecution of offenders. The public interest in protecting the matters identified by Police Scotland was "exceptionally high" and outweighed that in disclosure.

[41] Much the same criticisms were directed at this part of the decision, and for similar reasons we reject them. Again it was argued that the police and the Commissioner relied on general propositions and did not focus on the actual information involved. We agree with the Commissioner that even in the case of relatively innocuous material, the wider effects of disclosure on the prevention or detection of crime and/or the apprehension or prosecution of accused persons must be considered (paragraphs 101-104). He also noted that the personal interest of the appellant in the information does not equate to a public interest of significant weight (paragraph 117). The 100 year period for section 35 exemptions suggested that limited weight could be applied to the passage of time.

[42] In short the Commissioner again addressed the correct issues and reached a decision on the public interest test and the maintenance of the section 35 exemptions which was open to him, is easily understood, and is free of any error of law. The appeal in this regard is refused.

The section 38(1)(b) personal data exemption

[43] The discussion on this aspect is also academic given the rejection of the appeal on the other exemptions. The question was whether disclosure of personal information concerning witnesses and police officers would contravene data protection principles. The claimed exemption is absolute therefore the public interest test did not arise.

[44] The Commissioner was satisfied that the withheld information included the personal data of living individuals. The issue was whether disclosure would be lawful, and in particular whether any of the conditions in Article 6(1) of UK GDPR would permit disclosure. Only condition (f) was potentially relevant. In short disclosure would be lawful if necessary for the appellant's legitimate interests unless overridden by the interests or fundamental rights and freedoms of the witnesses and officers. Thus again a weighing and balancing exercise was required, albeit not in the context of competing public interests.

[45] The three stage test set out in *South Lanarkshire Council* v *Scottish Information Commissioner* 2014 SC (UKSC) 1 was followed. The appellant had a legitimate interest in the information in that he wishes to use it for the purpose of his challenge to his conviction. There is also a wider interest in scrutinising guilty verdicts. However disclosure was not reasonably necessary to further the appellant's interests. Documents provided by the appellant showed that there are processes whereby the information can be obtained without placing it in the public domain, and the appellant already has some of it.

[46] In any event, even if disclosure was reasonably necessary for the appellant's purposes, it was overridden by the interests or fundamental rights and freedoms of the data subjects. Particularly given its circumstances, members of the public would not expect personal data relating to them which was provided for the investigation into this murder case to be released for anyone to read. The same would apply to the police officers involved.

The conclusion was that no condition in Article 6 of UK GDPR allowed the personal data to be disclosed. Disclosure would breach a data protection principle in Article 5(1) therefore the personal data is exempt under section 38(1)(b) of FOISA.

[47] Apart perhaps from the rejected submission as to a presumption in favour of disclosure, it is not clear in what respect it is said that the Commissioner's decision on this issue is flawed. He balanced the competing interests and, as he was entitled to, held that the data subjects' interests prevailed. The reasoning is full and clear. We have detected no error of law on his part.

Disposal

[48] For the above reasons the appeal against the Commissioner's decision is refused. Any questions regarding expenses are reserved.